

Great Lakes US Supreme Court case – how sacrosanct are Choice of Law clauses?

Joe Grasso, Partner, Wiggin & Dana



Dr. StrangeLaw; or How I Learned to Stop Worrying and Love the Clause (choice of law)



Live Polling



Do the policies you deal with have a choice of law provision?



- Yes
- No



#IUMI2023

Live Polling

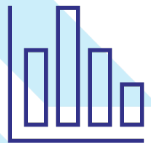
If so, do you know which law was selected?



- Yes
- No

Live Polling

Do you think the law to be applied to any disputes under a particular policy has a substantial impact on underwriting results?



- Yes
- No

Great Lakes Insurance SE v. Raiders Retreat Realty Co., LLC

On March 6, 2023, the US Supreme Court agreed to decide a dispute concerning enforceability of a choice of law clause in a marine insurance policy.

But the issue to be decided has potentially broader implications:

Under federal admiralty law, can a choice of law clause in a maritime contract be rendered unenforceable if enforcement is contrary to the “strong public policy” of the state whose law is displaced?

Great Lakes Insurance SE v. Raiders Retreat Realty Co., LLC – Background

- UK-based insurer; US-based (PA) insured
- Yacht insured for \$550,000
- Yacht ran aground in June 2019 off Ft. Lauderdale, FL - \$300,000 in damage
- Subsequent investigation revealed failure to update fire suppression system (no connection to grounding)



Great Lakes Insurance SE v. Raiders Retreat Realty Co., LLC – Background

- Insurer declined claim, voiding policy, and commenced DJ action in Pennsylvania
- Insured asserted counterclaims, including extra-contractual claims under PA law (breach of fiduciary duty, bad faith, violation of PA State consumer fraud statute)
- Great Lakes moved to dismiss counterclaims

Great Lakes Insurance SE v. Raiders Retreat Realty Co., LLC – Background (cont.)

The Clause at issue:

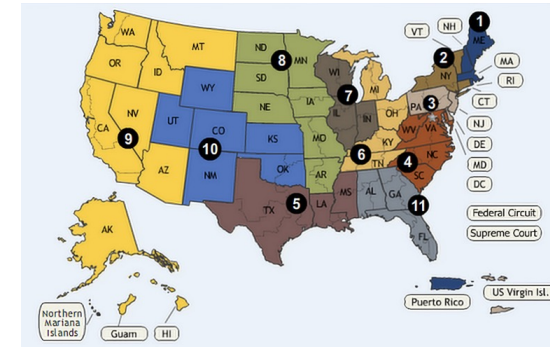
It is hereby agreed that any dispute arising hereunder shall be adjudicated according to well established, entrenched principles and precedents of substantive United State Federal Admiralty law and practice but where no such well established, entrenched precedent exists, this insuring agreement is subject to the substantive laws of the State of New York.

Raiders Retreat – District Court Holding



District Court held in favor of insurer - Choice of law will generally be upheld as valid and enforceable

- If freely-bargained for
- If does not contradict a strong public policy of the United States
- Unless enforcement would be unreasonable or unjust
- Unless chosen state has no relationship to the parties or the transaction



Raiders Retreat – District Court Holding



Insured argued (unsuccessfully) that enforcement would be “unreasonable an unjust”:

- Great Lakes does not have sufficient contacts with the State of New York.
- Enforcement “would frustrate “Pennsylvania’s ‘strong public policy’ of punishing insurers who deny coverage in bad faith”, relying on:
 - *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972).
 - *Milanovich v. Costa Crociere, S.p.A.*, 954 F.2d 763 (D.C. Cir. 1992).

Raiders Retreat – District Court Holding



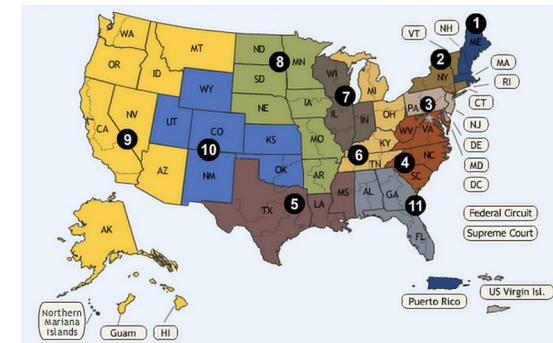
Court found enforcement to be “reasonable and just”:

“The issue is not, as Raiders contends, whether New York law conflicts with Pennsylvania public policy; the issue is whether the well-established principle that choice-of-law provisions in maritime contracts are presumptively valid must yield to the public policy preferences of the particular state in which the case happens to have been brought.

The Court’s conclusion is consistent with maritime law’s primary purpose: ‘to protect and encourage commercial maritime activity’.”

Raiders Retreat – Third Circuit Holding

- Interlocutory appeal to the Third Circuit
- Third Circuit vacated and remanded.
- District Court should have determined whether Pennsylvania has a strong public policy that would have been thwarted by applying New York law.
- The court also discussed impact of prior decisions involving choice of **forum**



Supreme Court grants Cert. – argument will take place on October 10, 2023

- Cert. granted before remand



Raiders Retreat in the Supreme Court

Petition for Certiorari

1. Under federal admiralty law, what is the standard for judging the enforcement of a choice of law clause in a maritime contract?
2. Under federal admiralty law, can a choice of law clause in a maritime contract be rendered unenforceable if enforcement is contrary to the “strong public policy” of the state whose law is displaced?

What issue(s) will the US Supreme Court address?

Under federal admiralty law, can a choice of law clause in a maritime contract be rendered unenforceable if enforcement is contrary to the “strong public policy” of the state whose law is displaced?

Raiders Retreat – Amicus Briefs

- AIMU/ IGP&I (Petitioner)
- New England Legal Foundation (Neutral)
- Chamber of Commerce of USA (Petitioner)
- APCIA (Petitioner)
- AAJ (Respondent)
- States of LA, MS, and PA (Respondent)
- Policyholder United Group (Take a Guess?)

Raiders Retreat

- Impact of/on Wilburn Boat?

Wilburn Boat Co. v Fireman's Fund Ins. Co., 348 U.S. 310 (1955)

“But this does not answer the questions presented, since in the absence of controlling Acts of Congress this Court has fashioned a large part of the existing rules that govern admiralty. And States can no more override such judicial rules validly fashioned than they can override Acts of Congress. Consequently the crucial questions in this case narrow down these: (1). Is there a judicially established federal admiralty rule governing these warranties? (2) if not, should we fashion one?”.

- Uniformity?
- Forum Shopping?

First Circuit – A Different Approach

- Great Lakes Insurance SE v. Anderson (No. 21-1648; April 19, 2023)
 - Identical choice of law clause
 - Court found clause to be ambiguous
 - Demonstrates importance of clean wordings!



Joseph G. Grasso, Esq.

Wiggin and Dana LLP

215.988.8321

jgrasso@wiggin.com