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## Public Policy Considerations Concerning Forum Selection Clauses in Insurance Contracts

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## PUBLIC POLICY CONSIDERATIONS CONCERNING FORUM SELECTION CLAUSES IN INSURANCE CONTRACTS

CHAD G. MARZEN\*

### INTRODUCTION

Contracts are basically a part of the daily commercial life of essentially every individual and business in the United States today. From verbal to written, informal to formal, express to implied, contracts can be found in many places. In many situations of daily life, people likely enter into contracts without many second thoughts of questioning the existence of a contract. For instance, implied contracts arise when an individual goes to their favorite restaurant and orders a meal. When the restaurant provides the ordered food to the customer, an implied contract for the customer to pay for the food arises.<sup>1</sup> In other situations, such as a contract for the sale of real estate,<sup>2</sup> commercial

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1. See RICHARD A. MANN & BARRY S. ROBERTS, SMITH & ROBERSON'S BUSINESS LAW, 176 (Cengage Learning, 16th ed. 2015) ("An implied contract is one that is inferred from the parties' conduct, not from spoken or written words. Implied contracts are also called implied in fact contracts. Thus, if Elizabeth orders and receives a meal in Bill's restaurant, a promise is implied on Elizabeth's part to pay Bill the price stated in the menu or, if none is stated, Bill's customary price.").

2. There are many law review articles which address legal issues concerning real estate contracts. For example, see Seth Chertok, *The Rise of the Dodd-Frank Act: How Dodd-Frank Will Likely Impact Private Equity Real Estate*, 16 U. PA. J. BUS. L. 97 (2013) (examining the relationship between the Dodd-Frank Act and the private equity real estate market); Tanya D. Marsh, *Sometimes Blackacre Is a Widget: Rethinking Commercial Real Estate Contract Remedies*, 88 NEB. L. REV. 635 (2010) (examining the "uniqueness doctrine" in real estate law); Shelby D. Green & Temisan Agbeyegbe, *The Improvident Real Estate Deal: The Lawyer's Ethical Duty to Warn*, 39 REAL EST. L.J. 147 (2010) (analyzing the ethical duties of attorneys in real estate transactions); Alvin Robert Thorup, *TIC or Treat: How Tenant-in-Common Real Estate Sales Can Avoid the Reach of the Securities Laws*, 34 REAL EST. L.J. 422 (2006) (examining the relationship of tenancy-in-common sales and securities regulation); Alice M. Noble-Allgire, *Attorney Approval Clauses in Residential Real Estate Contracts – Is Half a Loaf Better Than None?*, 48 U. KAN. L. REV. 339 (2000) (examining legal issues concerning attorney approval clauses in real estate contracts).

shipping contract,<sup>3</sup> or agricultural contract,<sup>4</sup> among many possible examples, the contract is likely to be formal and include a number of terms which are the result of negotiations between the parties.

A number of scholars emphasize that commercial contracts in today's world are difficult for the layperson to completely understand.<sup>5</sup> With

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3. There are also many law review articles examining legal issues concerning commercial shipment. For example, see John F. Munger, *Importation of Mexican Produce into the United States: Procedures, Documentation, and Dispute Resolution*, 30 ARIZ. J. INT'L & COMP. L. 605 (2013) (examining contracts between parties in the United States and Mexico); Larry A. DiMatteo, *CISG as a Basis of a Comprehensive International Sales Law*, 58 VILL. L. REV. 691 (2013) (examining the Convention on Contracts for the International Sale of Goods); Matthew P. Vafidis, *No Sanity Clause: Thoughts on the Bill of Lading Package Limitation*, 25 U.S.F. MAR. L.J. 235 (2012–2013) (examining “package limitations” in shipment contracts by sea); Ademuni-Odeke, *Insurance of F.O.B. Contracts in Anglo-American and Common Law Jurisdictions Revisited: The Wider Picture*, 31 TUL. MAR. L.J. 425 (2007) (analyzing insurance issues); Michael E. Crowley, *The Limited Scope of the Cargo Liability Regime Covering Carriage of Goods by Sea: The Multimodal Problem*, 79 TUL. L. REV. 1461 (2005) (examining cargo liability issues); James L. Chapman, IV & Shawn A. Voyles, *Cargo Litigation: A Primer on Cargo Claims and Review of Recent Developments*, 16 U.S.F. MAR. L.J. 1 (2003–2004) (examining cargo shipments and claims).

4. Further, there are various law review articles concerning agricultural contracts. For example, see Isabel F. Peres, Timothy A. Slating & Jay P. Kesan, *The Case for Vertical Integration in the Developing Bioenergy Industry*, 39 WM. & WARY ENVTL. L. & POL'Y REV. 575 (2014); Robert D'Agostino & Bruce G. Luna II, *The U.C.C. and Perfection Issues Relating to Farm Products*, 35 N. ILL. U. L. REV. 169 (2014); Abbey Stemler & Anjanette H. Raymond, *Promoting Investment in Agricultural Production: Increasing Legal Tools for Small to Medium Farmers*, 8 OHIO ST. ENTREPRENEURIAL BUS. L. J. 281 (2013); Doug O'Brien, *Policy Approaches to Address Problems Associated with Consolidation and Vertical Integration in Agriculture*, 9 DRAKE J. AGRIC. L. 33 (2004); Joseph A. Miller, *Contracting in Agriculture: Potential Problems*, 8 DRAKE J. AGRIC. L. 57 (2003); David C. Barrett, Jr., *Hedge-to-Arrive Contracts*, 2 DRAKE J. AGRIC. L. 153 (1997); Neil D. Hamilton, *State Regulation of Agricultural Production Contracts*, 25 U. MEM. L. REV. 1051 (1995); Christopher R. Kelley, *Agricultural Production Contracts: Drafting Considerations*, 18 HAMLIN L. REV. 397 (1995); Neil D. Hamilton, *Why Own the Farm If You Can Own the Farmer (and the Crop)?: Contract Production and Intellectual Property Protection of Grain Crops*, 73 NEB. L. REV. 48 (1994).

5. For example, see Thomas D. Barton, Gerlinde Berger-Walliser & Helena Haapio, *Visualization: Seeing Contracts for What They Are, and What They Could Become*, 19 J.L. BUS. & ETHICS 47, 47 (2013) (The authors state the following in their Abstract: “Commercial contract users read their contract documents infrequently, and understand them inadequately.”); Richard M. Alderman, *Why We Really Need the Arbitration Fairness Act*, 12 J. CONSUMER & COM L. 151, 156–57 (“[B]inding pre-dispute mandatory arbitration clauses are quickly becoming the norm in consumer contracts. Mandatory arbitration is imposed on consumers who lack the knowledge or bargaining power to knowingly agree to waive their right to use the courts, and in a manner that imposes significant increased costs and substantial deterioration of substantive rights. For these reasons alone, steps should be taken to slow down or stop the advance of pre-dispute mandatory arbitration clauses in consumer contracts.”); Carol B. Swanson, *Unconscionable Quandary: UCC Article 2 and the Unconscionability Doctrine*, 31 N.M. L. REV. 359, 359 (2001) (“[I]n a commercial world of standardized contracts largely unread by the parties, the

provisions such as limited liability clauses,<sup>6</sup> liquidated damages clauses,<sup>7</sup> and arbitration clauses<sup>8</sup> present in many contracts, contracts today are more complex than ever and even experienced businesspersons must retain the services of experienced counsel to better understand the implications of all the various contractual terms.

One such clause that appears in many commercial contracts today is the forum selection clause. A forum selection clause designates which forum shall have jurisdiction in the event of litigation between the parties.<sup>9</sup> Since the 1972 decision of the United States Supreme Court in *M/S Bremen v. Zapata*,<sup>10</sup> numerous courts throughout the country have decided whether or not to uphold these clauses in various types of commercial agreements,<sup>11</sup> and the question of

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unconscionability doctrine is an important variable.”); Shmuel I. Becher, *Asymmetric Information in Consumer Contracts: The Challenge That Is Yet To Be Met*, 45 AM. BUS. L.J. 723, 731–32 (2008) (“Indeed, empirical evidence shows that most consumers do not read SFCs. Instead of reading, consumers tend to rely on the drafter’s representation and reputation and to focus their attention on a few limited aspects of the transaction. If consumers do not read contracts to which they adhere, it is doubtful that they maximize their utility by entering them.”).

6. See S. Harrison Williams, *Consumers and Remedies: Do Limitation of Liability Clauses Do More Harm Than Good?*, 65 S.C. L. REV. 663, 665 (2014) (“One type of liability altering clause is a limitation of liability clause, which caps the amount of one party’s or both parties’ liability under the contract. Limitation of liability clauses in contracts are so common today that most consumers regularly enter into agreements in which the consumer’s remedy is severely limited.”).

7. See Larry A. DiMatteo, *A Theory of Efficient Penalty: Eliminating the Law of Liquidated Damages*, 38 AM. BUS. L.J. 633, 633 n.1 (2001) (“Liquidated damages refer to a provision in a contract in which the parties agree to prevent litigation on the issue of damages in the event of breach. It is sometimes labeled as a stipulated damage clause or agreed damages provision.”).

8. See Theodore Eisenberg, Geoffrey P. Miller & Emily Sherwin, *Arbitration’s Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts*, 41 U. MICH. J.L. REFORM 871, 871 (2008) (“Arbitration clauses are common features of American consumer agreements. Popular products such as cellular phone service, credit cards, and discount brokerage typically come with fine-print contracts in which customers waive their right to litigate disputes in court. Knowingly or not, the customer who signs these contracts agrees to submit disputes to arbitration and, in many cases, agrees not to participate in aggregate proceedings, either in court or before an arbitrator.”).

9. See JANE P. MALLOR, A. JAMES BARNES, THOMAS BOWERS & ARLEN W. LANGVARDT, *BUSINESS LAW: THE ETHICAL, GLOBAL AND E-COMMERCE ENVIRONMENT* 32 (Brent Gordon et al. eds., 15th ed. 2013) (“Contracts sometimes contain a clause reciting that disputes between the parties regarding matters connected with the contract must be litigated in the courts of a particular state. Such a provision is known as a forum selection clause.”).

10. 407 U.S. 1 (1972).

11. Within the past year alone, numerous courts have issued decisions concerning forum selection clauses. For example, see *SED Holding, LLC v. 3 Star Properties, LLC*, 784 S.E.2d 627 (N.C. Ct. App. 2016); *KC Ravens LLC v. Nima Scrap, LLC*, 369 P.3d 341 (Kan. Ct. App. 2016); *Russo v. Barger*, 366 P.3d 577 (Ariz. Ct. App. 2016); *Bad Ass Coffee Co. of Hawaii, Inc. v. Royal Aloha Int’l, LLC*, 365 P.3d 161 (Utah Ct. App. 2015); *Am. First Fed. Credit Union v. Soro*, 359 P.3d 105 (Nev. 2015); *Fairbanks Contracting & Remodeling, Inc. v. Hopcroft*, 169 So.3d 282

enforceability of forum selection clauses has inspired a rich scholarly literature.<sup>12</sup>

In insurance law, there are many questions concerning the enforceability and interpretation of certain insurance contract provisions, including anti-concurrent causation clauses,<sup>13</sup> other insurance clauses,<sup>14</sup> and omnibus clauses,<sup>15</sup> for instance. Just as in other commercial contracts, forum selection clauses can appear in insurance contracts today.

