

## Oklahoma Law Applied to Asbestos Claim

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In the widely anticipated decision in *McCann v. Foster Wheeler LLC*, the California Supreme Court unanimously held that California's interest in affording a remedy to a California resident who was exposed to asbestos in another state was outweighed by Oklahoma's interests in providing fair treatment to, and an appropriate incentive for, business enterprises.

The decision immediately raises interesting questions of the effect on remaining defendants in lawsuits where a defendant whose product/location is allegedly a substantial source of the plaintiff's asbestos exposure, but against whom suit is barred by virtue of a statute of repose applicable in the jurisdiction of exposure. Under the circumstances presented here, for example, with Foster Wheeler immune from liability, would remaining defendants who are alleged to have exposed Terry McCann to asbestos in other states, assuming they exist, be permitted to put on evidence about McCann's exposure to asbestos in Oklahoma in order to reduce their own percentage of liability?

McCann was allegedly exposed to asbestos in Oklahoma over a two-week period in July 1957, nearly 50 years prior to the time he was diagnosed with mesothelioma. He believed he had "been around" a Foster Wheeler boiler for two or three days and had occasionally observed the process of installing asbestos insulation into it. McCann became a resident of California in 1975. He filed his complaint in July 2005, naming Foster Wheeler and numerous other defendants.

Foster Wheeler responded by filing a motion for summary judgment arguing that the action should be governed by Oklahoma law rather than California law, and Oklahoma's statute of repose barred plaintiff's cause of action against Foster Wheeler.

The trial court granted Foster Wheeler's motion and entered judgment in its favor. The 2nd Appellate District disagreed and reversed, finding that under the "governmental interest" analysis that California courts use to decide choice-of-law issues, California's interest would be more impaired by applying Oklahoma law than Oklahoma's interests would be by applying California law. Under California law, plaintiffs' action was timely. The Court of Appeal did not address the question whether Oklahoma's statute of repose even applied to Foster Wheeler, which was not an Oklahoma entity.

On review, the Supreme Court considered two issues: whether Oklahoma's interest in the application of its statute of repose is limited to application to companies headquartered in Oklahoma; and whether California's interests, rather than Oklahoma's interests, would be more impaired by the failure to apply the respective state's laws.

As to the first question, the Court had no difficulty in deciding that there was no California precedent to suggest that a state's interest in the application of a statute limiting liability for specified commercial activity carried on within the state applies only to local companies and not equally to out-of-state companies doing business within the state.

The applicable governmental interest analysis involves three steps: 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. 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 case to determine whether a true conflict exists. 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 interests would be more impaired if its law were not applied.

After determining that a true conflict existed, the Supreme Court undertook the "comparative impairment" analysis. In this analysis, courts do not weigh "the conflicting governmental interests in the sense of determining which conflicting law manifest(s) the better or worthier social policy on the specific issue," but instead address the problem of "allocating domains of law-making power in multi-state contexts by determining the appropriate limitations on the reach of state policies – as distinguished from evaluating the wisdom of those policies." (Slip op. pp. 34-35)

In concluding that the failure to apply Oklahoma law would significantly impair Oklahoma's interests, the Court recognized that "California choice-of-law cases...continue to recognized that a jurisdiction ordinarily has the predominant interest in regulating conduct that occurs within its borders [citations], and in being able to assure individuals and commercials entitles 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." (Slip Op. pp. 35-36.)

In doing so, the high Court stated: "In the present case, in the event [defendant] were to be denied the protection afforded by the Oklahoma statute of repose and be subjected to the extended limitations rule embodied in California law, the subordination of Oklahoma's interest in the application of its law would rest solely upon the circumstance that after the defendant engaged in the allegedly tortious conduct in Oklahoma, plaintiff happened to move to a jurisdiction whose law provides more favorable treatment than that available under Oklahoma law." (Slip op. at p. 36) "[T]he 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 served by the stature of repose."

"By contrast, a failure to apply California law on the facts of the present case will effect a far less significant impairment of California's interest." (Slip. op. at p. 37.) Although "if the law of this state is not applied here, California will not be able to extend its liberal statute of limitations for asbestos-related injuries or illnesses to some potential plaintiffs who exposure to asbestos occurred wholly outside of California." Nevertheless, under existing choice-of-law jurisprudence, "California's interest in applying its laws providing a remedy to, or facilitating recovery by, a plaintiff in a case where the defendant's allegedly tortious conduct occurred in another state is less than its interest when the defendant's conduct occurred in California."

Accordingly, the Supreme Court concluded that the Court of Appeal erred in holding that California law rather than Oklahoma law should apply. (Slip op. pp. 42-43.)

The unanimous holding in *McCann* may provide valuable insight into the view of the Court in two other asbestos cases now before it, *O'Neil v. Crane Co.* and *Merrill v. Leslie Controls*. These cases present the issue of whether a manufacturer of valves and fittings installed on Navy ships, and designed to be used with asbestos packing, gaskets and insulation, may rely upon the "component parts" defense or related theories to preclude strict liability for asbestosis injuries suffered by seamen on those ships. We believe *McCann* is a reflection of the high court's attitude toward asbestos cases in California, and believe that it is more likely than not that O'Neill, which held manufacturers liable for furnishing component parts, will be overturned, and Merrill, which exonerated the component parts manufacturers, will become the law in California. While not a valid factor for consideration, the judiciary's budget problems may subconsciously be a factor.