

# Choice of Law Governing Asbestos Claims

By David T. Biderman and Judith B. Gitterman

Choice of law questions in asbestos litigation can be highly complex. The court determining choice of law must often take into account a wide variety of factors, including the citizenship of a large number of defendants from a variety of jurisdictions; multiple claims of exposure dating back decades in time; and claims of exposure in numerous states or countries as well as on military bases and naval vessels. Moreover, where more than one jurisdiction is involved, one state's law will not necessarily apply to every issue in the case; the decision as to which state's law should apply may be made on an issue-by-issue basis. In asbestos cases, the outcome can turn on which state's law is found applicable to issues such as the statute of limitations, causation, or criteria for admissibility of scientific evidence.

## **The California Supreme Court's Decision in *McCann v. Foster Wheeler***

In a decision last year, the Supreme Court of California held that Oklahoma's statute of repose governed a long-time California resident's mesothelioma claim based on asbestos exposure 50 years prior to the plaintiff's 2005 diagnosis, exposure that occurred when he was working on an asbestos-insulated boiler that was manufactured by a New York corporation and installed at an Oklahoma oil refinery. *McCann v. Foster Wheeler, LLC*, 48 Cal. 4th 68 (Cal. 2010). The plaintiff had resided in California since 1975. *Id.* at 74. The plaintiff's claim would be barred under the Oklahoma statute of repose, which bars any tort action arising more than 10 years after the substantial completion of an improvement to real property—provided that the boiler qualified as an improvement to real property as defined in that statute, an issue that was remanded to the court of appeal. *Id.* at 89; 12 Okla. Stat. Ann. tit. 12, § 109. However, the claim would not have been barred under the California special statute of limitations governing asbestos claims, which permits personal injury claims based on exposure to asbestos brought (1) within one year of the date plaintiff first suffered disability or (2) within one year of the date the plaintiff knew or reasonably should have known that the disability was caused or contributed to by his or her exposure, whichever is later. *McCann*, 48 Cal. 4th 89–90; Cal. Civ. Proc. Code § 340.2.

The *McCann* court employed California's three-step "governmental interest" or "comparative impairment" test, which differs from either the First or Second Restatement of Law, Conflicts, which has been adopted in many other jurisdictions. Under the governmental interest approach,

[f]irst, the court determines whether the relevant law of each of the potentially affected jurisdictions with regard to the particular issue in question is the same or different. Second, if there is a difference, the court examines each jurisdiction's interest in the application of its own law under the circumstances of the particular



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case to determine whether a true conflict exists. Third, if the court finds that there is a true conflict, it carefully evaluates and compares the nature and strength of the interest of each jurisdiction in the application of its own law “to determine which state’s interest would be more impaired if its policy were subordinated to the policy of the other state” . . . and then ultimately applies “the law of the state whose interest would be the more impaired if its law were not applied.”

*McCann*, 48 Cal. 4th 88 (citing *Kearney v. Salomon Smith Barney, Inc.*, 39 Cal. 4th 95, 107–8 (Cal. 2006)).

Previously, the court of appeal had reversed the trial court’s ruling that the plaintiff’s claim was time-barred under Oklahoma law. The court of appeal held that California’s statute of limitations applied, finding that California had an obvious interest in providing a remedy to its long-time resident, while Oklahoma’s interest was a substantially “local” interest in protecting Oklahoma residents from liability for conduct occurring in Oklahoma. *McCann v. Foster Wheeler, LLC*, 73 Cal. Rptr. 3d 96, 102 (Cal. Ct. App. 2008), *rev’d*, 48 Cal. 4th 68 (Cal. 2010). The court of appeal reasoned that because defendant Foster Wheeler was a New York corporation and the boiler had been designed and built in New York, Oklahoma’s interest in applying its statute of repose was “difficult to discern.” *Id.* The appellate court questioned whether there was even a true conflict that would arise only if both states had interests in applying their laws, and it held that California’s interest would be more impaired by applying Oklahoma law than Oklahoma’s interest would be impaired if California law were applied. *Id.*

The California Supreme Court reversed the court of appeal, finding that the appellate court erred in concluding Oklahoma only had an interest in applying its statute of repose in favor of Oklahoma residents. To the contrary, under the California Supreme Court’s analysis, Oklahoma had a strong interest in applying its statute of repose to all defendants, not just those incorporated in or having their headquarters in Oklahoma.

