By Margaret P. Stevens

## Navigating Choice of Law Issues

## Proper choice of law analysis can be the key to finding a winning strategy

Then considering a new case, many lawyers skip right over what should be their first step, one taken even before drafting a complaint, preparing a demurrer, or writing a contract. When you first receive a new file and begin to become acquainted with the facts and consider possible legal strategies, ask yourself: What law applies to this dispute (or in contract negotiations, what law should apply to any dispute that arises)? Even though the case may be filed in a California court, there is a good chance that some of the parties and claims are connected to other states. If you overlook the choice of law issues at the outset, you may miss the opportunity to bring or defeat a crucial demurrer or leave out a winning cause of action.

There are two situations in which a case may involve the law of some state (or country) other than California. First, the client may be party to a contract with a choice of law clause—a specific provision that calls for the application of foreign law. Second, California's choice of law rules may require the application of another state's laws to your dispute. Of course, if you are litigating outside California, you will need to examine the choice of law rules of the forum state.

In contractual disputes, California employs a strong policy favoring the enforcement of choice of law provisions. It is important to distinguish between two kinds of clauses that are frequently included in contracts between persons or firms from different states and that give rise to choice of law questions.

A typical example of the first type—what may be called a choice of law clause proper—may read, "Any dispute arising under this contract shall be governed by the laws of the State of Minnesota." Although choice of law clauses are generally enforceable, they can be defeated in two ways. First, the party opposing enforcement can show 1) the chosen state lacks a substantial relationship to the parties or their transaction, and 2) there is no other reasonable basis for the parties' choice of law. If these showings cannot be made, the provision may still be set aside if it can be demonstrated that the chosen law is contrary to a fundamental public policy of California.<sup>2</sup>

The second type of clause is called a forum selection clause. A typical forum selection clause may read, "Any dispute arising under this contract shall be heard in the Superior Court of Broward County, Florida." A forum selection clause does not necessarily indicate what law will be applied to the dispute. Thus, even if a client's contract specifies that disputes will be litigated in California, a forum selection clause alone will not prevent California courts from applying the law of a different state.

If all the events took place in the state of California and all the parties reside in California, probably there is no choice of law issue to analyze. But, if the parties are from more than one state or some of the events took place outside California, then it is possible that the law of some other state will govern the dispute.

#### **Choice of Law Analysis**

A preliminary choice of law analysis can begin with some simple questions. What was the location of the event or transaction giving rise to the dispute? What law would the parties have expected to govern their relationship or conduct? Remember that California will give extraterritorial reach to its laws when the alleged conduct originated in this state.<sup>3</sup> If one of the parties is a corporation, determine where the company makes decisions related to the conduct at issue. For example, preparation of materials in California, although disseminated from points outside of California, may be enough of a connection to apply the laws of this state.<sup>4</sup>

If the laws of another state might be applied to the dispute, both federal constitutional questions and California choice of law principles are implicated. The analysis of the constitutional issues turns on whether there are significant contacts between the claims in the litigation and the forum state. If the contacts are sufficient to give the forum state an interest in the dispute, then the application of the forum state's law is constitutionally permitted. But if the contacts are nonexistent or so slight that the forum state has no interest in the dispute, applying the forum state's laws to the dispute violates due process guarantees.<sup>5</sup>

In many cases more than one state has significant contacts with the dispute. In that case, if the litigation is in California, California's

choice of law methodology must be applied. Under the approach of the California Supreme Court, the threshold task is to analyze the potential conflict of laws. A false conflict obtains if the states involved have identical or nearly identical laws, or if analysis of their interests reveals that both states would apply the same law. In that case, no further analysis is required, because the question of which law to apply is moot.

If, however, there is a true conflict of laws, California requires a three-step analysis.<sup>7</sup> First, the court must identify the foreign state laws that may apply based on the facts alleged in the complaint.<sup>8</sup> Second, the court must determine what interest each state has in having its law applied to the case. Third, if



Margaret P. Stevens, of Liner Yankelevitz Sunshine & Regenstreif, is Barristers president for 2003-04.

the court finds the foreign state laws to be materially different and that each state has an interest in having its own law applied, it must determine which state's interests would be "more impaired" if its law were not applied.

