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Environmental Law

Court Curtails Forum Shopping

New Jersey Supreme Court's *Sensient* decision confirms recent trend of other state courts

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When the Supreme Court affirmed the Appellate Division's decision in *Sensient v. Allstate Insurance Company* last month, it provided a final seal of approval to what previously had been an ever-expanding scope of jurisdiction over the interpretation of insurance policies relating to possible coverage of environmental remediation within our state's borders. The Court's decision was the latest in what appears to be a national jurisprudential trend toward rejecting traditional principles of comity in the context of parallel actions in sister jurisdictions pertaining to environmental contamination.

Sensient involved the EPA's remediation of a former manufacturing site in Camden. When the EPA served the plaintiff owner with a demand for reimbursement of cleanup costs in 2004, the owner tendered the claim to its insurers seeking indemnification and contribution under various CGL insurance policies that had been issued over the course of multiple years. One of those carriers, Zurich American, filed a pre-emptive declaratory judgment action in New York, the jurisdiction from which the policy was brokered, seeking a determination that it had no duty to either defend or indemnify the plaintiff with respect to any cleanup costs at the Camden site. Zurich premised its argument on the absolute pollution exclusion contained in its policy with the plaintiff. Two months later, the plaintiff filed a declaratory judgment of its own in New Jersey, advancing claims not only for declaratory relief, but for breach of the implied covenant of good faith and fair dealing as well.

Zurich's rationale for its pre-emptive strike was understandable from a strategic point of view given that New York law strictly applies pollution exclusions of the sort contained in the plaintiff's policy, whereas neither New Jersey nor New York law recognizes an independent cause of action for breach of the implied covenant of good faith and fair dealing. Zurich therefore sought to avail itself of New York's more favorable substantive law by filing before the plaintiff, and moving to stay or dismiss the New Jersey action under the so-called "first-filed rule."

The first-filed rule is a general principle of comity standing for the proposition that where an action is already pending in one state, the orderly and efficient administration of justice is better served by not allowing a subsequently filed action involving the same issue to proceed in another state, absent "special equities." The trial court in *Sensient* adopted a strict application of this rule, and granted Zurich's motion to dismiss the plaintiff's New Jersey action. The Appellate Division disagreed primarily for the reason that New Jersey's dominant interest in resolving insurance coverage issues concerning hazardous waste-infested properties within its borders presented a special equity sufficient to reject adherence to the first-filed rule. The Supreme Court affirmed.

The Court began its analysis by noting that, as a threshold matter, the first-filed rule is not intended as an inflexible, absolute bar to subsequently filed actions. Rather, the rule is equitable in nature and should not be followed in those actions where overriding public policies or other special equities so dictate. Special equities have been found to exist when one party has engaged in jurisdiction shopping to deny the other party the benefit of its natural forum, or has filed an action in bad faith in anticipation of the opposing party's imminent suit in another, less favorable forum.

Although the Court did not go so far as to find that Zurich acted in bad faith, its reasoning at the very least suggested that the divergent views taken by courts in various jurisdictions regarding insurance coverage in environmental pollution cases lend themselves to the vices associated with pre-emptive litigation strikes. This observation, coupled with New Jersey's long-standing and dominant public-policy interest in environmental remediation within its borders, gives rise to special equities

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sufficient to trump general principles of comity and favors nonapplication of the first-filed rule in environmental insurance coverage cases. Such cases touch not just on property, "but on the health and safety of New Jersey's residents, a number of whom were exposed unsuspectingly to toxic substances."

The Court drew support for its holding from the similar analysis applied in choice-of-law issues in environmental cases. In such cases, courts overwhelmingly reject the law of the place of the contract in favor of the law of the site of the insured risk. Unless some other state has a more significant relationship to the action, the site of the insured risk carries substantial, if not dispositive, weight in determining the substantive law that will apply in the action. Similarly, with respect to Zurich's application for comity-stay relief, the fact that the policy was brokered in New York clearly did not outweigh the fact that both the insured risk and environmental pollution were located in New Jersey. While the contractual relationship between Zurich and the plaintiff may have originated in New York, thus establishing the minimum contacts necessary to institute the first-filed action in that jurisdiction, that relationship was dominated by New Jersey's overriding public policy interest in remediation of polluted sites within its borders.

While the *Sensient* opinion may at first blush read as a pro-insured opinion, it is more appropriately viewed as part of a national judicial policy against forum shopping by all parties involved in environmental contamination cases. For example, the Alabama Supreme Court's recent opinion in *Vulcan Materials Co. v. Alabama Insurance Guaranty Association*, 2007 WL 4215046 (Ala. Civ. App. Nov. 30, 2007), applied virtually the same policy-driven logic in granting an insurer's application for comity-stay relief as against an insured's subsequently filed action.

Vulcan was a manufacturer of perchloroethylene, or perc, a chemical used in the dry-cleaning process. In 1998, the City of Modesto sued Vulcan in California state court (the Modesto Action), alleging that Vulcan was responsible for perc-related groundwater contamination and other property damage in multiple locations. The court divided these locations into groups and the Modesto Action proceeded in phases, one phase per group.