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, 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. 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. In the absence of any explicit indication that a jurisdiction’s “business friendly” statute or rule of law is intended to apply only to businesses incorporated or headquartered in that jurisdiction (or that have some other designated relationship with the state—for example, those entities licensed by the state), as a practical and realistic matter the state’s interest in having that law applied to the activities of out-of-state companies within the jurisdiction is equal to its interest in the application of the



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law to comparable activities engaged in by local businesses situated within the jurisdiction.

*McCann*, 48 Cal. 4th at 91.

Thus, unless a state legislature explicitly indicates that its laws limiting liability apply only to businesses that are incorporated in or headquartered in that state, California courts will presume that those laws apply *across the board* to all companies doing business in that state, not only to local defendants; the state has a legitimate interest in encouraging business within its borders.

In reaching this conclusion, the California Supreme Court cited its prior decision in *Offshore Rental Co. v. Continental Oil Co.*, 22 Cal. 3d 157 (Cal. 1978), in which it determined that precluding corporations' actions for injury to key employees furthered another state's important interest "to protect businesses acting within the state's borders 'from the financial hardships caused by the assessment of excessive legal liability or exaggerated claims resulting from the loss of services of a key employee.'" This interest applied to *all* commercial entities doing business in the state, not just local businesses. *McCann*, 48 Cal. 4th at 93; *Offshore Rental Co.*, 22 Cal. 3d at 164.

The *McCann* court acknowledged that California also had an interest in applying its statute of limitations because the plaintiff resided in California for over 30 years, and a recovery against the defendant for an injury, even if occurring outside California, would assist the California resident in obtaining compensation and not becoming dependent on California resources. *McCann*, 48 Cal. 4th at 96. This interest, however would not be as greatly impaired by application of Oklahoma law as would Oklahoma's law be impaired in applying California's statute of limitations. *Id.* at 97. As noted in *McCann*, California does not follow the old choice-of-law rule that applies the law of the jurisdiction where a defendant's allegedly tortious conduct occurred without regard to the nature of the issue before the court.

California choice-of-law cases nonetheless continue to recognize that a jurisdiction ordinarily has "the predominant interest" in regulating conduct that occurs within its borders . . . and in being able to assure individuals and commercial entities operating within its territory that applicable limitations on liability set forth in the jurisdiction's law will be available to those individuals and businesses in the event they are faced with litigation in the future.

*Id.* at 97–98 (citations omitted).

Thus, the court concluded as follows:

[P]ast California cases indicate that it is generally appropriate for a court to accord limited weight to California's interest in providing a remedy for a current California resident when the conduct of the defendant from whom recovery is sought occurred in another state, at a time when the plaintiff was present (and, in

the present situation, a resident of) that other state, and where that other state has its own substantive law, that differs from California law, governing the defendant's potential liability for the conduct that occurred within that state.

*Id.* at 76.

### **Implications of *McCann* for Defendants in California Courts**

The *McCann* decision is significant for defendants sued in a California forum for injuries that occurred in other jurisdictions and where there is little or no nexus between the plaintiff's injuries and the forum state. Motions to transfer venue are often made in such circumstances; however, counsel should not overlook a pretrial motion seeking a determination that another state's law applies to specific issues in the case. A trial court may be reluctant to transfer the case to another forum when trial is imminent, but the choice-of-law decision is an entirely different matter. In many cases, the choice-of-law decision may determine which side prevails in a lawsuit, as in *McCann*, where application of Oklahoma's statute of repose barred the plaintiff's action.

The choice of law as to proof of causation in asbestos cases can be just as significant. California follows the California Supreme Court's decision in *Rutherford v. Owens-Illinois, Inc.*, 16 Cal. 4th 953 (1997), which holds that in asbestos cases, plaintiffs may prove causation by showing only that a defendant's product contributed to the plaintiff's risk of developing cancer to a standard of "reasonable medical probability"; the plaintiff is not required to prove a specific dose of exposure to the defendant's product. In contrast, many jurisdictions do require that plaintiffs prove substantial factor causation by showing not only frequency, regularity, and proximity of exposure to the defendant's product but also reasonable quantitative evidence that the exposure increased the risk of developing asbestos-related injury. *See, e.g., Borg-Warner Corp. v. Flores*, 232 S.W.3d 765, 773 (Tex. 2007). Thus the decision as to which state's law governs the issue of causation may effectively dictate the result of the ultimate issues in the case.

Similarly, the choice of law applicable to admissibility of expert testimony may affect whether a plaintiff's expert witnesses are permitted to testify at trial. California follows the *Kelly* rule (based on *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923)), which focuses on a consensus of scientific opinion as the standard for expert opinion testimony. *People v. Kelly*, 17 Cal. 3d 24, 30 (Cal. 1976). Other jurisdictions follow the standard articulated in *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993), which empowers the courts to be gatekeepers to ensure the reliability of scientific opinions.

