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The California Supreme Court's new "Business Choice of Law" doctrine opens way for nationwide companies to avoid some of California's liability statutes.
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March 07, 2012

The allure of California's golden sand, flashbulb-perfect movie stars, and laid-back way of life draws nearly 100,000 new residents to the state every year. Some of them will arrive having been unknowingly injured in their original state by the acts of nationwide companies—a defective hip replacement joint installed in Florida; a malignancy traced to asbestos exposure in Texas; a prenatal fetal deformation from improperly disposed chemicals in Ohio. They might not discover their injury for months or decades.

But when California's newest residents discover their weakened leg, hacking cough, or disabled child, they're going to do the American thing—sue. California is the world's eighth-largest economy, so most large companies manufacturing artificial joints, asbestos, chemicals, and a host of other products have facilities and/or sell products in California. And if plaintiffs are California residents by the time they discover their problem, they're going to file suit in California. The state is not considered particularly friendly to corporate defendants, earning a 2012 ranking by the American Tort Reform Foundation as the nation's second-worst "Judicial Hellhole" for perceived pro-plaintiff laws and large jury awards.

A conservative majority on the California Supreme Court (six of the seven sitting justices were appointed by Republican governors) is slowly changing that, however. In 2010, and again in 2011, the court issued two critical opinions that together provide a framework that can help national companies with California litigation to apply tort reform provisions from a more business-friendly state—like Florida, Texas, or Ohio—in which the injury on trial occurred. This doctrine has the potential to dramatically reduce the scope of damages and liability when a claim tried in California arises from an injury that took place in such a state.

The two cases establishing California's new "business choice of law" doctrine are *McCann v. Foster Wheeler LLC*, 225 P.3d 516 (Cal. 2010) and *Sullivan v. Oracle Corp.*, 254 P.3d 237 (Cal. 2011). In *McCann*, the California Supreme Court applied a three-step test to decide whether a manufacturer could rely on Oklahoma's statute of repose to argue that a claim for injuries related to asbestos exposure in Oklahoma was time-barred, even though the suit was being tried in California and was timely brought under California law. The test considered (1) whether the states have differing laws; (2) whether those laws are in "true conflict"; and (3) which state's interest in enforcing its law would be harmed more by the application of the other state's law.

The court would later clarify in *Sullivan*, which addressed whether California's overtime laws apply to nonresident employees of out-of-state companies who work in California, that laws of two states are in a "true conflict" when they express conflicting legislative priorities or interests.

McCann and *Sullivan* came to different end results: in *McCann*, the court found that Oklahoma's shorter limitations period arose from a legislative policy to limit liability for businesses operating in that state, so Oklahoma law should apply in the California suit; in *Sullivan*, the court concluded that overtime statutes of the states involved expressed the same legislative

policy favoring overtime pay for hourly employees, so there was no "true conflict" and California law should apply. But it's the court's overall reasoning that should excite nationwide companies and their counsel facing lawsuits in California for injury that occurred elsewhere.

"When a state adopts a rule of law limiting liability for commercial activity conducted within the state in order to provide what the state perceives is fair treatment to, and an appropriate incentive for, business enterprises," the court explained in *McCann*, "we believe that the state ordinarily has an interest in having that policy of limited liability applied to out-of-state companies that conduct business in the state, as well as to businesses incorporated or headquartered within the state." That is because a "state has a legitimate interest in attracting out-of-state companies to do business within the state, both to obtain tax and other revenue that such businesses may generate for the state, and to advance the opportunity of state residents to obtain employment and the products and services offered by out-of-state companies."

Accordingly, the Court ruled, "the displacement of Oklahoma law limiting liability for conduct engaged in within Oklahoma, in favor of the law of a jurisdiction to which a plaintiff subsequently moved, would . . . significantly impair the interest of Oklahoma," because if "Oklahoma's statute were not to be applied because plaintiff had moved to a state with a different and less 'business-friendly' law, Oklahoma could not provide any reasonable assurance—either to out-of-state companies or to Oklahoma businesses—that the time limitation embodied in its statute would operate to protect such businesses in the future."

This is powerful language in support of business's decade-long effort to control liability risks through state legislative curtailment. And it is indeed a doctrine that applies specifically to business: *McCann* expressly distinguished itself from a series of California cases from the 1960s and 70s in which the courts found individuals in automobile accidents taking place in other states and countries with statutes limiting liability more than California's could *not* apply the foreign state's law in California courts. The only explanation the court offered in *McCann* for the difference was that the earlier cases did not involve "commercial entities."

To be sure, this "business choice of law" doctrine is new—and nuances, which will need to be ground through by the lower appellate courts, abound. For example, *McCann* hypothesized that a different analysis might be warranted where a foreign state's " 'business friendly' statute or rule of law is intended to apply only to businesses incorporated or headquartered in that jurisdiction," a situation not present in *McCann* or *Sullivan*. Likewise, it is not clear how much foreign law can be applied in a California courtroom—the court has not directly addressed states with more defendant-friendly discovery regimes, liability allocation, or damages caps.

But the implication is certainly there, and nationwide companies with this kind of litigation should be sure to raise choice of law issues early and often in the trial court to avoid waiver. If significant damages are at stake, they may wish to consult with California-based appellate counsel; waiver can be a bear trap for the unwary under California law.

But once all the kinks with the new doctrine are worked out, it seems clear it will have a marked effect on business tort litigation in California arising from injuries that occurred elsewhere. Though sued in California, the defective hip-joint manufacturer may be able to apply Florida's punitive damages caps and limitations period for product defect actions; the manufacturer who allegedly caused asbestos exposure in Texas may be able to invoke that state's non-economic and exemplary damages limitations and fee-shifting provisions; and the Ohio chemicals company may be able to assert that state's liability allocation laws, damages caps, and defendant-friendly causation rules. The doctrine's potential reduction in litigation risk for such companies could be significant.

And, since neither California's overall allure nor its plaintiff-friendly laws seem set to change any time soon, it may be the best nationwide companies seeking to limit liability there can hope for.

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