In resolving a true conflict, the California Supreme Court has articulated a complicatedsounding test called the "comparative impairment" test,9 which proceeds in three steps. Step one asks: How much would California's interests be impaired if the law of the foreign state were applied? Step two asks: How much would the foreign state's interests be impaired if California law were applied? Step three requires a comparison of the impairments and the application of the law of the state that would suffer the greater impairment if its law were not applied. The essence of the comparative impairment test is thus: When there is a true conflict and the interest of one or more states will unavoidably be impaired, apply the law of the state that will do the least damage to the interests of other states.

Applying the comparative impairment test requires an analysis of the policies and interests served by the laws of California and the other state. If the case is analogous to one already analyzed by California appellate courts, there may be a clear answer to the question of comparative impairment. If there is no appellate court case to guide the analysis-and that is more often than not the case—you are on your own in convincing the court to adopt your client's position.

Although choice of law questions can be intimidating, the proper analysis may be critical to your case or transactional analysis. Pleading your claims requires that you know what law may govern them. Resolving a demurrer—or the federal equivalent, a 12(b) (6) motion—requires you to know what law applies. Likewise, you cannot argue for or against summary judgment unless you know which state's law you should cite. Analyzing the choice of law issue may guarantee a late night, but if you sense a conflict of laws, you need to tackle the problem right away. Waiting even a few weeks after receiving a complaint could mean forfeiting a winning demurrer or summary judgment motion.

### DAVID OSTROVE ATTORNEY-CPA

- Expert Witness 43 years
- Lawyer/Accountant Malpractice
- · Forensic Accounting
- Tax Matters
- **Business Valuation**
- Value of Services
- Computation of Damages
- · Mediator, Arbitrator

323/939-3400 dostrove@comcast.net



# Mē'di-ā'tion

n. The Secret to Successful Results - - and Satisfied Clients.

www.jeffkichaven.com 213.996.8465

### **Asset Protection Planning Now** Can Insulate Your Clients' Assets From Future Judgments

Yes, it's true. By properly restructuring your clients' estate plan, their assets and the assets they leave to their family will be protected from judgment creditors. Here are some of the situations in which our plan can help protect your clients' assets:



- Judgments exceeding policy limits or exclusions from policy coverage.
- Judgments not covered by insurance.
- Children suing each other over your client's estate.
- A current spouse and children from a prior marriage suing each other over your client's estate.
- A child's inheritance or the income from that inheritance being awarded to the child's former spouse.

#### STEVEN L. GLEITMAN, ESQ. 310-553-5080

Biography available at lawyers.com or by request.

Mr. Gleitman has practiced sophisticated estate planning for 25 years, specializing for more than 13 years in offshore asset protection planning. He has had and continues to receive many referrals from major law firms and the Big Four. He has submitted 52 estate planning issues to the IRS for private letter ruling requests; the IRS has granted him favorable rulings on all 52 requests. Twenty-three of those rulings were on sophisticated asset protection planning strategies.

<sup>&</sup>lt;sup>1</sup> Nedlloyd Lines B.V. v. Superior Court, 3 Cal. 4th 459, 464-65 (1992).

<sup>2</sup> Id. at 466.

<sup>3</sup> Diamond Multimedia Sys., Inc. v. Superior Court, 29 Cal. 4th 1036 (1999).

<sup>&</sup>lt;sup>4</sup> Clothesrigger v. GTE Corp., 191 Cal. App. 3d 605 (1987).

<sup>&</sup>lt;sup>5</sup> Norwest Mortgage v. Superior Court, 72 Cal. App. 4th 214 (1999).

<sup>&</sup>lt;sup>6</sup> Hurtado v. Superior Court, 11 Cal. 3d 574, 580 (1974).

<sup>7</sup> Washington Mut. Bank, FA v. Superior Court (Briseno), 24 Cal. 4th 906, 919 (2001).

<sup>8</sup> Bernhard v. Harrah's Club, 16 Cal. 3d 313 (1976).

<sup>&</sup>lt;sup>9</sup> Bernkrant v. Fowler, 55 Cal. 2d 588 (1961).