At least two scholars have examined legal issues relating to forum selection clauses in maritime insurance contracts,<sup>16</sup> but there is a gap in the recent law review literature concerning the enforceability of forum selection clauses in insurance contracts generally.

This Article intends to bridge that gap in the literature with a comprehensive examination of the enforceability of forum selection clauses in insurance contracts. Part I of this Article provides a brief background of key cases and general doctrinal rules concerning forum selection clauses. Part II

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(Fla. Dist. Ct. App. 2015); *Cemex Constr. Materials Florida, LLC v. LRA Naples, LLC*, 779 S.E.2d 444 (Ga. Ct. App. 2015); *Sheldon v. Pinto Tech. Ventures, L.P.*, 477 S.W.3d 411 (Tex. App. 2015).

12. There are various law review articles that are generally cited in addressing forum selection clauses. For example, see Kevin M. Clermont, *Governing Law on Forum-Selection Agreements*, 66 HASTINGS L.J. 643 (2015); Linda S. Mullenix, *Gaming the System: Protecting Consumers from Unconscionable Contractual Forum-Selection and Arbitration Clauses*, 66 HASTINGS L.J. 719 (2015); Bradley Scott Shannon, *Enforcing Forum-Selection Clauses*, 66 HASTINGS L.J. 777 (2015); William E. Marple & Andrew O. Wirmani, *Waiver of the Right to Remove in Forum Selection Clauses Subject to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 62 MERCER L. REV. 501 (2011); Michael D. Moberly & Carolyn F. Burr, *Enforcing Forum Selection Clauses in State Court*, 39 SW. L. REV. 265 (2009); David Marcus, *The Perils of Contract Procedure: A Revised History of Forum Selection Clauses in the Federal Courts*, 82 TUL. L. REV. 973 (2008); Paul Hartman Cross & Hubert Oxford, IV, *"Floating" Forum Selection and Choice of Law Clauses*, 48 S. TEX. L. REV. 125 (2006); Daniel Tan, *Damages for Breach of Forum Selection Clauses, Principled Remedies, and Control of International Civil Litigation*, 40 TEX. INT'L L.J. 623 (2005); Kendra Johnson Panek, *Forum Selection Clauses in Diversity Actions*, 36 J. MARSHALL L. REV. 941 (2003); Erin Ann O'Hara, *The Jurisprudence and Politics of Forum-Selection Clauses*, 3 CHI. J. INT'L L. 301 (2002).

13. For a comprehensive discussion on anti-concurrent causation clauses in insurance contracts, see Peter Nash Swisher, *"Why Won't My Homeowner's Insurance Cover My Loss?": Reassessing Property Insurance Concurrent Causation Coverage Disputes*, 88 TUL. L. REV. 515 (2014).

14. For an excellent discussion of "other insurance" clauses, see Douglas R. Richmond, *Issues and Problems in "Other Insurance," Multiple Insurance, and Self-Insurance*, 22 PEPP. L. REV. 1373 (1995).

15. For a thorough discussion of omnibus clauses and other issues in automobile liability insurance, see Johnny Parker, *The Wacky World of Collision and Comprehensive Coverages: Intentional Injury and Illegal Activity Exclusions*, 79 NEB. L. REV. 75 (2000).

16. See Geoffrey Robb & Kevin Canty, *Dispute Resolution Developments: Selecting Law, Jurisdiction, and Arbitration in Marine Insurance Policies*, 15 U.S.F. MAR. L.J. 325 (2002–2003).

specifically examines and reviews cases relating to the enforceability of forum selection clauses in insurance contracts and discusses the development of the general majority rule which upholds the validity of forum selection clauses in insurance contracts. Finally, Part III proposes a new balancing test for courts to utilize in determining whether to enforce a forum selection clause in an insurance contract. Just as courts utilize insurance principles in examining other provisions in insurance contracts, the proposed balancing test incorporates principles of insurance law in analyzing forum selection clauses.

### I. BRIEF BACKGROUND OF FORUM SELECTION CLAUSES

The first key landmark decision of the United States Supreme Court dealing with forum selection clauses was *M/S Bremen v. Zapata* in 1972.<sup>17</sup> In the *M/S Bremen* case, an American corporation contracted with a German corporation to tow a drilling rig from Louisiana to Italy.<sup>18</sup> In the middle of the Gulf of Mexico, the rig was seriously damaged in a storm.<sup>19</sup> The American corporation filed a complaint in federal district court in Florida, alleging negligent towage and breach of contract.<sup>20</sup> The contract between the parties had both a limitation of liability clause and a forum selection clause which stated: “Any dispute arising must be treated before the London Court of Justice.”<sup>21</sup>

In examining the validity of the forum selection clause, the *M/S Bremen* Court noted that historically, courts had not favored the enforcement of forum selection clauses.<sup>22</sup> However, the *M/S Bremen* Court emphasized the international nature of commerce and contended that American business and commercial expansion would be discouraged if courts consistently followed a “parochial” concept that disputes must always be resolved under American law and in the American courts.<sup>23</sup> The Court also noted that the clause was the result of “arm’s-length negotiation by experienced and sophisticated businessmen” and each side had sufficient bargaining power.<sup>24</sup> Thus, the Court found that there are “compelling reasons why a freely negotiated private international agreement, unaffected by fraud, undue influence, or overweening bargaining power . . . should be given full effect.”<sup>25</sup>

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17. See *M/S Bremen v. Zapata*, 407 U.S. 1, 2 (1972).

18. *Id.* at 1.

19. *Id.* at 3.

20. *Id.* at 3–4.

21. *Id.* at 2.

22. *M/S Bremen*, 407 U.S. at 9.

23. *Id.*

24. *Id.* at 12.

25. *Id.* at 12–13.

The *M/S Bremen* Court also rejected the contention that enforcement of the forum selection clause would violate public policy of the forum state. It emphasized that the contract in the present case did not involve a situation with a towage contract only in American waters, but rather a towage contract in an international commercial agreement.<sup>26</sup>

Finally, the *M/S Bremen* Court rejected the argument that litigating the dispute before the London Court of Justice would constitute an inconvenient forum for the American corporation. The Court noted that the selection of London provided certainty to the international agreement and that it was a neutral forum.<sup>27</sup> Furthermore, the Court noted that litigation in London was “clearly foreseeable” at the time the contract was entered into.<sup>28</sup> The Court concluded that a party wishing to defeat a forum selection clause would have to “show that trial in the contractual forum will be so gravely difficult and inconvenient that he will for all practical purposes be deprived of his day in court.”<sup>29</sup> Thus, given all these factors, the *M/S Bremen* Court upheld the validity of the forum selection clause.<sup>30</sup>

Nearly two decades later, in the case of *Carnival Cruise Lines, Inc. v. Shute*, the United States Supreme Court expanded beyond upholding forum selection clauses in an international commercial agreement between two contracting parties to upholding a forum selection clause in a case involving a passage contract ticket adhesion contract.<sup>31</sup> In *Carnival Cruise Lines*, a couple from Washington bought cruise line tickets for a cruise along the U.S. and Mexican Pacific coast.<sup>32</sup> While on the cruise, one of the plaintiffs suffered injuries after slipping on a deck mat.<sup>33</sup> The couple filed suit against the cruise liner for negligence and filed the suit in Washington.<sup>34</sup> However, the ticket contained a forum selection clause which designated a Florida court with jurisdiction in the event of litigation.<sup>35</sup>

The Supreme Court in *Carnival Cruise Lines* noted that simply because a forum selection clause is not negotiated between the parties does not necessarily lead to the result that the clause is unenforceable.<sup>36</sup> The Court noted that a cruise line may have a number of legitimate reasons why it would include a forum selection clause, including that since a cruise ship carries

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26. *Id.* at 15–16.

27. *M/S Bremen*, 407 U.S. at 17.

28. *Id.* at 17–18.

29. *Id.* at 18.

30. *Id.* at 20.

31. 499 U.S. 585 (1991).

32. *Id.* at 587–88.

33. *Id.* at 588.

34. *Id.*

35. *Id.* at 587–88.

36. *Carnival Cruise Lines*, 499 U.S. at 593.

passengers from many areas, it could subject the cruise line company to litigation in numerous courts.<sup>37</sup> It also observed that a clause eliminates any confusion as to the proper forum to pursue a claim and also acknowledged that limiting litigation to one forum may result in reduced fares passed on by the cruise line company to passengers.<sup>38</sup>

In addition, the Supreme Court emphasized that no evidence of bad faith conduct on the part of the cruise line company was presented in the case, and that the clause was not the result of fraud or overreaching.<sup>39</sup> Finally, the plaintiffs also admitted that they were given notice of the forum selection provision, and did not opt to reject the contract.<sup>40</sup> Therefore, the Supreme Court upheld the validity of the forum selection clause.<sup>41</sup>

Most recently, the Supreme Court in 2013 examined forum selection clauses in *Atlantic Marine Insurance Co. v. U.S. District Court for the Western District of Texas*.<sup>42</sup> In *Atlantic Marine*, the United States Supreme Court held that ordinarily the proper means to enforce a forum selection clause in federal court is through a motion to transfer via 28 U.S.C. § 1404(a), and forum selection clauses do not render a venue in a court wrong or improper under 28 U.S.C. § 1406(a) or Federal Rule of Civil Procedure Rule 12(b)(3).<sup>43</sup> While the Court primarily focused on the procedural and technical aspects of the proper means to enforce a forum selection clause in federal court, the Supreme Court affirmed its earlier decisions in *M/S Bremen* and *Carnival Cruise Lines* in indicating a presumption of support for forum selection clauses. The Supreme Court affirmed support of the policy that valid forum selection clauses should be “given controlling weight in all but the most exceptional cases.”<sup>44</sup>

With the *M/S Bremen*, *Carnival Cruise Lines*, and *Atlantic Marine* cases, courts today examining the validity of forum selection clauses essentially give a presumption that the clause is valid, absent other factors. In examining the validity of a clause, courts today essentially focus on three primary factors in

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37. *Id.* at 593–94.

38. *Id.*

39. *Id.* at 595. (“Any suggestion of a bad-faith motivate is belied by two facts: Petitioner has its principal place of business in Florida, and many of its cruises depart from and return to Florida ports.”).

40. *Id.*

41. *Carnival Cruise Lines*, 499 U.S. at 595.

42. 134 S. Ct. 568 (2013).

43. *Id.* at 579. *See* 28 U.S.C. § 1404(a) (2016) (“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.”); § 1406(a) (“The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought.”); Fed. R. Civ. P. 12(b)(3).

