

Delaware Law May Govern D&O Coverage Dispute Transferred to Another District

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On April 8, 2022, the United States District Court, District of Delaware, granted defendant-insurers' motion for a change of venue, transferring the directors and officers (D&O) insurance dispute originally filed in Delaware state court to the Western District of Oklahoma. *Paycom Software, Inc. v. Surety Company of America*, 2022 U.S. Dist. LEXIS 65624 (D. Del. April 8, 2022). The district court concluded that, "on balance," the convenience of the parties and witnesses and the interests of justice "strongly favor[ed]" transfer. In so holding, the district court declared that the fact that Delaware faces a growing number of filings per judgeship weighed strongly in favor of transfer. Importantly, the court did not determine what state's substantive law would apply to the D&O insurance coverage dispute. Delaware's choice of law rules will supply the answer to that question after transfer.

Defendants Travelers Casualty and Surety Company (Travelers) and QBE Insurance Corporation (QBE) issued primary and first-layer excess D&O insurance policies to plaintiff Paycom Software, Inc. (Paycom). In September 2018, during the policy period, the U.S. Securities and Exchange Commission (SEC) began seeking documents and testimony from Paycom and certain of its officers and other purported "Insured Persons" in connection with possible violations of the federal securities laws.

Paycom sought coverage under the D&O policies for legal costs incurred in responding to SEC subpoenas. Travelers reimbursed Paycom for certain costs incurred on behalf of its officers and other "Insured Persons," but denied coverage for costs Paycom incurred in response to subpoenas served on the company. Paycom sued Travelers and QBE in Delaware Superior Court. The defendants removed the suit from state court to federal district court, on diversity grounds.

The defendants then moved to transfer the suit to the Western District of Oklahoma pursuant to 28 U.S.C. § 1404(a). Under 28 U.S.C. § 1404(a), a district court may transfer any civil action to any other district: (1) if the other district is one in which the action might have been brought or to which all the parties have consented and (2) transfer is for the convenience of the parties and witnesses and in the interests of justice.

The defendants argued for transfer to the Western District of Oklahoma on the grounds that Paycom's headquarters, with key witnesses and documents, are located there, and the D&O policies were issued and many of the acts underlying Paycom's claim for coverage occurred there. Paycom challenged the transfer on the grounds that Paycom is incorporated in Delaware, the action involves D&O liability insurance risks that "are uniquely related to Delaware," the coverage dispute was likely to be decided under Delaware law, and Delaware courts are highly experienced in adjudicating D&O coverage disputes.

To avoid the "paramount" importance of the plaintiff's choice of forum, the defendants had to establish that the balance of convenience of the parties was *strongly* in favor of venue in Oklahoma. The district court examined the 12 factors identified by the Third Circuit in *Jumara v. State Farm Insurance Company*, 55 F.3d 873, 879 (3d Cir. 1995) as relevant to the balancing analysis.

The district court determined that six of the *Jumara* factors weighed in favor of transfer: the defendants' choice of an Oklahoma forum; where the claim arose; the convenience of the witnesses; practical considerations; the relative administrative difficulty resulting from court congestion; and the local interest in deciding local controversies at home.

Where the claim arose favored transfer, the district court concluded, given that nothing occurred in Delaware giving rise to the claims, the SEC issued subpoenas to Paycom in Oklahoma, and the insurance policies were issued to Paycom in Oklahoma. The convenience of witnesses favored transfer because six of the nine Paycom officers and employees who were subpoenaed by the SEC reside in Oklahoma, two of whom no longer work for Paycom and were thus outside the subpoena power of the federal district court in Delaware.

Importantly, the district court concluded that relative administrative difficulty due to court congestion weighed *strongly* in favor of transfer. Delaware faces a growing number of weighted filings that require substantially more judicial resources than the average civil case – 953 weighted filings per judgeship in Delaware versus 291 in the Western District of Oklahoma.

The district court viewed as neutral the five remaining *Jumara* factors: convenience of the parties, enforceability of the judgment, local interest in deciding local controversies at home, public policies of the fora, and trial judges' familiarity with applicable state law in diversity cases.

Regarding Oklahoma's and Delaware's local interests, the district court reasoned that, while Delaware has a public policy interest in the capabilities and conduct of officers and directors of Delaware corporations, that public policy is not directly related to insurance coverage disputes.

Paycom argued that, under Delaware's choice of law rules, which would apply if the case were transferred, Delaware law was likely to apply to the dispute, and that the District of Delaware had far more experience applying Delaware's choice-of-law rules and related case law. Paycom relied on the well-publicized Supreme Court of Delaware decision in *RSUI Indemnity Company v. Murdock*, 248 A.3d 887, 900, 907 (Del. 2021), where the court, after applying Delaware's choice of law rules, held that Delaware law governed a D&O insurance coverage dispute involving an insured incorporated in Delaware. The *Paycom* court found that Article III judges, wherever located, are competent to interpret D&O insurance policies and, further, that it was "unable to determine to what jurisdiction Delaware's choice-of-law test would point."

The district court concluded that, considered in their totality, the *Jumara* factors weighed strongly in favor of transfer. The court summarized the tally as six weighing in favor of transfer (with relative administrative difficulty due to court congestion being strongly in favor), one weighing against transfer and to be given paramount importance (the plaintiff's choice of forum), and the remaining five being neutral.

While many view Delaware state courts as favorable to policyholders in D&O coverage disputes, before determining to file in Delaware state court, or removing to Delaware federal court where feasible, it is important to address with counsel the possibility and potential results of a transfer of venue. In that regard, it should be kept in mind that, even after transfer, Delaware substantive law might still govern the D&O dispute. For cases transferred pursuant to 1404(a), the transferee court must use the choice of law rules that would have been applied by the transferor court.

Thus, following *Murdock*, while the case may end up in another district, it remains possible that a court applying Delaware choice-of-law rules may conclude that Delaware law applies because the policy was issued to a Delaware corporation.

If you have any questions or would like further information, contact Celestine M. Montague (montaguec@whiteandwilliams.com; 215.864.6813) or David J. Creagan (creagan@whiteandwilliams.com; 215.864.7032).

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