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Lumbermens Mutual Casualty Co. v. Commonwealth of Penn.

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In Lumbermens Mutual Casualty Co. v. Commonwealth of Pennsylvania, 2008 WL 223274 (Supreme Court of New York, New York Cty. 2008), the Defendants the Pennsylvania Department of Transportation (PDOT) and Commonwealth of Pennsylvania (Commonwealth) (collectively, the defendants) were faced with having to pay $60 million dollars associated with the environmental cleanup of hazardous materials discharged during the excavation of an interstate highway. The plaintiff, Lumbermens Mutual Casualty Co. (Lumbermens) was the parent-company of Kemper Indemnity Insurance (Kemper), the insurance company, which issued a pollution liability insurance policy (Kemper policy) to the defendants in connection with the construction of the interstate highway. The plaintiff commenced the instant action in New York for a judgment declaring the rights and obligations of the parties under the Kemper policy. Simultaneously pending in a Pennsylvania court, was defendants' action seeking payment of its claims under the Kemper policy. In order to dismiss the New York action and preserve its action in Pennsylvania, the defendants asserted four different arguments under New York's Civil Practice Law and Rules. In the end, the defendants' argument resting on the theory of forum non conveniens (the forum most convenient to the parties and where substantial justice would be accomplished) carried the day in spite of a forum designation clause in the Kemper policy which clearly listed New York as the forum for any court action.

In the spring of 2000, the Pennsylvania Department of Transportation (PDOT) launched the construction of an interstate highway known as Interstate 99 (the project). The interstate highway would span a stretch of eighteen miles. The actual construction work of the project was quite involved. The project demanded the PDOT to use the "cut and fill" process. In other words, the soil would be excavated from one portion of the project and used as fill in other portions of the soon to be highway. Given the nature of the construction, the PDOT obtained liability insurance for the possible pollution and hazards associated with the cut and fill process. Kemper issued an insurance policy (the policy) to the PDOT and the Commonwealth of Pennsylvania.

Hazardous pyritic material was unearthed both during preliminary engineering and excavation of the project. Pyrite is a metal and sulfur-bearing material that when exposed to air and water, oxidizes, turning the sulfurous material to sulfuric acid. If left untreated, the sulfuric acid dissolves the metals in the rock and can potentially contaminate the nearby streams and groundwater. Despite numerous attempts, the defendants could not neutralize and contain the sulfuric acid. Nevertheless, defendants continued to excavate and unearth additional pyritic materials.

Defendants moved to dismiss the plaintiff's New York action on four grounds including forum non conveniens. The court quickly concluded that Lumbermens as a parent company had standing to bring suit as it had established its pecuniary interests in the outcome of this case.

Although the forum designation clause designating New York as the forum for lawsuits seemed valid at the time of execution, enforcement of the clause was non binding because PDOT did not have the authority to agree that Pennsylvania may be sued in New York. According to Pennsylvania's Constitution, Article I Section II, the General Assembly of the Commonwealth of Pennsylvania is the only party with the power to designate the forum where Pennsylvania may be sued. As such, the clause was unenforceable and Pennsylvania had a more compelling interest in maintaining the constitutional limits on the powers of its agencies. The New York court therefore lacked subject matter jurisdiction.

Plaintiff's efforts to avoid litigation on the home-turf of the PDOT and the Commonwealth of Pennsylvania proved fruitless. Ultimately, plaintiff's reliance on the forum designation clause contained in the Kemper policy failed because the clause turned out to be unenforceable. Instead, Defendants' theory of forum non conveniens prevailed because it was in the interests of substantial justice to allow the Commonwealth of Pennsylvania to entertain this action.

On a business to business level, the forum designation clause in a contract between two business entities is generally upheld by the courts in New York and the surrounding states of New Jersey and Connecticut. However, the designated forum must have some nexus to the parties or the situs of the project/real estate. A manufacturer can't provide in its purchase order that disputes be resolved in Courts or States having laws favorable to manufacturers, if those designated states have no relationship to the parties. As an example, if a developer purchases structural steel from a manufacturer in Pennsylvania, and the developer of the shopping mall is in New York State, a provision in the purchase order from the manufacturer providing for Mississippi courts to be the forum for litigation should not be binding on the purchaser/developer if there is no nexus of that jurisdiction to the manufacturer or purchaser.

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