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N.Y. Law Is Applied to GE Indemnity for Polluted Sites

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The interpretation of insurance policies indemnifying General Electric against liability for hundreds of millions of dollars in claims from polluted sites around the country, including the Hudson River, should be decided under New York law, a state judge has ruled.

Manhattan Supreme Court Justice Bernard J. Fried held in *Appalachian Insurance Co. v. General Electric Co.*, 122807-1996, that even though General Electric Co.'s operations and pollution risks were spread nationwide, its New York domicile should be regarded as "a proxy for the principal location of the insured risk," and thus, serve as "the source of applicable law."

Seeking to avoid New York's insurer-friendly laws, GE had asked the court to apply the "law of the site" where pollution had occurred.

Justice Fried wrote that it is "well-settled" that in a contractual dispute, New York laws require courts to apply the law of the state "which has the most contacts with the contract."

Where a liability insurance contract is involved, Fried acknowledged that "the principal location of the insured risk" is the primary factor in determining governing law. However, he added, "although the location of the risk can be a compelling factor in a choice of law analysis, ... it is necessary for courts to modify the location of the insured risk rule when the risk is located in several states."

Fried turned to the proxy rule of the Appellate Division, 1st Department, in *Certain Underwriters at Lloyd's, London v. Foster Wheeler*, 36 A.D.3d 17 (2006), a case in which the insured sought coverage for hundreds of thousands of asbestos claims throughout the country and decided it should be applied to GE's case.

Even though GE had moved its executive offices to Connecticut, the judge noted that its principal place of business remains in New York.

GE had sought a declaratory judgment that the insurers that issued policies to GE between 1956 and 1986 had a duty to idemnify the corporation against all liabilities to third parties resulting from its environmental contamination of numerous sites.

Louis Chiafullo, a partner at McCarter & English in Newark, N.J., which represents GE, said the cleanup costs at the various sites would be "in the hundreds of millions."

Some attorneys, however, estimated that the figure would be greater.

"The Hudson River, the single biggest site to have been contaminated, might cost more than $1 billion," said Michael Balch, a counsel at Skadden, Arps, Slate, Meagher & Flom, which represents General Reinsurance and North Star Reinsurance.

The second-biggest, a Pittsfield, Mass. plant and the neighboring Housatonic River, "could be at least several hundreds of millions," Balch said.

He said that the application of New York law could result in a more favorable result to insurers.

"It would significantly reduce GE's chances of insurance recovery," he said. "New York laws are more favorable for insurers because of the application of pollution exclusion clauses, which other states interpret more favorably for policy holders; the late notice requirement, which in New York, does not require a showing of prejudice; and allocation issues, which under New York laws, would spread GE's damages across insurance policies, rather than allowing them to lump damages as they want under a single policy year."

New York has changed its late-notice rule to include a showing of prejudice, but the new law will not take effect until Jan. 19, 2009.

Chiafullo contended that Fried's ruling was not significant "in the grand scheme of things."

"In a purely procedural decision, the court applied New York's choice of law rules, and determined that New York law should be applied, rather than the law of the site or Massachusetts law," he said. "GE has resolved its environmental coverage claims with the vast majority of its insurers."

The remaining claims will proceed to trial "against the few remaining insurers and GE expects to recover insurance proceeds from those remaining defendants," said Chiafullo.

ATTEMPT AT UNIFORMITY

In a footnote, Justice Fried said that the pollution exclusion clause in New York policies have a "temporal component," requiring toxic discharge to be both "sudden" and "accidental" in order for a company to recover. In other states, however, such as in Georgia, Washington and Indiana, "the phrase 'sudden and accidental' has no temporal component," he wrote.

Additionally, he said that New York courts allocate damages using a "pro rata methodology," in which damages are distributed among insurers in proportion to the risk. In other states, an "all sums" methodology might be used, in which the insured can seek "full coverage for its claims for any policy in effect during the time period of the injury or damage."

GE argued that the law of the site should apply because the states in which the environmental sites are located have the strongest interest in the resolution of the dispute. But the judge responded that the coverage dispute will not affect GE's liability for the cleanup or whether victims of pollution should be compensated. "Rather, this dispute concerns the extent to which GE or the Insurers must bear the cost of the environmental cleanup," he wrote.

Fried stressed the need to adopt an approach that would promote uniformity of results. "It would be not only an enormous burden to consider the laws of numerous states on every issue in this case, but such an approach would make uniform interpretation of the contract impossible," he wrote.

"We think that the court's decision is extremely well-reasoned and fully comports with all of New York conflicts principles," said Elizabeth DeCristofaro, a partner with Ford Marrin Esposito Witmeyer & Gleser, which represented Continental Casualty Co. and Continental Insurance Co. "This was an important threshold question that will narrow the issues and reduce the claims to be addressed in the case."

Other firms representing insurer defendants in the case include Park & Kelly; Rivkin Radler; White and Williams; Landman Corsi Ballaine & Ford and Thorp Reed & Armstrong.