As another illustration of the importance of choice of law for particular issues, jurisdictions vary greatly in their laws on comparative liability and joint and several liability of tortfeasors. Whichever law is applied can affect the percentage of liability accorded each defendant and, in some cases, whether a defendant is held liable at all.

*McCann* teaches that where another state's laws will limit the defendant's liability, that state normally has a strong interest in applying its law to a defendant doing business within its borders, and under the comparative impairment test, this interest is likely to predominate over the interest of a forum state with little nexus to the parties and the alleged tortious conduct.

### ***Dépeçage*: Issue-by-Issue Analysis of Choice of Law**

Many jurisdictions will decide choice-of-law issues on an issue-by-issue basis. This concept is known as "*dépeçage*." As an Illinois court explained in another asbestos personal injury case, *Gregory v. Beazer East*, 892 N.E.2d 563, 580–81 (Ill. Ct. App. 1st Dist. 2008), that under *dépeçage*, each issue in the case receives separate consideration such that the laws of different states may be applied depending on the issue. The *Gregory* court rejected the plaintiff's contention that *dépeçage* should be applied on a defendant-by-defendant basis, citing a number of problems that would result from such an approach in a multi-defendant case where a single injury is alleged, though numerous defendants allegedly contributed to that injury, and where applying different substantive laws to different defendants could render inconsistent results.

By the same token, a court is likely to apply one state's rule of law to issues that are interrelated, to avoid contradictory rulings. For example, a court may rule that the same state law should apply both to causation and to joint and several liability issues. *Dépeçage* would not be used in a state following *lex loci delecti*; as discussed below, that rule requires application of the law of the place of injury to all tort issues.

### **Other Choice-of-Law Approaches**

#### ***The Law of the Place of Injury***

Some jurisdictions continue to apply the traditional conflict-of-laws rule for tort actions. The law of the place of the wrong—*lex loci delecti*—governs choice of law in product liability cases. In these jurisdictions, the place of the wrong is the place where the injury occurred. *See, e.g., Handy v. Uniroyal, Inc.*, 327 F. Supp. 596 (D. Del. 1971) ("[I]t is undisputed that Delaware applies the law of the place of the tort, *lex loci delecti*. . . . Therefore, since it is undisputed that the injuries complained of occurred in this state, Delaware tort law governs the claims founded upon tort, regardless of where any alleged negligence or defective manufacture may have occurred.").

#### ***The Most Significant Relationship Test***

Many jurisdictions have rejected the traditional *lex loci delecti* rule and have replaced it with the most significant relationship test. Under this test, found in the Restatement (Second) Conflict of Laws, the court analyzes a number of factors relating to the alleged tort. Section 145 of the Restatement provides:

- (1) The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties under the principles stated in section 6.
- (2) Contacts to be taken into account in applying the principles of section 6 to determine the law applicable to an issue include: (a) the place



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where the injury occurred, (b) the place where the conduct causing the injury occurred, (c) the domicile, residence, nationality, place of incorporation and place of business of the parties, and (d) the place where the relationship, if any, between the parties is centered. These contacts are to be evaluated according to their relative importance with respect to the particular issue.

Under section 145, evaluating significant contacts according to their relative importance with respect to the particular issue is emphasized, rather than a mechanical balancing of the contacts. Thus, in applying the significant relationship test in a product liability action, the court will examine not only where the injury allegedly occurred but also where the product was manufactured; where it was placed in the stream of commerce and sold; whether the place of injury is merely fortuitous; and if the plaintiff and defendants have a relationship, for example, contract or employment, where that relationship is centered. As decisions under the significant relationship test emphasize, the evaluation is not a simple weighing process, and which factors are most important will vary depending on the circumstances of the case. As with California's comparative impairment test, choice-of-law determinations under the significant relationship test may be made issue by issue.

### Conclusion

In asbestos litigation, the parties should not assume that the law of the forum will govern substantive issues in the case. The forum state's choice-of-law approach will be used, but if the forum follows an approach such as California's governmental interest test or the Restatement (Second) Conflicts of Law's significant relationship test, the decision as to key substantive issues may be made issue by issue. Where the law on issues such as the applicable statute of limitations, causation, proportionate liability, and admissibility of scientific evidence varies among jurisdictions that have some connection to the case, a motion for application of a specific state's law should be made as early as possible once the relevant facts are known, whether through the initial pleadings or (more likely) when uncovered in written discovery or depositions.

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