44. *Atlantic Marine Construction Co.*, 134 S. Ct. at 581.



their analysis: first, whether the clause was entered into as the result of fraud or overreaching; second, whether a plaintiff be effectively deprived of a remedy and a day in court if the forum selection clause is enforced; and third, the question of whether a strong public policy of the state where a lawsuit is brought would be contravened by enforcement of the clause.

## II. ENFORCEABILITY OF FORUM SELECTION CLAUSES IN INSURANCE CONTRACTS – A REVIEW OF THE CASELAW

The majority of courts examining the validity of forum selection clauses in insurance contracts hold that the provisions are generally enforceable in insurance policies. A typical decision enforcing forum selection clauses in insurance contracts can be found in the case of *Applied Waterproofing Technology, Inc. v. American Safety Indemnity Co.*<sup>45</sup> In the *Applied Waterproofing Technology* case, a waterproofing contractor filed a declaratory judgment action against its insurer, seeking a determination on the issues of defense and indemnification for an underlying lawsuit in which the insured was sued by a plaintiff who allegedly suffered respiratory damage from chemicals during waterproofing work that was completed.<sup>46</sup> The policy contained a pollution exclusion.<sup>47</sup> The applicable insurance policy contained an endorsement which included a forum selection clause designating Cobb County, Georgia as having exclusive jurisdiction for all claims involving rights under the policy.<sup>48</sup>

The facts of the case indicated that in prior years, the insurer did not have a forum selection clause in its contract with the insured.<sup>49</sup> The insured contended the insurer “inconspicuously” added the clause with a renewal of the insurance policy without their knowledge and consent, thus the insurer’s conduct was unconscionable.<sup>50</sup>

The court rejected the insured’s arguments and particularly noted that courts have not required actual knowledge of the existence of a forum selection clause as a condition of its enforceability.<sup>51</sup> It noted that the Declarations page of the applicable policy did not fail to list the new endorsement which included the forum selection clause, and that there was no evidence that the policy and Declarations page had not been furnished to the insured’s agent.<sup>52</sup> Thus, the court found that the forum selection clause was not the result of conduct rising

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45. No. 09-CV-1040-IEG (NLS), 2009 WL 2448272 (S.D. Cal. Aug. 10, 2009).

46. *Id.* at \*1–2.

47. *Id.* at \*2.

48. *Id.* at \*1.

49. *Id.* at \*4.

50. *Applied Waterproofing Tech., Inc.*, 2009 WL 2448272, at \*4.

51. *Id.*

52. *Id.* at \*5.

to the level of fraud or overreaching.<sup>53</sup> Furthermore, the insured did not produce evidence that financial considerations would essentially prohibit it from pursuing its claims in Georgia and also failed to show that the clause would violate California public policy.<sup>54</sup> Given all of these factors, the court held the forum selection clause to be enforceable.<sup>55</sup>

The *Applied Waterproofing Technology* case is an excellent example of the courts upholding the majority rule regarding forum selection clauses within insurance contracts. The majority rule has not only been applied with cases involving a policy and an endorsement, like the *Applied Waterproofing Technology* case, but also to situations where a forum selection clause is located outside of the policy itself, such as an insurance certificate<sup>56</sup> and an indemnity agreement between an insurer and an insured.<sup>57</sup> In examining situations where a foreign forum is designated, courts have ruled that the presence of a foreign forum in a forum selection clause does not render the clause unenforceable.<sup>58</sup> Forum selection clauses have also been upheld in a case where an insured has invoked a forum selection clause<sup>59</sup> and even in cases involving health insurance contracts.<sup>60</sup>

Despite the majority rule where courts generally enforce forum selection clauses in insurance contracts, in a number of cases the courts have declined enforcement. One area where the courts have divided in rulings involves environmental pollution claims. A split has also emerged with automobile insurance claims. Finally, although two early federal court decisions upheld the validity of forum selection clauses with ERISA disability insurance policies,<sup>61</sup> a recent 2013 opinion of the United States District Court of the Northern District of Illinois in *Coleman v. Supervalu Inc. Short Term Disability Program* found a forum selection clause within a disability insurance plan to be unenforceable.<sup>62</sup>

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53. *Id.*

54. *Id.* at \*5–6.

55. *Applied Waterproofing Tech., Inc.*, 2009 WL 2448272, at \*6.

56. *See Intermetals Corp. v. Hanover Int'l. Aktiengesellschaft Fur Industrierversicherungen*, 188 F. Supp. 2d 454 (D. N.J. 2001).

57. *See Discover Prop. & Cas. Ins. Co. v. Tetco, Inc.*, 932 F. Supp. 2d 304 (D. Conn. 2013).

58. *See Bancroft Life & Cas. ICC, Ltd. v. Davnic Ventures, L.P.*, No. H-12-2015, 2013 WL 1222112 (S.D. Tex. Mar. 25, 2013).

59. *See Ensco Int'l. Inc. v. Certain Underwriters at Lloyd's*, No. 3:07-CV-1581-O, 2008 WL 958205 (N.D. Tex. Apr. 8, 2008).

60. *See Faur v. Sirius Int'l. Ins. Corp.*, 391 F. Supp. 2d 650 (N.D. Ill. 2005); *Dombrovski v. Sirius Int'l. Ins. Corp.*, No. 1:07-CV-379, 2008 WL 408460 (N.D. Ohio Feb. 12, 2008).

61. *See Klotz v. Xerox Corp.*, 519 F. Supp. 2d 430 (S.D. N.Y. 2007); *Smith v. Aegon USA, LLC*, 770 F. Supp. 2d 809 (W.D. Va. 2011).

62. 920 F.Supp.2d 901 (N.D. Ill. 2013).

A. *Forum Selection Clauses in Insurance Certificates and Indemnity Agreements*

Courts have found forum selection clauses printed in an insurance certificate to be enforceable even when the clause is not printed in the policy itself. In *Intermetals Corp. v. Hanover International Aktiengesellschaft Fur Industrierversicherungen*, a New Jersey company was engaged in the business of importing steel from foreign countries.<sup>63</sup> The company engaged a New York insurance broker to obtain quotes for marine insurance coverage for international steel shipments.<sup>64</sup> The New Jersey company requested insurance coverage from a marine insurer, and the marine insurer accepted by faxing a Certificate of Marine Insurance.<sup>65</sup> The certificate included a forum selection clause designating the court of jurisdiction as the place where the insurance certificate is issued.<sup>66</sup> The New Jersey company allegedly suffered damage on a shipment from Poland to Detroit, and the marine insurer denied the claim.<sup>67</sup> A lawsuit by the New Jersey company against the marine insurer for the claim denial in the United States District Court for the District of New Jersey ensued.<sup>68</sup>

A principal argument of the New Jersey company in the case was that enforcement of the forum selection clause would be unreasonable since the forum selection clause appeared on the insurance certificate and not on the policy itself.<sup>69</sup> The court noted that with marine insurance policies, the terms of both a certificate and an insurance policy are read together to understand the complete agreement between the parties.<sup>70</sup> In addition, the court noted that the New Jersey company did not meet its burden of proving the clause is unreasonable concerning location of the witnesses and the expense of an overseas forum.<sup>71</sup> The court remarked that potential witnesses in the case would be located in several countries, that it is common to pursue marine insurance cases by deposition, and that expenses would be incurred in any forum irrespective of location since there are “numerous potential witnesses from different countries who speak different languages.”<sup>72</sup> In summary, the court held the forum selection clause to be valid and enforceable.<sup>73</sup>

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63. 188 F. Supp. 2d 454, 456 (D. N.J. 2001).

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Intermetals Corp.*, 188 F. Supp. 2d at 456.

69. *Id.* at 458.

70. *Id.*

71. *Id.* at 459–60.

72. *Id.*

73. *Intermetals Corp.*, 188 F. Supp. 2d at 461.

In *Discover Property & Casualty Insurance Company v. Tetco, Inc.*, the United States District Court for the District of Connecticut upheld a forum selection clause in an indemnity agreement.<sup>74</sup> In this case, the insurer and one of the insured's entered into an indemnity agreement which contained a forum selection clause.<sup>75</sup> An amendment to the indemnity agreement included the commercial general liability policy involved in the case.<sup>76</sup>

In the underlying liability case, the insured's subsidiary had entered into an agreement to ship a third party's petroleum products to a third party's customers.<sup>77</sup> During the delivery of one shipment in Texas, one of the third party's customers sustained property damage following an explosion and fire.<sup>78</sup> The third party was an additional insured under the applicable insurance policy, and after the third party's claim was denied by the insurer, the third party filed a lawsuit against the insurer.<sup>79</sup> Without the insured's consent, the insurer paid a confidential settlement to the third party to resolve the property damage claims.<sup>80</sup>

The insured's subsidiary and the insurer then entered into a mediation agreement in which the parties agreed to mediate whether or not the insured was obligated to reimburse the insurer for the settlement costs as a result of the property damage claims settlement with the additional insured.<sup>81</sup> Under that agreement, in the event mediation would be unsuccessful, the parties agreed to conduct a binding arbitration in Texas to resolve the matter.<sup>82</sup> Apparently, the insurer's counsel reached out to the insured's counsel several times regarding an arbitration, with no response.<sup>83</sup> Several months later, the insurer filed a declaratory judgment in the United States District Court for the District of Connecticut, and then the insured and its subsidiary followed with a motion to compel arbitration in Texas state court.<sup>84</sup>

One of the main arguments of the insured in the matter was that the arbitration clause superseded the forum selection cause in the indemnity agreement.<sup>85</sup> The court rejected this contention, noting that both provisions could be read together to mean that the insured "waived personal jurisdiction objections for the purposes of a suit in Connecticut to determine whether there

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74. 932 F. Supp. 2d 304, 314 (D. Conn. 2013).

75. *Id.* at 307.

76. *Id.*

77. *Id.*

78. *Id.*

79. *Discover Prop.*, 932 F. Supp. 2d at 307.

80. *Id.*

81. *Id.*

82. *Id.* at 307–08.

83. *Id.* at 308.

84. *Discover Prop.*, 932 F. Supp. 2d at 308.

