The Legal Intelligencer

Is Choice of Law Considered a Waivable Issue?

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If you think you understand the law of waiver, read on. You may be surprised to learn that the U.S. Court of Appeals for the Third Circuit has not yet decided whether typical waiver principles apply to choice-of-law issues. Strange as it seems, in the Third Circuit there is the potential for a case going to conclusion, by motion or full trial, only to have it remanded and redone under a law that no one asked to be applied in the initial trial court proceedings. A recent case reminds us of this peculiar state of law in the Third Circuit.

In August, a Third Circuit panel issued its decision in *Nuveen Municipal Trust v. WithumSmith+Brown,* 692 F.3d 283 (3d Cir. 2012). In *Nuveen*, the appellant in a professional malpractice action sought to excuse its failure to file an affidavit of merit required under state law. On appeal, the appellant raised two alternative choice-of-law arguments regarding the "correct" law to be applied. The appellee argued that the appellant had waived the choice-of-law issues by failing to raise them with the district court.

The Third Circuit agreed that the appellant had not done enough "to alert the district court that it was also raising these choice-of-law issues." For most issues, that finding would be sufficient to establish waiver. For choice-of-law issues, however, the court declined to find waiver. It cited two reasons.

First, the court declared that choice of law is not necessarily waivable, stating that the Third Circuit has not yet "adopted a consistent rule regarding whether choice-of-law issues may be waived." Second, the Third Circuit held that it may entertain any waived issue "at [its] discretion" if warranted by the public interest or other exceptional circumstances. A brief review of waiver law and Third Circuit precedent puts the court's approach in perspective.

Waiver is traditionally a matter of equity that falls within the discretion of the court. The Third Circuit has previously explained that waiver serves two purposes. First, as a matter of judicial efficiency, the waiver doctrine ensures that the necessary evidentiary development occurs in the trial court, not at the appellate level. If the matter is not argued and developed factually at the trial level, it is usually deemed waived. Under this standard, pure questions of law — such as choice of law — may not be waived. For this reason, the Third Circuit is more likely to consider an argument raised for the first time on appeal if it raises a pure

question of law and does not require further evidentiary development.

In addition, however, waiver prevents "surprise to the parties." This could occur if brand new arguments are raised on appeal. This concern implicates choice-of-law issues and seems to make them waivable. A party should not be permitted to benefit by springing a choice-of-law question on its opponent after the trial court proceedings have closed. Following this standard, appellate courts around the country generally treat choice of law as a waivable issue.

The First Circuit requires the parties to raise choice-of-law questions before the district court where, for example, a particular jurisdiction's statute of limitations might foreclose a plaintiff's recovery if applicable. Recognizing the dangers of "surprise" choice-of-law claims, the Fifth Circuit will not excuse a party's failure to raise a choice-of-law question on the grounds that the district court should have sua sponte independently conducted a choice-of-law analysis. As the Seventh Circuit stated rather succinctly, "it is not the trial judge's job to do the parties' work for them" on potentially conflicting laws. The Eighth Circuit has a similar approach; and in the Ninth Circuit, courts may find a waiver of the choice-of-law question even if it was raised at the trial level, but was first raised in a motion for reconsideration.

The Third Circuit has employed a different approach. For the past 65 years, this circuit has treated choice-of-law issues as non-waivable. In 1944, the Third Circuit in *United States v. Certain Parcels of Land* remanded a question of evidence first considered under Pennsylvania state law for reconsideration under federal law, although no one had urged federal law before the trial court. Explaining its receptivity to a new argument raised for the first time on appeal, the Third Circuit declared that "the appropriate law must be applied in each case and upon a failure to do so appellate courts should remand the cause to the trial court to afford it the opportunity to apply the appropriate law, even if the question was not raised on appeal."

