

CALIFORNIA'S TERRITORIAL TURN IN CHOICE OF LAW

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I. INTRODUCTION

Until the 1950s, American courts routinely applied territorial rules to decide what law to employ in cases presenting a conflict of laws.¹ For example, under the traditional approach, courts applied the law of the place of the injury in torts² and the law of the situs of the land for disputes involving real property.³

Beginning in the 1950s, California courts helped lead a judicial “revolution” that resulted in most American courts abandoning traditional rules for policy-oriented approaches that considered a variety of factors.⁴ By the 1960s, California courts had adopted the interest

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1. See generally PETER HAY ET AL., CONFLICT OF LAWS 18–24 (5th ed. 2010); WILLIAM M. RICHMAN & WILLIAM L. REYNOLDS, UNDERSTANDING CONFLICT OF LAWS § 46, at 157–59 (3d ed. 2003); KERMIT ROOSEVELT III, CONFLICT OF LAWS 3–14 (2010); CLYDE SPILLINGER, PRINCIPLES OF CONFLICT OF LAWS 4–30 (2010); RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 5 (5th ed. 2006) (discussing the origins and evolution of choice of law doctrine in America). The *First Restatement* grounded territorial rules in a theory of vested rights under which rights vested based on the occurrence of a critical event in some state's territory. RESTATEMENT OF CONFLICT OF LAWS §§ 55, 60, 64 (1934) [hereinafter FIRST RESTATEMENT].

2. See, e.g., Ala. G.S.R. Co. v. Carroll, 11 So. 803 (Ala. 1892); FIRST RESTATEMENT, *supra* note 1, §§ 377–78 (applying the law of place of wrong to torts).

3. See, e.g., *In re Barrie's Estate*, 35 N.W.2d 658 (Iowa 1949); FIRST RESTATEMENT, *supra* note 1, §§ 217–50 (applying law of the situs of land to issues concerning rights in property).

4. Commentators describe the rapid move from the territorial approach as a “revolution.” See HAY, *supra* note 1, at 27; WEINTRAUB, *supra* note 1, at 7. It would be hard to overstate the importance of California decisions for modern choice of law jurisprudence. They figure prominently in seminal treatises, cf. BRAINERD CURRIE, SELECTED ESSAYS ON

analysis methodology for resolving false conflicts cases.⁵ In the 1970s, California courts became the preeminent international proponents of the comparative impairment methodology for resolving true conflicts.⁶

In a long line of decisions from the 1950s to the 1990s, the Supreme Court of California rejected the territorial location of events as the predominant criterion for determining what law governs a dispute with ingredients from different states.⁷ Instead the court employed a three-part analysis for choice of law issues. First, the court determined whether

THE CONFLICT OF LAWS 629–89 (1963) (devoting an entire chapter to the conflicts decisions of Justice Traynor), and retain a central place in conflicts casebooks. *See, e.g.*, LEA BRILMAYER ET AL., CONFLICT OF LAWS: CASES AND MATERIALS 142–46, 201–09, 216–23, 225–31, 274–77 (6th ed. 2011); LAURA E. LITTLE, CONFLICT OF LAWS: CASES, MATERIALS, AND PROBLEMS 322–25, 340–47, 348–59, 434–42 (2013); SYMEON C. SYMEONIDES & WENDY COLLINS PERDUE, CONFLICT OF LAWS: AMERICAN, COMPARATIVE, INTERNATIONAL: CASES AND MATERIALS 66–69, 225–29, 290–95, 300–14, 461–67 (3d ed. 2012).

The *Second Restatement*, directing courts to consider multiple factors and governmental interests, RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1971) [hereinafter SECOND RESTATEMENT], has been adopted by a plurality of states, and a supermajority of states follow it or some other modern policy-oriented approach. HAY, *supra* note 1, at 94 (summarizing the choice of law approaches by state and indicating that no more than fourteen states follow the traditional approach for torts or contracts).