85. *Id.* at 310.

is a valid agreement between the parties to arbitrate this dispute.”<sup>86</sup> In analyzing the forum selection clause specifically, the court examined a number of factors, including: 1) the convenience of the witnesses, 2) the location of relevant documents, 3) the convenience of the parties, 4) the locus of operative facts, 5) the availability of process to compel the attendance of unwilling witnesses, 6) the relative means of the parties, 7) the forum’s familiarity with governing law, and 8) trial efficiency and the interest of justice.<sup>87</sup> Examining these factors, the court noted that several weighed in favor of a transfer to Texas, and several weighed in favor of either forum.<sup>88</sup> In conclusion, the court found that the “substantial weight” granted to the forum selection clause “preponderates” over all the factors, thus the forum selection clause was held enforceable.<sup>89</sup>

### B. *Forum Selection Clauses and Designation of Overseas Forum*

In insurance contracts between commercial entities, the fact that a forum designated in a forum selection clause is an overseas one generally does not result in a forum selection clause to be held unreasonable. The case of *Bancroft Life & Casualty ICC, Ltd. v. Davnic Ventures, L.P.* involved a matter in which the insured purchased business interruption insurance.<sup>90</sup> The insurer offered the insured the ability to borrow back premiums through loans, and the insured signed two promissory notes with the insurer.<sup>91</sup> After the insured defaulted on both promissory notes, the insurer filed a breach of contract claim against the insured.<sup>92</sup> The insured counterclaimed with several claims, including a breach of contract claim, conversion claim, fraudulent inducement claim, breach of fiduciary duty claim, unjust enrichment claim, and a rescission claim.<sup>93</sup> The insurer then filed a motion to dismiss the counterclaims based upon the forum selection clause in the policy which designated St. Lucia as the exclusive venue for actions under the policy.<sup>94</sup>

As noted earlier, one of the considerations the *M/S Bremen* Court examined concerning the validity of forum selection clauses is the consideration of whether or not a party will be deprived of their day in court if the forum designated in a forum selection clause is utilized.<sup>95</sup> The insured

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86. *Id.*

87. *Id.* at 312–14.

88. *Id.* at 314.

89. *Discover Prop.*, 932 F. Supp. 2d at 314.

90. *See Bancroft Life & Cas. ICC, Ltd. v. Davnic Ventures, L.P.*, No. H-12-2015, 2013 WL 1222112 (S.D. Tex. Mar. 25, 2013).

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *See M/S Bremen v. Zapata*, 407 U.S. 1, 18 (1972).

argued in *Bancroft Life* that the designation of St. Lucia would essentially result in an outcome where it would be deprived of its day in court since the court system of St. Lucia does not provide for jury trials.<sup>96</sup> The court rejected this argument,<sup>97</sup> citing other courts that upheld forum selection clauses that designated an overseas forum.<sup>98</sup> In the United States District Court for the Western District of Texas decision *Alternative Delivery Solutions Inc. v. R.R. Donnelley & Sons Co.*, the court noted that the argument that a party loses its day in court because it has to pursue litigation in a forum which does not include a jury trial is unconvincing because such an argument would essentially invalidate all arbitration clauses and bench trials.<sup>99</sup> The *Bancroft Life* court found the forum selection clause to be reasonable and thus the insured's counterclaims were dismissed for improper venue.<sup>100</sup>

Similarly, the Illinois Court of Appeals also upheld the designation of a foreign forum in a forum selection clause in *Yamada Corporation v. Yasuda Fire and Marine Insurance Company, Ltd.*<sup>101</sup> The underlying facts in the *Yamada Corporation* case involved the failure of a manufacturer's diaphragm

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96. See *Bancroft Life & Cas. ICC, Ltd. v. Davnic Ventures, L.P.*, No. H-12-2015, 2013 WL 1222112, at \*4 (S.D. Tex. Mar. 25, 2013).

97. *Id.* at \*4-5.

98. *Id.* at \*5. See *Interamerican Trade Corp. v. Companhia Fabricadora De Pecas*, 973 F.2d 487, 489-90 (6th Cir. 1992) ("As [the defendant] points out: the courts in Brazil are fully competent; litigation in Brazil may be more inconvenient for [the plaintiff] but is not unjust; other courts have found Brazil to be a proper forum; and, speculative concern regarding fairness of a foreign court, which parties must have considered when negotiating the agreement, does not justify refusal to enforce the clause."); *Lockman Found. v. Evangelical Alliance Mission*, 930 F.2d 764, 768 (9th Cir. 1991) ("Second, [the Plaintiff] objects to the lack of jury trials in Japan. This fact does not render Japanese courts an inadequate forum."); *Haynsworth v. The Corp.*, 121 F.3d 956, 967 (5th Cir. 1997) ("This is particularly so in the case of England, a forum that American courts repeatedly have recognized to be fair and impartial. We have not hesitated to force plaintiffs to litigate their claims of securities fraud in that nation, differences between English and American remedies notwithstanding."); *In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India* in Dec., 1984, 809 F.2d 195, 202 (2nd Cir. 1987) ("Practically all relevant factors demonstrate that transfer of the cases to India for trial and adjudication is both fair and just to the parties.").

99. No. Civ.SA05CA0172-XR, 2005 WL 1862631 (W.D. Tex. July 8, 2005), at \*12. The Court stated the following:

To invalidate all forum selection clauses that designate forums that do not provide for a jury trial would implicate many of the comity concerns raised by the Supreme Court in *The Bremen* and other cases concerning international agreements. Further, Plaintiff's argument that being deprived of its right to jury trial will "for all practical purposes . . . prevent [the Plaintiff] from having its day in court" is wholly unconvincing, for such a conclusion would presumptively invalidate all bench trials and arbitration clauses. *Id.*

100. *Bancroft Life*, 2013 WL 1222112, at \*5-6.

101. 712 N.E.2d 926 (Ill. App. Ct. 1999).

pump for a water purification system.<sup>102</sup> The failure of the pump resulted in the release of acid, which damaged a water conditioning company's facility.<sup>103</sup>

The forum selection clause at issue in the insurance coverage dispute contained a clause which stated that "[i]t is agreed that coverage disputes arising out of this insurance shall be subject to Japanese law and forum."<sup>104</sup> Significantly, both the insured and insurer in the case were corporate entities with their principal places of business in Japan.<sup>105</sup> The policy was delivered and negotiated in Japan, as well as executed in Japan.<sup>106</sup> The court emphasized that applying the forum selection clause would lead to coverage under one uniform law, which would lead to consistency and certainty.<sup>107</sup>

The gravamen of the insured's argument was that Japanese law and the courts provide for fewer remedies than can be offered to an insured under Illinois law.<sup>108</sup> The insured contended that Japanese law does not provide for fees, costs, and exemplary damages which are provided under Illinois insurance law.<sup>109</sup> However, the court rejected these arguments, stating specifically "[t]he fact that an international transaction may be subject to laws and remedies different from or less favorable than those of the United States is not alone a valid basis to deny the enforcement of forum-selection clauses."<sup>110</sup> Thus, the forum selection clause designation of Japan as an overseas forum was enforceable.<sup>111</sup>

### C. *An Insured's Offensive Assertion of a Forum Selection Clause*

The vast majority of cases involving forum selection clauses in insurance contracts involve situations in which an insurer asserts a forum selection clause against an insured. Courts have upheld forum selection clauses in cases where an insurer asserts the clause, but also where an insured offensively asserts a clause as well, such as the United States District Court for the Northern District of Texas case of *Ensco International Inc. v. Certain Underwriters at Lloyd's*.<sup>112</sup> The *Ensco International* case involved damage to an insured's oil and gas platforms as well as drilling rigs in the Gulf of Mexico following

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102. *Id.* at 928.

103. *Id.*

104. *Id.* at 929.

105. *Id.*

106. *Yamada Corp.*, 712 N.E.2d at 931.

107. *Id.* at 932.

108. *Id.* at 933.

109. *Id.*

110. *Id.* at 933–34.

111. *Yamada Corp.*, 712 N.E.2d at 934.

112. *See Ensco Int'l. Inc. v. Certain Underwriters at Lloyd's*, No. 3:07-CV-1581-O, 2008 WL 958205, at \*1 (N.D. Tex. Apr. 8, 2008).

Hurricane Katrina in 2005.<sup>113</sup> The insured alleged the insurer wrongfully denied insurance coverage for the removal of the oil derrick and related debris that fell to the seabed, and then filed a lawsuit in Texas state court.<sup>114</sup> The insurer then removed the case to federal court pursuant to 28 U.S.C. § 1441(a)<sup>115</sup> on the ground that the federal court had jurisdiction. The case involved application of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards because several of the underwriters who issued the applicable insurance policies were not citizens of the United States and the policies contained arbitration clauses.<sup>116</sup> The insured then filed a motion to remand back to state court on the basis that removal was improper due to a forum selection clause which designated the state courts of one Texas county with exclusive jurisdiction over any claims.<sup>117</sup>

On its motion to remand, the primary basis of the insured's argument was that the insurer waived its right to removal through the forum selection clause within the insurance contract. For waiver of the right of removal to be effective, it must be "clear and unequivocal."<sup>118</sup> As the Fifth Circuit Court of Appeals in *Argyll Equities LLC v. Paolino* noted, "[a] party may waive its rights by explicitly stating that it is doing so, by allowing the other party the right to choose venue, or by establishing an exclusive venue within the contract."<sup>119</sup> Applying the "clear and unequivocal" test, the court in the *Ensco International* case held that the forum selection clause not only expressly stated that exclusive jurisdiction of any disputes under the insurance contract would be located in the Texas state courts, it even designated venue in a particular Texas county.<sup>120</sup> In upholding the forum selection clause, the court in the *Ensco International* case significantly extended the enforceability of forum selection clauses to situations in which an insured offensively invokes the clause.

#### D. Forum Selection Clauses and Health Insurance Contracts

Forum selection clauses have even been upheld in cases where an individual is an insured under a health insurance contract. In the context of a

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113. *Id.*

114. *Id.*

115. See 28 U.S.C. § 1441(a) (2012) ("Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.").

116. *Ensco Int'l. Inc.*, 2008 WL 958205, at \*2.

117. *Id.*

118. 211 F.App'x. 317, 318 (5th Cir. 2006).

119. *Id.*

120. *Ensco Int'l. Inc.*, 2008 WL 958205, at \*3.



health insurance contract, an insured may argue that a forum selection clause should not be enforced due to unequal bargaining power between the insured and the insurer, particularly since the insured under a health insurance contract is not a commercial entity. In *Faur v. Sirius International Insurance Corp.*, an insured suffering from leukemia alleged the insurer breached its contract in denying medical benefits for leukemia treatments.<sup>121</sup> The forum selection clause at issue in the contract designated the courts of Marion County, Indiana to resolve any contractual disputes under the policy.<sup>122</sup>

The insured primarily argued that the forum selection clause was a result of unequal bargaining power with the insurer.<sup>123</sup> In examining this argument, the court in *Faur* noted that there were no allegations that the insured was “strong armed” into the contract nor was the insured prevented from reading the clause.<sup>124</sup> In particular, the court focused on the actual language of the contract—the print of the forum selection clause was in the same size as the rest of the contract, and the clause was not hidden in inconspicuous type.<sup>125</sup> In addition, the clause was identified on the first two pages of a twenty one page contract.<sup>126</sup> Under these facts, the *Faur* court stated the forum selection clause could not be considered to be inconspicuous nor the result of unequal bargaining power.<sup>127</sup>

Another contention that arises with regard to forum selection clauses in health insurance contracts is that the inclusion of the provision would deprive an insured of their day in court. In a health insurance contract, the insured may be in a position where their health condition makes it difficult to travel and pursue a case in another state. In the *Faur* case, an Illinois insured made allegations that litigating claims in Indiana would be a great burden to her as most witnesses and documents relevant to the claim were located in Illinois and that bringing witnesses and experts to Indiana would be a significant financial burden.<sup>128</sup> However, the court rejected the insured’s arguments, noting that depositions could potentially be taken in Illinois for use for proceedings in Indiana and that since Indiana and Ohio are neighboring states, travel is likely not burdensome to the level of it being “absolutely prohibitive.”<sup>129</sup> Even despite the fact the *Faur* court indicated that it could

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121. *Faur v. Sirius Int’l. Ins. Corp.*, 391 F. Supp. 2d 650, 653 (N.D. Ill. 2005).