Fourteen years later, the Third Circuit again declined to find waiver of a choice-of-law issue. In *Parkway Baking v. Freihofer Baking*, the trial court interpreted a contract under Pennsylvania state law. The Third Circuit, however, allowed the appellant to argue that Illinois law governed under Pennsylvania's choice-of-law rules. The Third Circuit rejected the argument that application of Illinois law was barred by the appellant's failure to raise the issue in the district court. Indeed, the Third Circuit not only declined to find waiver, but it adopted the appellant's tardy notion that the parties and court had used the wrong law at trial. Thus, choice-of-law issues were confirmed to be non-waivable and could be decided on the merits, even if raised for the first time on appeal.

Then the Third Circuit began to back away from its non-waiver position. In 1980, the district court in *Mellon Bank v. Aetna Business Credit* applied Pennsylvania law in reaching its decision. When the appellant argued for a different law on appeal, the Third Circuit rejected the argument because neither party had raised the argument below. Following a similar approach, in 1995, the Third Circuit declared with clarity in *Neely v. Club Med Management Services,* that "choice of law issues may be waived." Relying on *Mellon Bank*, legal scholarship and decisions from the Fourth, Seventh, Ninth and Tenth circuits, the en banc court explained further that "like a plaintiff's need to prove one or more of the specific statutory elements of his or her claims, choice-of-law issues [not raised] will be waived." Thus, the Third Circuit appeared to join the rank and file of courts holding choice-of-law issues to be waivable.

Or so it seemed. In neither *Mellon Bank* nor *Neely* did the Third Circuit expressly overrule, distinguish, or even make mention of prior cases rejecting waiver of choice-of-law questions. The Third Circuit continued to treat the issue as unresolved. Indeed, in 2006, the court in *Huber v. Taylor* observed that "we have not adopted a consistent rule regarding whether choice-of-law issues are waivable." Citing *Parkway Baking* and *Certain Parcels*, the Third Circuit noted that the court had long held choice-of-law questions beyond waiver. The pro-waiver decision in *Neely* was treated as an outlier because it did not specifically overrule or address the *Parkway Baking* or *Certain Parcels* decisions.

Now, six years later, the Third Circuit has again decided against resolving these apparently inconsistent decisions. Although the choice-of-law waiver issue was ripe for the *Nuveen* court to decide, its August opinion declined to address the question head-on. In relying on the older line of precedent, the Third Circuit has again made choice-of-law and conflict questions apparently non-waivable. Indeed, the court implies that

a trial or appellate judge may sua sponte challenge the parties' agreement as to governing law. In *Nuveen*, the court entertained an otherwise-waived choice-of-law question on public policy grounds, highlighting the Third Circuit's deeply entrenched preference for applying the "right" law.

Under this approach, a case may proceed through trial or other disposition on the assumption that a particular law applies, only to have the case remanded on appeal following the surprise argument by one of the parties or even sua sponte by the court. Although the Third Circuit is undoubtedly on guard for any gamesmanship, immunizing choice-of-law questions from the waiver doctrine could inadvertently reward a casual or cunning approach to litigation: A party could impliedly consent to a particular law at trial, then use choice-of-law arguments on appeal to seek a better result under a different law.

Such waiver cases continue to arise. Just last month, the Third Circuit again cited to its own "inconsistent" decision-making when faced with a choice-of-law waiver question. In *Pacific Employers Insurance v. Global Reinsurance*, the appellant sought application of New York, rather than Pennsylvania, law. Finding that the issue had been properly raised below, the court proceeded to hear the choice-of-law question on the merits, but it adopted the *Huber* analysis in describing the waiver issue.

A definitive answer to the waiver question in the Third Circuit remains elusive. As a result, both litigants and trial courts may be plagued with repetitive proceedings under different laws, should the Third Circuit find that the incorrect law was applied below — even when neither party objected to its application. Until the ambiguity over waiver is resolved, counsel should keep in mind the Third Circuit's preference for applying the "right" law when choice-of-law questions appear late in the life of a case.

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