5. *See infra* notes 28–39 and accompanying text. According to the interest analysis theory, true conflicts are cases where two or more states have a governmental interest in applying their law to the dispute. False conflicts are cases where only one state has any interest in applying its law. For the classic formulation of the theory of interest analysis, see CURRIE, *supra* note 4, at 177, 183–87.

6. *See infra* notes 40–49 and accompanying text. Professor Currie’s original theory called for the application of forum law when the forum state had any interest served by the application of that law. This meant that courts should apply forum law in all true conflicts. In 1963, Professor Baxter proposed comparative impairment as an alternative method for resolving true conflicts. His goal was not to achieve the maximum implementation of forum policies but rather to promote the “maximum attainment of underlying purpose by all governmental entities.” William F. Baxter, *Choice of Law and the Federal System*, 16 STAN. L. REV. 1, 12 (1963). To achieve this goal, comparative impairment directs courts to “determine which state’s internal objective will be least impaired by subordination in cases like the one before it.” *Id.* at 18. While adopting comparative impairment criteria for resolving true conflicts, California courts continue to call their choice of law methodology “governmental interest analysis.” *See McCann v. Foster Wheeler LLC*, 225 P.3d 516, 524 (Cal. 2010).

Until Louisiana adopted comparative impairment by statute, LA. CIV. CODE art. 3542 (1991), California was the sole jurisdiction to employ that choice of law methodology. California decisions are discussed at length in leading treatises. *See generally* HAY, *supra* note 1, §§ 17.16–17.19, at 823–33; RICHMAN, *supra* note 1, § 79[b], at 251–53; WEINTRAUB, *supra* note 1, §§ 6.26–6.28, at 460–68; *see also* Horowitz, *The Law of Choice of Law in California—A Restatement*, 21 UCLA L. REV. 719 (1974). This Article does not address differences between Baxter’s normative criterion and the consequentialist goals of the drafter of the Louisiana Code. *See* HAY, *supra* note 1, § 2.11, at 50–51 n.31–32 (explaining differences between various forms of comparative impairment).

7. *See infra* notes 20–39 and accompanying text.

the laws from different jurisdictions differed. Second, if they differ, the court examined each jurisdiction's interest in the application of its own law to determine whether there was a true conflict. Third, if there was a true conflict, the court evaluated each jurisdiction's interests and applied "the law of the state whose interest would be more impaired if its law was not applied."⁸

In 2010⁹ and 2011,¹⁰ the Supreme Court of California unanimously decided two conflicts cases. In holding that foreign law applied in both cases, the court relied heavily on the fact that events giving rise to the claims occurred outside California's territory.¹¹ The 2010 decision went far towards finding that a foreign state has an overriding interest in applying its law when that law favors defendants who acted in that state's territory.¹² The 2011 opinion turned even more sharply towards a territorial theory, resurrecting a rule from 1916 that state legislation is presumed to operate only within the territorial limits of the state.¹³

Apart from Dean Symeonides, who identified the 2010 decision as "the most noteworthy development of the year" for choice of law methodology,¹⁴ and apart from defense lawyers, who trumpeted the 2010 and 2011 decisions as heralding a "new 'business choice of law' doctrine,"¹⁵ the 2010 and 2011 decisions have attracted little attention.¹⁶

8. *Kearney v. Solomon Smith Barney, Inc.*, 137 P.3d 914, 922 (Cal. 2006); *Anschutz Corp. v. Merrill Lynch & Co., Inc.*, 690 F.3d 98, 112 (9th Cir. 2012).

9. *McCann*, 225 P.3d at 516 (holding that California resident's tort claims stemming from exposure to asbestos in another state were barred by the other state's statute of repose when the plaintiff was not a resident of California at the time of original exposure).

10. *Sullivan v. Oracle Corp.*, 254 P.3d 237, 249 (Cal. 2011) (holding that California's Unfair Competition Law did not establish cause of action for nonresidents for work performed outside the state for a California employer in violation of federal overtime requirements).

11. *See infra* Section III(B)(3).

12. *See infra* section III(C).

13. *See infra* note 230 and accompanying text.