122. *Id.* at 657.

123. *Id.*

124. *Id.* at 658.

125. *Id.*

126. *Faur*, 391 F. Supp. 2d at 658.

127. *Id.*

128. *Id.* at 659.

129. *Id.*

“sympathize” with the insured’s health crisis and financial status, it still upheld the validity of the forum selection clause in the health insurance contract.<sup>130</sup>

Similarly, the United States District Court for the Northern District of Ohio in *Dombrovski v. Sirius International Insurance Corp.* found a forum selection clause enforceable under similar facts as the *Faur* case.<sup>131</sup> The underlying facts of the *Dombrovski* case involved the denial of claims made by a health insurer following the insured’s suffering of a stroke.<sup>132</sup> The insured in the *Dombrovski* case not only alleged that she was wheelchair-bound, suffered from Parkinson’s disease and lacked the financial means to litigate the case in Indiana (the designated state of the forum selection clause),<sup>133</sup> but also that she did not understand the language (English) of the forum selection clause.<sup>134</sup>

Just like the court in the *Faur* case, the court in *Dombrovski* even noted it was “sympathetic” to the medical conditions of the insured.<sup>135</sup> However, the *Dombrovski* court also emphasized that the forum selection clause designated a neighboring state and that it was not persuaded that the insured would be required to make multiple personal appearances in Indiana for the case.<sup>136</sup> Thus, the *Dombrovski* court held the forum selection clause to be enforceable.<sup>137</sup>

Reading the *Faur* and *Dombrovski* decisions together, the majority rule upholding the validity of forum selection clauses in insurance contracts can even be extended to health insurance contracts. Both the *Faur* and *Dombrovski* courts appeared to place significant weight on the fact that the forum selection clause designated a forum that was a neighboring state to the state of residence of each insured; thus, the geographic distance of the forum did not place an undue burden on the insured to litigate their claims. Under different facts, for instance, if the insured was from California and the forum selection clause in the health insurance contract assigned Maine as the designated forum, perhaps in the health insurance context with an insured who has significant financial and medical impediments, such a clause may be ruled to be unenforceable. While forum selection clauses in insurance contracts have generally been upheld in a variety of situations, there are some fact patterns, such as environmental pollution liability insurance, automobile insurance, and ERISA disability insurance, where a split among courts has emerged on the enforceability of forum selection clauses.

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130. *Id.*

131. *See Dombrovski v. Sirius Int’l. Ins. Corp.*, No. 1:07-CV-379, 2008 WL 408460, at \*9 (N.D. Ohio Feb. 12, 2008).

132. *Id.* at \*1.

133. *Id.* at \*4.

134. *Id.* at \*3.

135. *Id.* at \*5.

136. *Dombrovski*, 2008 WL 408460, at \*5.

137. *Id.* at \*9.

*E. Forum Selection Clauses and Environmental Insurance Policies*

Courts are divided on the enforceability of forum selection clauses in environmental insurance policies, particularly with regard to coverage relating to liability and environmental claims arising out of incidents involving underground petroleum storage tanks. The topic of environmental insurance itself generally has inspired a rich scholarly literature.<sup>138</sup> The enforceability of a forum selection clause in an environmental insurance contract raises many questions, such as the availability of coverage for claims arising out of environmental risks within a certain state to the role of state regulation of environmental insurance contracts.

One of the key considerations courts have examined concerning the enforceability of forum selection clauses with environmental insurance claims relates to the location of evidence and witnesses. With environmental liability claims, in almost all situations, the evidence relating to the actual environmental damage will be in one state. This factor leans heavily toward a finding against enforcement of a forum selection clause which designates a foreign forum.<sup>139</sup> For instance, the Superior Court of New Jersey Appellate Division in *Param Petroleum Corp. v. Commerce and Industry Insurance Co.* placed particular emphasis on the location of the insured risk in declining to enforce a forum selection clause in an environmental insurance contract.<sup>140</sup> The court stated that “at least when dealing with risks located wholly within

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138. See, e.g., Christopher R. Hermann, Joan P. Snyder & Paul S. Logan, *The Unanswered Question of Environmental Insurance Allocation in Oregon Law*, 39 WILLAMETTE L. REV. 1131 (2003) (discussing generally issues relating to environmental liability allocation under Oregon law); Benjamin J. Richardson, *Mandating Environmental Liability Insurance*, 12 DUKE ENVTL. L. & POL'Y F. 293 (2002) (analyzing policy arguments concerning compulsory environmental liability insurance); Rebecca M. Bratspies, *Splitting the Baby: Apportioning Environmental Liability Among Triggered Insurance Policies*, 1999 BYU L. REV. 1215 (1999) (discussing various methods utilized by courts in allocating insurance coverage for environmental liability claims); Evan M. Goldenberg, *The Scope of Insurance Coverage for Pollution Claims in Florida: Full Indemnification for Indivisible Cleanup Costs Caused by Multiple Releases*, 24 NOVA L. REV. 373 (1999) (discussing insurance coverage issues concerning pollution claims under Florida law); Paul K. Freeman, *Environmental Insurance as a Policy Enforcement Tool in Developing Countries*, 18 U. PA. J. INT'L. ECON. L. 477 (1997) (discussing international environmental issues); Nicholas J. Wallwork, Lucas J. Narducci & Troy B. Froderman, *Liability Insurance in Environmental Litigation: An Overview of Selected Issues in Developing Arizona Law*, 22 ARIZ. ST. L.J. 367 (1990) (discussing environmental insurance issues under Arizona law); Kenneth S. Abraham, *Environmental Liability and the Limits of Insurance*, 88 COLUM. L. REV. 942 (1988) (discussing the relationship between environmental liability and insurance).

139. See, e.g., *Petroleum Products, Inc. v. Commerce and Indus. Ins. Co.*, No. 2:09-CV-00425, 2009 WL 4782063, at \*8 (S.D. W.V. Dec. 4, 2009); *Seneca Ins. Co. v. Henrietta Oil Co.*, No. 02-CV-3535(DC), 2003 WL 255317, at \*3 (S.D. N.Y. Feb. 4, 2003); *Keweenaw Convenience, Inc. v. Commerce and Indus. Ins. Co.*, No. 5:00-CV-111, 2001 WL 34070116, at \*4 (W.D. Mich. Jan. 11, 2001).

140. 296 N.J. Super. 164, 171–72 (N.J. Super. Ct. App. Div. 1997).

this State, we are of the view that the parties to the insurance contract should not be permitted to negotiate away the protection of our courts, protection which is intended for the insured, the insurance company, and for those who may suffer damages as a result of an insured risk.”<sup>141</sup> In the United States District Court for the Western District of Michigan case *Keeweenaw Konvenience, Inc. v. Commerce and Industry Insurance Co.*, the insurance policy at issue contained a forum selection clause designating New York as the forum for any disputes under the contract.<sup>142</sup> The environmental claim at issue in the underlying case occurred in Michigan, where the insured filed an insurance coverage claim against the insurer.<sup>143</sup> In analyzing and balancing all of the relevant factors, the court noted the only factor which favored the validity of the forum selection clause was the insurer’s presumption of the validity of the clause—other factors such as the convenience of the parties, access to sources of proof, availability of process, the cost of obtaining willing witnesses, and practical problems all were against enforceability of the forum selection clause.<sup>144</sup>

Another key factor, which makes it less likely for a court to enforce a forum selection clause in an environmental insurance contract, is a forum state’s interest in not only statutory environmental policy but also the regulation of insurance. For example, the United States District Court for the Southern District of West Virginia in *Petroleum Products, Inc. v. Commerce and Industry Insurance Co.* cited the Underground Storage Tank Act,<sup>145</sup> a West Virginia statute, in asserting that West Virginia, and not a foreign forum designated in a forum selection clause, held a substantial state interest in the litigation.<sup>146</sup> The *Petroleum Products* court observed<sup>147</sup> that the Underground Storage Tank Act contains an extensive regulatory scheme, imposing financial responsibility requirements upon underground storage tank owners.<sup>148</sup> Insurance is specifically listed as a means for an underground storage tank owner to obtain financial responsibility.<sup>149</sup> Thus, the *Petroleum Products* court declined to enforce the forum selection clause at issue in the case.<sup>150</sup>

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141. *Id.*

142. 2001 WL 34070116, at \*1.

143. *Id.* at \*1–2.

144. *Id.* at \*3–4.

145. W. VA. CODE § 22-17 (2016).

146. *Petroleum Products, Inc. v. Commerce and Indus. Ins. Co.*, No. 2:09-CV-00425, 2009 WL 4782063, at \*9 (S.D. W.V. Dec. 4, 2009).

147. *Id.*

148. W. VA. CODE § 22-17-10 (2016).

149. *Id.* (“Such means of financial responsibility may include, but are not limited to, insurance, guarantee, surety bond, letter of credit, proof of assets or qualification as a self-insurer.”).

150. *Petroleum Products*, 2009 WL 4782063, at \*10.

Several other courts have cited state regulatory mechanisms in asserting a substantial state interest in the area of environmental insurance, which overcomes the designation of a foreign forum in a forum selection clause. For example, the Superior Court of New Jersey Appellate Division in the *Param Petroleum Corp.* case noted that the Spill Compensation and Control Act,<sup>151</sup> the Solid Waste Management Act,<sup>152</sup> and the Water Pollution Control Act,<sup>153</sup> all New Jersey statutes, indicated a significant interest in keeping a forum where environmental damage occurs in an environmental insurance case.<sup>154</sup> Similarly, the United States District Court for the Southern District of New York in *Seneca Insurance Co. v. Henrietta Oil Co.* also cited in an environmental insurance case that not only the Texas Natural Resources Conservation Commission, but also the Texas Department of Insurance, held a strong interest in the state where environmental damage occurred.<sup>155</sup>

But not all courts decline to enforce forum selection clauses in environmental insurance contracts. In the case of *In re AIU Insurance Co.*, the insured contended that most of the witnesses involved in the underlying environmental contamination case were located in the local forum and that the Texas Insurance Code applied to the case.<sup>156</sup> In response to the insured's arguments, the Supreme Court of Texas noted that litigating in a foreign state forum would not deprive the insured of its day in court and that no evidence was proffered which indicated fraud, overreaching, nor an intention of the insurer to utilize the courts of a foreign state as a means to discourage claims.<sup>157</sup>

In addition, the Supreme Court of Texas in *In re AIU Insurance Co.* also rejected the contention that the local forum should prevail due to a state regulatory interest in insurance.<sup>158</sup> The court closely examined<sup>159</sup> the specific language the statute cited by the insured, Texas Insurance Code Article 21.42. The statutory language provides that

[a]ny contract of insurance payable to any citizen or inhabitant of this State by any insurance company or corporation doing business within this State shall be held to be a contract made and entered into under and by virtue of the laws of this State relating to insurance, and governed thereby, notwithstanding such policy or contract of insurance may provide that the contract was executed and

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151. N.J. STAT. ANN. § 58:10-23.11 (West 2016).

