



Ninth Circuit Strikes Down Choice Of State Of Incorporation Law

By Keith Paul Bishop on February 10, 2012

No one puts a choice of law provision at the beginning of a contract. They are nearly always relegated to the boilerplate provision at the end. This placement often belies their critical importance. Cases are lost or won on the basis of the choice of law.

It's no secret that a great many corporations located in California are incorporated in Delaware. Is the fact of Delaware incorporation sufficient to uphold a Delaware choice of law? In *Ruiz v. Affinity Logistics Corp.*, (9th Cir. Case No. 10-55581, Feb. 8, 2012), the Court of Appeals said no.

The case involved an "Independent Truckman's Agreement and an Equipment Lease Agreement. These agreements purported to establish an independent contractor relationship and stipulated that Georgia law applied (the state in which the defendant was incorporated and had its principal office). The plaintiff claimed that California law should be applied and that the agreement established an employer/employee relationship.

Citing *Nedlloyd Lines B.V. v. Superior Court*, 834 P.2d 1148 (Cal. 1992), the Court of Appeals found that California courts will apply the parties' choice of law unless the analytical approach set forth in Section 187(2) of the Restatement (Second) of Conflict of Laws dictates a different result. While the Court found that as a threshold matter the chosen state had a substantial relationship (by virtue of the defendant's incorporation and principal office location), the analysis should not end there.* A court should next ask whether the chosen state's law is "contrary to a fundamental policy of California" and whether California has a materially greater interest in resolution of the issue. Applying this rubric, the Court invalidated the parties' contractual choice of law.

The Court's opinion glosses over a key analytical point. Section 187 deals with two different situations. Subdivision (1) concerns issues that the parties to a contract could have resolved by specific reference in the contract. For these type of issues, a court is not required to address the two additional questions above. Subdivision (2) concerns issues that parties could not have resolved through an explicit contractual provision. For example, an incompetent party can't agree that it is competent. The Ninth Circuit's opinion provides no analysis as to why it thought that Subdivision (2) applied (and thus further questions must be asked and answered).

Please contact **Keith Paul Bishop** at Allen Matkins for more information kbishop@allenmatkins.com

Choice of law provisions can be found in a wide variety of other employment related agreements and arrangements (such as equity compensation plans, equity award agreements, trade secret and confidentiality agreements). This case serves as a warning that incorporation in Delaware may be insufficient to uphold the selection of Delaware law.

For another recent post on choice of law issues, see [Court Rules Choice Of Law Provision Takes Precedence Over Internal Affairs Doctrine](#).

Please contact **Keith Paul Bishop** at Allen Matkins for more information kbishop@allenmatkins.com

<http://www.calcorporatelaw.com/>