14. Symeon Symeonides, *Choice of Law in the American Courts in 2010: Twenty-Fourth Annual Survey*, 59 AM. J. COMP. L. 303, 325 (2011).

15. Amiel L. Wade, *The California Supreme Court's New "Business Choice of Law" Doctrine*, WADE LAW GRP. (Mar. 19, 2012), <http://www.avvo.com/legal-guides/ugc/the-california-supreme-courts-new-business-choice-of-law-doctrine>. The firm hosting the site identifies itself as Litigation and Business Law Specialists. *Id.* Mr. Wade reads the decision as a triumph for business interests achieved by a politically conservative majority on the California Supreme Court:

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 [sic], they're going to file suit in California. However, the state is not considered particularly friendly to corporate

The opinions proclaimed no radical break with comparative impairment and labored to reconcile their results with prior decisions. Accordingly, the decisions might be read narrowly as suggesting modest clarifications that foreign business-friendly laws should be construed to apply to all businesses, not just those based in the states.¹⁷

This Article offers a different view. Reading the latest opinions of the Supreme Court of California together with recent decisions of the California Court of Appeal, it argues that California courts since 2000

defendants, earning a 2012 ranking by the American Tort Reform Foundation as the nation's second-worst "judicial [h]ellhole" for perceived pro-plaintiff laws and large jury awards.

A conservative majority on the California Supreme Court [sic] 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).

Id.

Other online sources recognized the practical importance of the decision for business defendants. Kelly Savage, *California Supreme Court Provides New Guidance to Courts Making "Choice-of-Law,"* SEDGWICK, DETERT, MORAN, ARNOLD, LLP (Feb. 18, 2010), <http://www.appellatestrategist.com/2010/02/articles/jurisdictions/california/california-supreme-court-provides-new-guidance-to-courts-making-choiceoflaw/> ("This decision should limit forum shopping and prevent California from becoming a litigation magnet for plaintiffs who seek to sue for injuries that might otherwise be time[barred.]). The law firm host of this site represented Foster Wheeler LLC. *Id.*

16. Discussions have been confined to surveys of the law. *See, e.g.,* Symeonides, *supra* note 14; David T. Biderman & Judith B. Gitterman, *Choice of Law Governing Asbestos Claims*, THE SECTION OF LITIGATION MASS TORTS LITIGATION COMMITTEE (2011), available at <http://www.perkinscoie.com/images/content/2/5/v2/25219/lit-11-11choicelawgoverningasbestosclaims.pdf>; *see also* MICHAEL H. HOFFHEIMER, CONFLICT OF LAWS EXAMPLES AND EXPLANATIONS 215–16, 285–86, 296–97 (2d ed. 2013) (attempting to harmonize result of *McCann* decision with comparative impairment approach).

17. Both the Supreme Court of California and court of appeal purported to apply the same choice of law methodology. Both produced unanimous decisions. The court of appeal unanimously concluded that the plaintiff's claims were timely under California's statute of limitations. *McCann v. Foster Wheeler LLC*, 73 Cal. Rptr. 3d 96 (Ct. App. 2008) (Cooper, P.J.) (Rubin, J. & Flier, J., concurring without separate opinions); *see infra* Part III(B)(2) and accompanying text.

have employed territorial principles to identify state interests in a way that signals a decisive turn away from the state's longstanding commitment to the comparative impairment methodology. Moreover, it argues that this turn is reinforced by the emerging pattern of decisions since 2010 by federal courts attempting to follow the latest California cases.¹⁸

This Article does not argue that the cases were wrongly decided. On the contrary, the outcomes may be defended on various grounds. But, this Article contends that the selective adoption of territorial values as a way to cabin state interests prevents a coherent approach, undermines predictability, and leaves California courts vulnerable to the criticism that they are result-oriented. Such criticisms are hardly refuted by judicial expressions of sympathy for "business friendly" foreign laws in a pattern of decisions favoring corporate defendants.¹⁹

Part II surveys the evolution of California's approach to choice of law. Part III focuses on choice of law decisions by California appellate courts since 2000. It argues that those opinions exhibit a resurgence of territorial thinking in finding that states where conduct occurred have a predominant interest in applying their law even when the law has no effect on conduct, and in finding that California has a diminished interest in applying its law when conduct occurs outside California. Part IV considers broader implications of California's turn to territorial principles and examines the increasing weight given to territorial events in cases since 2010 that follow the latest California opinions.