152. § 13:1E-1.

153. § 58:10A-1.

154. 296 N.J. Super. at 169.

155. *Seneca Ins. Co. v. Henrietta Oil Co.*, No. 02-CV-3535(DC), 2003 WL 255317, at \*4 (S.D. N.Y. Feb. 4, 2003).

156. 148 S.W.3d 109, 112 (Tex. 2004).

157. *Id.* at 114.

158. *Id.*

159. *Id.*

the premiums and policy (in case it becomes a demand) should be payable without this State, or at the home office of the company or corporation issuing the same.<sup>160</sup>

In analyzing the language, the court noted that the provision does not specifically mandate that the lawsuit be brought within Texas (the local state).<sup>161</sup> Moreover, the court warned of a provincial attitude concerning forum selection clauses.<sup>162</sup> The court strongly remarked that arguments concerning benefits to the local community in an insurance coverage dispute are “highly offensive to a system of justice based on the rule of law and gives fodder to those who have in the past questioned the fairness of Texas courts.”<sup>163</sup> The court emphatically noted that the trial court “clearly abused” its discretion in not enforcing the forum selection clause in the case.<sup>164</sup>

The divide of courts on the issue of enforcement of a forum selection clause in an environmental insurance contract is well illustrated by the divide of the federal and state courts within the state of Florida. In the case of *D/H Oil and Gas Co. v. Commerce and Industry Insurance Co.*, the United States District Court for the Northern District of Florida declined to enforce a forum selection clause in an environmental insurance contract.<sup>165</sup> In examining a situation where the underlying case involved a petroleum spill in the Florida panhandle, the *D/H Oil and Gas* court focused on the factors that the majority of the witnesses relevant to the case were in Florida, the majority of the pertinent documents and evidence were located in Florida, and also that documents and witnesses necessary to defend the case were located in Florida.<sup>166</sup> In addition, the court also noted Florida’s statutory interest in protecting natural resources within the state,<sup>167</sup> citing several statutory provisions relating to a significant state interest in protecting groundwater and surface waters.<sup>168</sup> Finally, the *D/H Oil and Gas* court also invoked Florida’s insurance regulatory interest as a significant public policy interest providing

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160. TEX. INS. CODE ANN. art. 21.42 (West 2015).

161. In re AIU Ins. Co., 148 S.W.3d 109, 114 (Tex. 2004).

162. *Id.*

163. *Id.*

164. *Id.* at 114–15.

165. See No. 3:04-CV-448-RV/MD, 2005 WL 1153332, at \*8 (N.D. Fla. May 9, 2005).

166. *Id.* at \*4.

167. *Id.* at \*5.

168. See FLA. STAT. § 376.30(1)(b) (2016) (noting that the Legislature finds and declares: “That the preservation of surface and ground waters is a matter of the highest urgency and priority, as these waters provide the primary source for potable water in this state.”); § 376.30(2)(b) (noting that the Legislature finds and declares: “Spills, discharges, and escapes of pollutants, drycleaning solvents, and hazardous substances that occur as a result of procedures taken by private and governmental entities involving the storage, transportation, and disposal of such products pose threats of great danger and damage to the environment of the state, to citizens of the state, and to other interests deriving livelihood from the state.”).

support for the finding that environmental insurance disputes should be heard in a local forum where the environmental damage occurs. In Florida, the Florida Petroleum Liability and Restoration Insurance Program is a state-sponsored program which provides for cleanup of sites where inland contamination has occurred.<sup>169</sup> Similar to West Virginia's state administrative regulatory scheme under the West Virginia Underground Storage Tank Act, Florida also requires underground petroleum storage tank owners to demonstrate financial responsibility for liability claims involving personal injury and property damage that arise out of the release of petroleum.<sup>170</sup> Just as in West Virginia, in Florida an underground petroleum storage tank owner may meet the financial responsibility requirement by having insurance coverage in place.<sup>171</sup> As the court in *D/H Oil and Gas* noted, "it is clear that the Florida legislature views the availability of insurance proceeds as an integral part of its statutory scheme to protect its citizens, and not just the insured, from environmental contamination."<sup>172</sup> Thus, the *D/H Oil and Gas* court made an exception to the general rule of forum selection clause enforceability and did not enforce the clause at issue in the environmental insurance contract.<sup>173</sup>

While the United States District Court for the Northern District of Florida in the *D/H Oil and Gas* case did not enforce a forum selection clause in an environmental insurance contract, two decisions of the Florida First District Court of Appeals have enforced forum selection clauses in environmental insurance contracts. In *Land O'Sun Management Corp. v. Commerce and Industry Insurance Co.*, the Florida First District Court of Appeals declined to invalidate a forum selection clause in an environmental insurance contract based on public policy grounds due to the doctrine of separation of powers expressed in the Florida constitution.<sup>174</sup> While many other courts have invoked a state's regulatory interest in insurance in declining to enforce forum selection clauses in environmental insurance contracts, the *Land O'Sun* court invoked the state's regulatory interest in insurance in a case upholding a forum

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169. FLA. STAT. § 376.3072 (2016).

170. § 376.3072(1).

171. *Id.*

172. *D/H Oil and Gas Co. v. Commerce and Indus. Ins. Co.*, No. 3:04-CV-448-RV/MD, 2005 WL 1153332, at \*6 (N.D. Fla. May 9, 2005).

173. *Id.* at \*8. ("While valid forum selection clauses are to be enforced in most circumstances, this case plainly presents an exception to the general rule.").

174. *See* 961 So.2d 1078, 1080 (Fla. Dist. Ct. App. 2007) ("We decline to accept Appellant's invitation to declare the forum selection clause invalid on public policy grounds because the constitutional requirement of the separation of powers precludes this court from directing the legislative branch to adopt certain policy statements such as the one Appellant urges upon us."). The Florida Constitution expressly provides for the separation of powers in Article 2, Section 3: "The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein." FLA. CONST. art. 2, § 3 (2016).

selection clause. The court in *Land O'Sun* expressly noted that the Office of Insurance Regulation has the statutory authority to review and approve insurance policies,<sup>175</sup> and since the policy which included the forum selection clause was approved by the Office of Insurance Regulation, the court remarked “it cannot be said that the clause violates strong public policy enunciated by statute or judicial fiat.”<sup>176</sup>

Six years following the *Land O'Sun* decision, in 2013, the Florida First District Court of Appeals once again faced the question of whether to enforce a forum selection clause in an environmental insurance contract in the *Illinois Union Insurance Co. v. Co-Free, Inc.* case.<sup>177</sup> The insured in the *Co-Free* case sought to distinguish the *Land O'Sun* case on the basis that the insurer in *Land O'Sun* was an admitted Florida carrier while the insurer in *Co-Free* was a surplus lines carrier.<sup>178</sup> However, the court did not move away from its prior ruling in *Land O'Sun* and noted that since the Legislature has not explicitly addressed forum selection clauses in environmental insurance policies, then essentially the court cannot fulfill the function of the legislative branch in invalidating a forum selection clause if the insured cannot prove that a forum selection clause would essentially deprive it of its day in court.<sup>179</sup>

As the above cases indicate, courts vary on their rulings with regard to the enforceability of forum selection clauses in environmental insurance contracts. Courts also vary depending on the specific issue in the context of automobile insurance policies as well.

#### F. Forum Selection Clauses and Automobile Insurance Policies

Courts have also varied on the enforcement of forum selection clauses in the area of automobile insurance. If the plaintiff appears to be “forum shopping” within the specific counties of a state,<sup>180</sup> then it is more likely that a court will enforce an insurer’s forum selection clause. In *O'Hara v. First Liberty Insurance Corp.*, a Pennsylvania uninsured motorist case, the plaintiffs

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175. See FLA. STAT. § 627.410(1) (2016). The statute states the following:

A basic insurance policy or annuity contract form, or application where written application is required and is to be made part of the policy or contract, group certificates issued under a master contract delivered in this state, or printed rider or endorsement form or form of renewal certificate, may not be delivered or issued for delivery in this state unless the form has been filed with the office by or on behalf of the insurer that proposes to use such form and has been approved by the office or filed pursuant to s. 627.4102.

176. *Land O'Sun*, 961 So.2d at 1080.

177. 128 So.3d 820 (Fla. Dist. Ct. App. 2013).

178. *Id.* at 823.

179. *Id.* at 824–25.

180. Christopher J. Conrad, *Forum the Bell Tolls: Plaintiffs Lose Challenge to Validity of Forum Selection Clause in Their Auto Insurance Policy*, 16 DEF. DIG. 23 (2010).



filed their complaint in Philadelphia County,<sup>181</sup> presumably to “forum shop.”<sup>182</sup> However, the applicable policy which included uninsured motorist coverage required a plaintiff to bring a suit “in a court of competent jurisdiction in the county and state of your legal domicile at the time of the accident.”<sup>183</sup> The plaintiff’s domicile was in Delaware County, Pennsylvania.<sup>184</sup> The Pennsylvania Superior Court sustained the insurer’s motion to transfer based upon the forum selection clause, holding that the clause clearly and unambiguously designated the appropriate forum as the “county and state” of an insured’s “legal domicile.”<sup>185</sup> In addition, the court found no injury to the public or the public good in requiring an insured to litigate an uninsured motorist claim where they live and where an accident occurs.<sup>186</sup>

Courts also will enforce a forum selection clause in an automobile insurance contract if there is no ambiguity in the insurance policy. The insureds in *Wolkenberg v. Allstate Insurance Company* filed an underinsured motorist claim in Illinois,<sup>187</sup> despite the fact they lived in Florida, the accident occurred in Florida, and the forum selection clause designated the courts of Florida to resolve claims under the insurance policy.<sup>188</sup> The insureds contended an “If We Cannot Agree” provision in the policy which stated that disagreements “will be resolved in a court of competent jurisdiction” created an ambiguity which conflicted with the forum selection clause in the policy.<sup>189</sup> Even though the insureds argued that “a” essentially means “any” with regard to a court of competent jurisdiction, the court found there was “no conflict between language stating that disputes generally will be resolved by a court of competent jurisdiction and language specifying which courts may be a proper forum for resolving those disputes.”<sup>190</sup> Given there was no ambiguity in the insurance policy, the *Wolkenberg* court upheld the forum selection clause.<sup>191</sup>

Another key consideration on the question of whether a court will enforce a forum selection clause in an automobile insurance contract is the location of where the insurance policy is delivered. In *Nelson v. CGU Insurance Co. of Canada*, the estate of a deceased insured filed an uninsured motorist claim in

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181. 984 A.2d 938, 940 (Pa. Super. Ct. 2009).