In January 2005, while the Modesto Action was progressing, Transport Insurance Company, one of Vulcan's insurance carriers, brought a declaratory judgment action against Vulcan, in California state court (the California Action), claiming that it had no duty to defend or indemnify Vulcan in the Modesto Action. On a parallel track, the first phase of the Modesto Action proceeded to trial, and in June 2006 a jury awarded compensatory damages to the City of Modesto of more than $3 million against Vulcan and other defendants and awarded punitive damages of $100 million (a sum later remitted to $7.2 million) against Vulcan.

Soon after the verdict in the Modesto Action, two more of Vulcan's insurers, First State Insurance Company and Nutmeg Insurance Company, filed a second declaratory judgment action in California state court (the First State Action). Similar to Transport Insurance Company, those two insurers also sought a judgment declaring that they had no duty to defend or indemnify Vulcan in the Modesto Action.

In August 2006, Vulcan brought yet a third declaratory judgment action against its various insurers (the same insurers named in the First State Action) relating to the Modesto Action, only this time in Alabama circuit court (the Alabama Action). As a basis for filing in this jurisdiction, Vulcan noted that its principal place of business was located in Alabama; it purchased the policies in question in Alabama; it paid its premiums from Alabama; and the policies were brokered in Alabama. Both the First State Action and the California Action, however, involved essentially the same claims as the Alabama Action, though different parties initiated them.

The day after Vulcan filed its Alabama Action, it moved to stay or dismiss the First State Action in California on forum non conveniens grounds. The California court denied Vulcan's motion, and Vulcan did not appeal. Then, in October 2006, the insurance company defendants jointly moved the trial court in Alabama to dismiss Vulcan's complaint in the Alabama Action based on forum non conveniens or, alternatively, to stay the case. The Alabama trial court granted the motion and dismissed the Alabama Action as to all defendants. Vulcan appealed that decision and the Supreme Court affirmed.

Just as Zurich argued in *Sensient*, Vulcan argued that the claim upon which its Alabama Action was based actually originated within that state because Alabama was where Vulcan purchased the insurance policies; where it paid the premiums on the insurance policies; where the agent through whom the insurance policies were purchased was located; and where Vulcan tendered its claims for coverage. Applying the same equitable principles of comity-stay relief employed by the Appellate Division in *Sensient*, the Alabama Supreme Court in *Vulcan* disagreed.

The court held that the act giving rise to Vulcan's declaratory judgment action was not the initiation of the contractual relationship between Vulcan and its insurers, which occurred in Alabama. Rather, it was the alleged breach of that contractual relationship — i.e., the insurance companies' refusal to defend and indemnify Vulcan in the Modesto Action. Furthermore, there was no dispute that the Modesto Action arose in California, where the perc discharges and contaminations occurred, and that action was the very action over which Vulcan brought its Alabama declaratory judgment action.

Finally, the court in *Vulcan* emphasized California's substantive nexus to the subject matter of Vulcan's declaratory judgment action, compared to Alabama's mere marginal nexus. The catalyst of both the Alabama and First State Actions was the perc-related contamination of approximately 50 sites throughout the Modesto area, whereas

no perc-related contamination had even been identified in Alabama. In summary, from the 1990s until August 2006 (when Vulcan filed its Alabama Action), virtually all material facts related to the subject matter of the action occurred in California, from the perc discharge, to the resulting injury, to the remediation, to the institution of the underlying Modesto action, to the insurers' first declaratory judgment actions. Acknowledging that California's strong policy interest in the outcome of Vulcan's declaratory judgment action clearly outweighed Alabama's merely tangential interest, the Court in *Vulcan* thus dismissed Vulcan's complaint.

Sensient and *Vulcan* are mirror images of one another. In *Sensient*, the court of the jurisdiction in which the contamination occurred denied an insurer's application for comity-stay relief based on its previous filing of a related claim in a foreign jurisdiction; in *Vulcan*, the court of a foreign jurisdiction granted an insurer's application for comity-stay relief based on its filing of a related claim in the jurisdiction in which the contamination occurred. Nonetheless, these cases present parallel examples of what appears to be a modern jurisprudence's trend toward affording general principles of comity substantially less deference in environmental remediation cases, favoring judicial oversight by the jurisdiction in which the contamination occurred.

In light of this policy, all parties will be severely hampered in their ability to forum shop by filing related lawsuits in jurisdictions with only marginal nexuses to the contamination in question while simultaneously seeking comity-stay relief in the jurisdiction where the contamination occurred. This trend is neither pro-insured, nor pro-insurer. Rather, it is reflective of an overriding interest held by the various states in overseeing remediation of environmental contamination within their respective borders. These interests will generally trump the interests of foreign jurisdictions with only peripheral contacts with the forum jurisdiction and marginal interests in the outcome of the action. ■