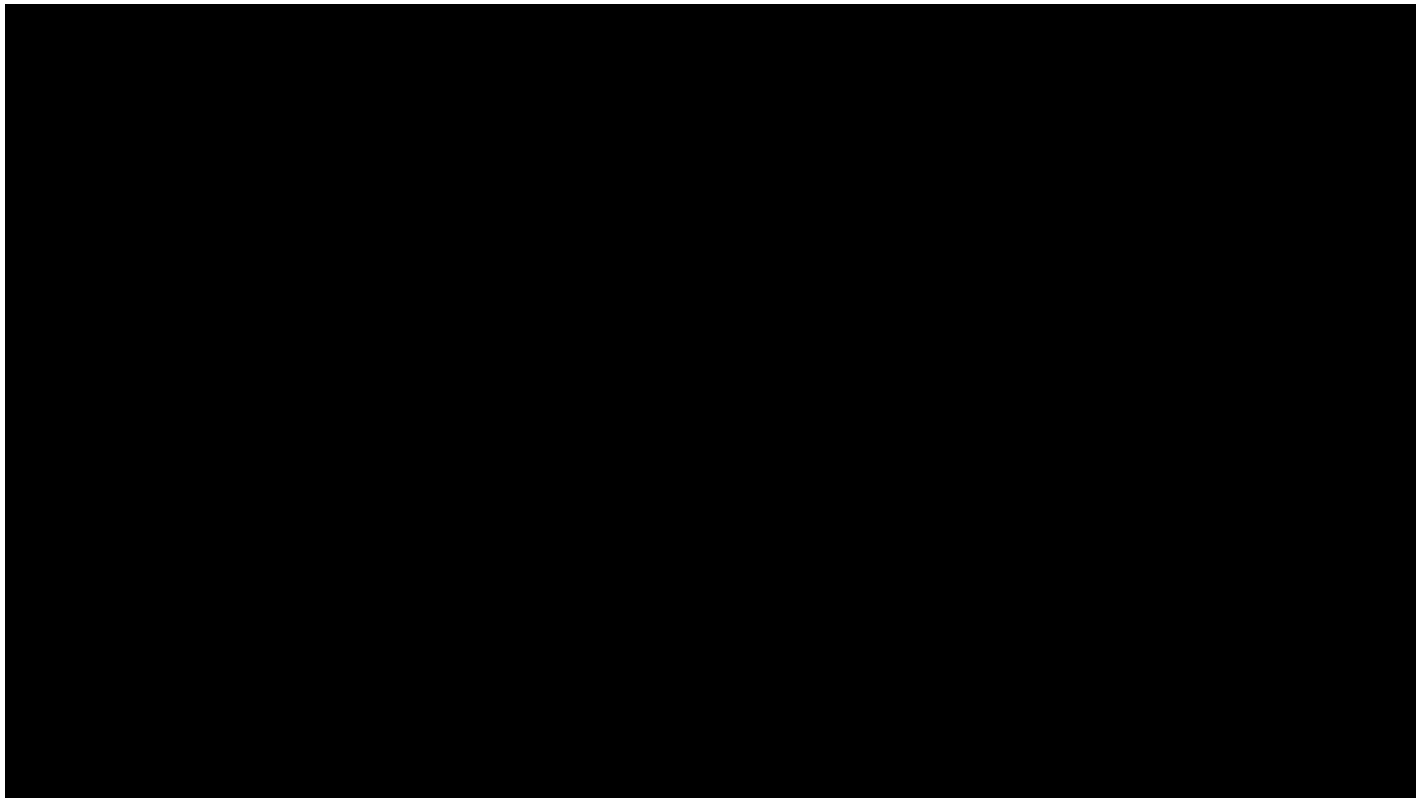


Policyholder Playbook Episode 16: Do Not Assume Choice-of-Law Clauses Apply to Extracontractual Claims

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PRACTICES Insurance Recovery, Litigation



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Show notes:

Do not assume that a choice of law provision in your insurance policy applies to extracontractual claims, like bad faith claims. Here's what I mean – imagine your policy has a New York choice of law provision. Most policyholder advocates agree that when it comes to extra contractual claims—for example, insurance bad faith—New York is not an ideal jurisdiction. It's just hard to plead a viable bad faith claim in New York. Other states are very different. Texas, for example, has codified insurance bad faith, and the prompt payment of claims. Breach of the bad faith statute could entitle an insured to treble damages, and breach of the prompt pay statute can come with an 18% interest penalty. And this is why one should not assume that a choice of law provision applies to all claims.

As a New York federal court has remarked, “a choice-of-law provision indicating that a contract will be governed by a certain body of law does not dispositively determine the law which will govern a tort claim arising incident to a contract.”

The same court has said, “a choice of law provision will apply to tort claims incident to a contract if the express language of the provision is sufficiently broad as to encompass the entire relationship between the contracting parties.”

For example, does the choice of law provision say that New York law applies to “any dispute relating to this Policy”? If so, a Delaware court recently held that choice of law provision does extend to extracontractual claims.

Or, does the choice of law provision say “this contract will be construed in accordance with New York law.” If so, a New York federal court had held that, under that language, New York law may not apply to extracontractual claims.

This play, like so many from the playbook, hinges on the policy language. The upshot is, do not assume that a choice of law provision governs extracontractual claims – it may not – and which state’s law applies to extracontractual claims can dramatically change your position with an insurer.

Case No. 1 – *Winter-Wolff Int'l, Inc. v. Alcan Packaging*, 499 F. Supp. 2d 233, 239 (E.D.N.Y. 2007)

Case No. 2 – *Winter-Wolff Int'l v. Alcan Packaging*, 499 F. Supp. 2d 233, 240 (E.D.N.Y. 2007)

Case No. 2 – *ETC Ne. Pipeline v. Associated Elec.*, 2023 WL 6441815, at *2 (Del. Super. Ct. Sept. 5, 2023)

Case No. 3 – *Refco Grp. v. Cantor Fitzgerald*, 2014 WL 2610608, at *40 (S.D.N.Y. 2014)