182. Conrad, *supra* note 180.

183. *O’Hara*, 984 A.2d at 939.

184. *Id.*

185. *Id.* at 942.

186. *Id.* at 943.

187. *Wolkenberg v. Allstate Ins. Co.*, Nos. 1-12-0190, 1-12-1048, 2012 WL 6965220, at \*1 (Ill. App. Ct. Oct. 31, 2012).

188. *Id.* at \*2.

189. *Id.* at \*4.

190. *Id.* at \*5.

191. *Id.*

Maine, where the accident occurred.<sup>192</sup> At the time of the deceased insured's death, he temporarily resided in Nova Scotia and the insurance policy, which included a forum selection clause, designated the Supreme Court of Nova Scotia as the forum to resolve disputes under the policy.<sup>193</sup> The estate of the deceased insured contended that two provisions of the Maine Insurance Code, one a provision which prohibited agreements in insurance contracts that "deprive the courts" of Maine jurisdiction of actions against foreign insurers,<sup>194</sup> and the other a provision permitting an insured to take action against a foreign insurer in the state of Maine,<sup>195</sup> applied and thus the forum selection was invalid.<sup>196</sup> In analyzing these arguments, the *Nelson* court noted the provisions did not apply as the policy was issued for delivery *outside* of the state of Maine, thus the court remarked that "nothing in Maine's uninsured motorist laws reflects a strong public policy against enforcement of forum-selection clauses in contracts of insurance outside of this State."<sup>197</sup>

Finally, another factor which courts consider in the automobile insurance context is whether enforcement of the forum selection clause may lead to inconsistent litigation results. At least two decisions have varied on enforcement of a forum selection clause in this situation. The underlying facts of the *American Safety Casualty Insurance Co. v. Mijares Holding Co., LLC* case involved the rejection by an insurance and reinsurance carrier of an insured's one million dollar reimbursement claim for a settlement the insured made with a third-party.<sup>198</sup> The insured filed a claim against both insurers in Florida.<sup>199</sup> The primary insurer had a forum selection clause in its insurance contract with the insured, but the reinsurance company apparently did not.<sup>200</sup> The insured argued that enforcement of the forum selection clause would possibly create inconsistent results between both the primary insurer and reinsurer and this constituted a compelling reason to decline enforcement of the forum selection clause.<sup>201</sup> Despite this reason, and even though the Florida Third District Court of Appeals acknowledged it as "an applicable compelling

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192. No. Civ. 02-193-BS, 2003 WL 1856439, at \*1 (D. Maine April 10, 2003).

193. *Id.* at \*1-2.

194. See ME. REV. STAT. tit. 24, § 2433 (2016) ("No conditions, stipulations or agreements in a contract of insurance shall deprive the courts of this State of jurisdiction against foreign insurers, or limit the time for commencing actions against such insurers to a period of less than 2 years from the time when the cause of action accrues.").

195. § 2434 ("Any person having a claim against any foreign insurer may bring a trustee action or any other appropriate action therefor in the courts of this State. Service of process upon such an insurer must be made as provided in section 421.").

196. *Nelson*, 2003 WL 1856439, at \*3.

197. *Id.*

198. 76 So.3d 1089, 1091 (Fla. Dist. Ct. App. 2011).

199. *Id.*

200. *Id.*

201. *Id.* at 1092.

reason,” the reason did not rise to the level to overcome the presumption under Florida law that forum selection clauses are valid.<sup>202</sup>

However, the possibility of inconsistent results in an uninsured motorist case led the Indiana Court of Appeals to decline to enforce a forum selection clause in *Farm Bureau General Insurance Co. of Michigan v. Sloman*.<sup>203</sup> In the underlying case, the uninsured motorist carrier denied the insureds claim due to an alleged failure of the insured to comply with the one-year written notice provision in the policy.<sup>204</sup> The insured filed suit against the insurer in Indiana, but the insurance policy contained a forum selection clause designating venue as the county and state where the policy was purchased, Michigan.<sup>205</sup>

In contrast to the decision of the Florida Third District Court of Appeals in the *Mijares Holding Co.* case, the Indiana Court of Appeals in *Sloman* declined to enforce the forum selection clause in the insurance policy due to the practical effect of the insured having to file two separate lawsuits in the case to recover.<sup>206</sup> The *Sloman* court gave great importance to the fact that the insured would be required to pursue a claim against the uninsured tortfeasor in Indiana to obtain a determination on liability and damages, and then file another lawsuit in Michigan against the uninsured motorist carrier to obtain a determination on the insurer’s obligation to pay uninsured motorist benefits.<sup>207</sup> The *Sloman* court distinguished the *Carnival Cruise Lines* case on the ground that it did not involve a situation where a threat of multiple lawsuits existed, and the court essentially found the “issue to be of paramount concern because any lawsuit involving an insurance policy that contains both a forum selection clause restricting suit to a particular venue and uninsured motorist coverage will likely lead to multiple lawsuits involving the same parties and the same issues of liability.”<sup>208</sup> In essence, upholding the forum selection clause would result in not only “confusion” but the “expenditure of unnecessary judicial resources.”<sup>209</sup>

#### G. Forum Selection Clauses and ERISA Disability Insurance Policies

A split in authority on the enforceability of forum selection clauses is also emerging with cases involving disability insurance policies governed by the provisions of the Earned Retirement Income Security Act of 1974 (ERISA).<sup>210</sup>

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202. *Id.*

203. 871 N.E.2d 324 (Ind. Ct. App. 2007).

204. *Id.* at 327.

205. *Id.*

206. *Id.* at 331.

207. *Id.*

208. *Farm Bureau Gen. Ins.*, 871 N.E.2d at 332.

209. *Id.*

210. See John T. Burnett, *ERISA Preemption and Individual Conversion Policies: How Broad Should ERISA Coverage Be?*, 35 TORT & INS. L.J. 781, 784 (2000) (“ERISA is designed to curtail

ERISA generally applies to employee welfare benefit plans, and thus many disability insurance contracts are covered.<sup>211</sup> At least three key decisions involving situations where disability insurance benefits have been denied include a question of whether a forum selection clause in a disability insurance plan governed by ERISA is enforceable.

In 2007, the United States District Court for the Southern District of New York upheld a forum selection clause in a disability insurance contract in the case of *Klotz v. Xerox Corp.*<sup>212</sup> The *Klotz* court gave great weight to the fact that Congress did not explicitly prohibit insurers from limiting venue through forum selection clauses and that enforcement of forum selection clauses in disability insurance contracts actually furthers ERISA's purpose in "establishing a uniform administrative scheme" as only one federal court would interpret the disability plan document and provide a uniform set of standards for claims processing and disbursement.<sup>213</sup> In upholding the forum selection clause in the disability insurance contract, the *Klotz* court held that enforcing a forum selection clause does not conflict with 29 U.S.C. § 1132(e)(2),<sup>214</sup> the venue provision of ERISA, which permits a plaintiff to file a lawsuit where an alleged breach took place.<sup>215</sup>

Similarly, the United States District Court for the Western District of Virginia also upheld a forum selection clause in a disability insurance contract in *Smith v. Aegon USA, LLC*.<sup>216</sup> Following the lead of the *Klotz* decision, the *Smith* court also held that a forum selection clause did not conflict with ERISA's venue provision nor did it conflict with ERISA's mandate for an

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the loss of employee benefits caused by the absence of vesting provisions, to stop abuses occasioned by the lack of governing minimum standards, to increase the stability of plans by requiring adequate funding of benefits, and to prevent the termination of plans before adequate funds have accrued. ERISA uses a system of uniform laws and regulations to strike a balance between the employee's interest in security and the employer's interests in ease and efficiency.").

211. See D. Frank Winkles & Claude H. Tison, Jr., *Avoiding ERISA Under Disability Insurance Contracts*, 79 FLA. B.J. 20 (2005) ("As its name implies, the Employee Retirement Income Security Act of 1974 (ERISA) was enacted for the primary purpose of protecting employees' rights under pension plans established by their employers. Like many laws, ERISA contains 'add-on' provisions that extend its reach beyond its stated purpose. The most important of these is ERISA's inclusion of 'employee welfare benefit plans,' which extends its coverage beyond pension plans to any employer-sponsored plan that provides life, health, disability, or other insurance coverage to employees. Such benefits are usually provided through group insurance policies paid in whole or part by the employer.").

212. See *Klotz v. Xerox Corp.*, 519 F. Supp. 2d 430, 437–38 (S.D. N.Y. 2007).

213. *Id.* at 436.

214. 29 U.S.C. § 1132(e)(2) (2016) ("Where an action under this subchapter is brought in a district court of the United States, it may be brought in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found, and process may be served in any other district where a defendant resides or may be found.").

215. *Klotz*, 519 F. Supp. 2d at 437.

216. *Smith v. Aegon USA, LLC*, 770 F. Supp. 2d 809, 813 (W.D. Va. 2011).

insured to have “ready access to the Federal courts.”<sup>217</sup> Finally, the *Smith* court also held the forum selection clause in the case was not unreasonable even given the assertion that the insured did not receive prior notice of the provision.<sup>218</sup> As the *Smith* court stated, “[t]he absence of notice and opportunity to reject in this case does not render the clause fundamentally unfair.”<sup>219</sup>

In contrast to the *Klotz* and *Smith* decisions, the United States District Court for the Northern District of Illinois declined to enforce a forum selection clause in a disability insurance contract in the *Coleman v. Supervalu, Inc. Short Term Disability Program* case.<sup>220</sup> In its decision, the *Coleman* court focused closely on the ERISA venue provision, 29 U.S.C. § 1132(e)(2). The insurer contended the insured waived her venue rights under ERISA.<sup>221</sup> The *Coleman* court also cited a fiduciary duty provision of ERISA codified in 29 U.S.C. § 1104(a)(1)(D), which requires that a fiduciary discharge duties “solely in the interest of the participants and beneficiaries” and must do so “in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of . . . [ERISA].”<sup>222</sup>

The insured argued that the venue provision was not “consistent” with a forum selection clause and essentially contended that “ERISA rights cannot be waived through the terms of a plan, because a fiduciary would never be able to enforce a plan term that conflicts with ERISA.”<sup>223</sup> The *Coleman* court agreed with the insured’s argument that 29 U.S.C. § 1104(a)(1)(D) prohibits an insured waiving rights under the ERISA venue provision.<sup>224</sup> In addition, the *Coleman* court also rejected the rationales of the *Smith* and *Klotz* decisions, which noted that enforcement of a forum selection clause would promote a uniform interpretation of a disability insurance policy as one court would have the authority to make interpretations.<sup>225</sup> Significantly, the *Coleman* court noted this was the function of a choice of law clause, not a forum selection clause, and thus did not enforce the forum selection clause.<sup>226</sup>

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217. *Id.* at 812; *see also* 29 U.S.C. § 1001(b) (2016).

218. *Smith*, 770 F. Supp. 2d at 812.

219. *Id.*

220. *Coleman v. Supervalu, Inc. Short Term Disability Program*, 920 F. Supp. 2d 901 (N.D. Ill. 2013).

221. *Id.* at 906.

222. 29 U.S.C. § 1104(a)(1)(D) (2016).

223. 920 F. Supp. 2d 901, 906 (N.D. Ill. 2013).

224. *Id.* at 907.

225. *Id.* at 909.

226. *Id.*

### III. THE INCORPORATION OF INSURANCE PRINCIPLES INTO FORUM SELECTION CLAUSE ANALYSIS – A NEW BALANCING TEST

A number of the cases discussed in the previous section relating to forum selection clauses in insurance contracts focus on the significant policy factors addressed by the United States Supreme Court in the *M/S Bremen* and *Carnival Cruise Lines* cases. Essentially, in the wake of the *M/S Bremen* and *Carnival Cruise Lines* cases, courts generally looking at the enforceability of forum selection clauses in commercial contracts focus heavily on three particular factors: first, whether the clause was entered into as the result of fraud or overreaching; second, would a plaintiff be effectively deprived of a remedy and a day in court if the forum selection clause is enforced; and third, would a strong public policy of the state where a lawsuit is brought be contravened by enforcement of the clause.

Several of these factors are quite relevant with regard to insurance contracts, particularly with regard to public policy concerns. As demonstrated in the cases involving environmental insurance and ERISA disability insurance, the enforcement of a forum selection clause may arguably run counter to public policy concerns with the policies and objectives of state administrative agencies, such as state entities regulating insurance, or in the case of ERISA, ERISA's federal statutory mechanisms. But insurance contracts in a number of ways are unique compared with other commercial contracts. As the United States Supreme Court aptly stated in *US v. South-Eastern Underwriters Association* in 1943, “[p]erhaps no modern commercial enterprise directly affects so many persons in all walks of life as does the insurance business. Insurance touches the home, the family, and the occupation or the business of almost every person in the United States.”<sup>227</sup> Insurance contracts are also unique since they provide the insured with the peace of mind that among many of life's greatest challenges in times of loss, such as illness or loss of a car or home, insurance proceeds can help mitigate the immense loss and suffering that is associated with tragic life events.<sup>228</sup>

In examining future cases involving the validity of forum selection clauses in insurance contracts, courts can examine the following factors below in a balancing test, which incorporates principles significant to the unique principles of insurance contracts. While no one factor should override all the others, courts can weigh each of these factors independently of the others and

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227. 322 U.S. 533, 540 (1944).

228. *Crisci v. Security Ins. Co. of New Haven, Conn.*, 426 P.2d 173, 179 (Cal. 1967) (“Among the considerations in purchasing liability insurance, as insurers are well aware, is the peace of mind and security it will provide in the event of an accidental loss, and recovery of damages for mental suffering has been permitted for breach of contract which directly concern the comfort, happiness or personal esteem of one of the parties.”).

make a determination based upon the weight of all the factors as to whether to enforce a forum selection clause in an insurance contract.

A. *Type of Insured Under the Policy*

As insurance contracts are contracts of adhesion,<sup>229</sup> an insured is situated in an uneven bargaining position compared with the insurer. However, as the cases earlier discussed indicate, a lack of bargaining power alone is a weak argument and is not a ground alone for invalidating a forum selection clause. It is certainly a relevant inquiry in the insurance context to determine the type of insured under the insurance policy. Is the insured an individual? Or is the insured rather a commercial entity? Certainly, an insured which is a commercial entity likely has superior information and knowledge relating to insurance as compared with an individual. In addition, a commercial entity is likely rather in a vastly superior position to attempt to negotiate with an insurer as opposed to an individual insured. Therefore, under this factor, if an insured is a commercial entity, the clause would be more likely to be enforced; but if the insured is an individual, this would be an argument to make a forum selection clause less likely to be enforced under this factor.

B. *Type of Claim at Issue in the Underlying Litigation*

The type of claim in an underlying case between an insured and an insurer is also relevant to the question of enforceability of a forum selection clause. A breach of contract claim or a negligence claim may be one factor the court considers which may make it more likely for a forum selection clause to be enforced. However, the presence of an intentional tort at issue in the underlying litigation, particularly allegations of bad faith on the part of an insurer, is a factor which leans heavily toward not enforcing a forum selection clause. A significant rationale for the recognition by courts of a remedy for insurance bad faith is to deter misconduct of an insurer.<sup>230</sup> A hypothetical case

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229. See *Max True Plastering Co. v. U.S. Fidelity and Guaranty Co.*, 912 P.2d 861, 864 (Okla. 1996) (“An adhesion contract is a standardized contract prepared entirely by one party to the transaction for the acceptance of the other. These contracts, because of the disparity in bargaining power between the draftsman and the second party, must be accepted or rejected on a ‘take it or leave it’ basis without opportunity for bargaining—the services contracted for cannot be obtained except by acquiescing to the form agreement. Insurance contracts are contracts of adhesion because of the uneven bargaining positions of the parties.”).

230. See *Dolan v. AID Ins. Co.*, 431 N.W.2d 790, 794 (Iowa 1988) (“[W]e are convinced traditional damages for breach of contract will not always adequately compensate an insured for an insurer’s bad faith conduct. Our focus, of course, is on the recompense available to the affected insured, not the extent to which the insurer may be subject to additional statutory penalties for its misconduct. The pertinent provisions of Iowa Code chapter 507B will, in all likelihood, deter nearly all bad faith conduct on the part of insurers, but when on those occasions they do not, the penalties would provide slight consolation to an aggrieved insured. Further, we do not believe the

may involve an insured who alleges insurance bad faith on the part of an insurer, but yet the insurer has included a forum selection clause in the policy. From a policy perspective, an insurer could theoretically immunize itself from bad faith liability if it designated the application of the law and forum of a state which did not recognize first party insurance bad faith. Such a result would be unjust and unreasonable given the circumstances. Thus, in cases where an insured has alleged claims based upon intentional torts and insurance bad faith, a court should be much less likely to enforce a forum selection clause in an insurance contract.

*C. Type of Insurance Contract Involved*

Similar to the type of insured involved, it is also relevant what type of insurance contract includes a forum selection clause. If the forum selection clause is included in an automobile insurance policy and the litigation can take place in one jurisdiction, a forum selection clause would be more likely to be enforced. However, if multiple lawsuits and the possibility of inconsistent judgments (such as in an uninsured motorist case) would be quite likely, such as in the *Sloman* case, then such a situation would be a factor against enforcing a forum selection clause.

In addition, if the claim involved an environmental insurance contract, then a forum selection clause would be less likely to be enforced given that a state regulatory interest in environmental protection and regulation of insurance would be present. In addition, claims involving forum selection clauses in health insurance contracts and disability insurance contracts should be less likely to be enforced, as enforcement may place a substantial burden on an out-of-state plaintiff to pursue litigation in an unfamiliar forum (particularly when the plaintiff may be in poor health).

*D. Location of the Parties, Witnesses, Documents, and Evidence in the Case*

A court's consideration of the enforceability of forum selection clauses in an insurance contract should also include a weighing of factors which a number of courts have already addressed in specific cases: the locations of the parties, location of witnesses, and location of the majority of the relevant documents and evidence in the case. One example where a court engaged in a factor by factor analysis was the United States District Court for the District of

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availability to the insured of extra-contractual damages should be dependent upon the insured sustaining severe emotional distress occasioned by the insurer's conduct. It follows that an action for intentional infliction of emotional distress, pursuant to . . . does not provide an adequate remedy due to its limited applicability. We conclude it is appropriate to recognize the first-party bad faith tort to provide the insured an adequate remedy for an insurer's wrongful conduct.").



Connecticut decision in the *Tetco* case, discussed earlier.<sup>231</sup> In weighing all of these factors, a court may find that the balance of these factors weighs heavily for or against enforcement of a forum selection clause in an insurance contract.

#### *E. Reasonable Expectations Doctrine in Insurance Law*

One of the doctrines which has gained greater acceptance among jurisdictions in the field of insurance law is the reasonable expectations doctrine.<sup>232</sup> In essence, with the doctrine of reasonable expectations, a court will require coverage that is congruent with the insured's reasonable expectations of coverage.<sup>233</sup> While not explicitly labeled as "reasonable expectations," in the *M/S Bremen* case the United States Supreme Court noted that giving "effect to the legitimate expectations of the parties" was one factor in upholding a forum selection clause.<sup>234</sup> However, in the case of a forum selection clause in an insurance contract, it is likely to be a debatable question as to whether or not an insured may reasonably expect a given designation of a forum by an insurer. For instance, it will be much more likely that an insured can reasonably expect a designated forum if an insurer designates the forum as the "state and county of the insured's legal domicile." However, it is less likely that an insured reasonably expect a designated forum in a hypothetical case where the insured is from Florida, the insurer a corporation with operations in Iowa, and then the forum selection clause designates North Dakota to resolve any disputes under the insurance policy.

Therefore, courts should ask the question: Could the insured reasonably expect the forum designated in the forum selection clause? If the answer is yes, then this answer would weigh in favor of enforcement of the clause; if the answer is no, then this would weigh against enforcement.

#### CONCLUSION

Courts throughout the country are often faced with determining the question of whether or not to enforce a forum selection clause within the contract. This is also a common question faced in insurance litigation. While

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231. See *Discover Prop. & Cas. Ins. Co. v. Tetco, Inc.*, 932 F. Supp. 2d 304, 312–14 (D. Conn. 2013).

232. See Jeffrey R. Pawelski, Note, *Insurers Don't Need the Court to "Babysit" Them: An Argument for Reasonable Expectations in American Family Mutual Insurance Co. v. Elliot*, 41 S.D. L. REV. 375 (1996) ("The doctrine of reasonable expectations has been applied by numerous courts to favorably construe insurance policy language for insureds.").

233. See Jeffrey W. Stempel, *Unmet Expectations: Undue Restriction of the Reasonable Expectations Approach and the Misleading Mythology of Judicial Role*, 5 CONN. INS. L.J. 181, 186 (1998) ("When courts apply 'pure' reasonable expectations theory, the court mandates coverage consistent with the policyholder's expectations even if relatively clear policy language is to the contrary.").

234. *M/S Bremen v. Zapata*, 407 U.S. 1, 12 (1972).

the majority doctrinal rule has developed in which courts will typically enforce a forum selection clause within an insurance contract in many cases, the current doctrinal rules generally do not take into account specific factors and doctrines more relevant to insurance, such as the reasonable expectations doctrine. Future courts should incorporate insurance principles into a balancing test in determining the validity of forum selection clauses in insurance contracts in order to properly weigh the concerns of both insurers and policyholders.