II. EVOLUTION OF CALIFORNIA'S APPROACH TO CHOICE OF LAW

A. *The Path to Comparative Impairment*

1. Seeds of Interest Analysis

California was at the forefront the national movement away from rigid application of territorial principles. In two opinions, Justice Traynor evaluated policies behind state laws in order to reach the conclusion that California would defer to laws from other states when no California policy would be served by applying its own law.

18. See *infra* part IV(B)(2)(b)-(d).

19. *McCann v. Foster Wheeler LLC*, 225 P.3d 516, 530 (Cal. 2010) (passage quoted *infra*).

In *People v. One 1953 Ford Victoria*,²⁰ the court held that Texas law should govern the level of investigation of a car owner required of a person who acquired a security interest in a car sold in Texas when the car was later used to transport marijuana in California.²¹ The trial court applied Texas law because the security interest was created in Texas.²² The supreme court affirmed, but Justice Traynor's opinion avoided a territorial rule and instead offered policy-based explanations for why California's reasonable investigation standard should not govern.²³ The court did not assume that legislation stopped at the state line but explained that it would be unreasonable to extend the legislation

20. 311 P.2d 480, 282–83 (Cal. 1957). In two earlier opinions, Justice Traynor had also considered state policies in dodging the outcomes dictated by traditional choice of law rules. In *Grant v. McAuliffe*, 264 P.2d 944, 946–49 (Cal. 1953), he considered policy consequences in classifying the issue of survival of claims as procedural, finding that California's interest as the forum state supported application of California law to the issue of survival of claims against the estate of a California tortfeasor brought by California plaintiffs as result of a car accident in Arizona. *But see Grant*, 264 P.2d at 949 (Schauer, J., dissenting); RESTATEMENT (FIRST), *supra* note 1, § 390 (maintaining that survival of cause of action is a matter of procedure to be governed by law of the place of the wrong).

In *Emery v. Emery*, 289 P.2d 218, 223 (Cal. 1955), the court rejected the law of the place of the tort and instead applied the law of family domicile to the issue of interspousal immunity. The court reasoned that the state of domicile has the primary responsibility for establishing and regulating the incidents of the family relationship, that family members can change their home state law through the democratic process, and that the law of domicile does not vary as family members travel. *Id.* at 428. *But see* RESTATEMENT (FIRST), *supra* note 1, § 384(2) (no recovery permitted in forum state if no cause of action created at place of wrong).

21. *One 1953 Ford Victoria*, 311 P.2d at 481. The state sought to forfeit the seller's security interest for failure to conduct the "reasonable investigation" of the buyer's character as required by a California statute. *Id.*

22. *Id.* (quoting trial court ruling). Justice Schauer maintained that the territorial rule was required by the Constitution. *Id.* at 483 (Schauer, J., concurring) (expressly rejecting any implication that California could constitutionally apply its reasonable investigation standard to security interests created in other states).

23. First, Justice Traynor found that applying the statute to conduct in other states where the party did not foresee consequences in California would be unreasonable:

In the absence of a plain legislative direction to the contrary, however, the statute cannot reasonably be interpreted as requiring such investigation when the sales are financed in other states and the vehicles are taken to California, not only without the knowledge of those financing the sales, but in violation of express contractual prohibitions.

Id. at 482. Second, Justice Traynor found that California's policies for the forfeiture law did not require applying its investigation standard to the facts. *Id.* at 481–83.

extraterritorially because of the special burdens such a construction would impose on car sales outside California.²⁴

In *Bernkrant v. Fowler*,²⁵ Justice Traynor concluded that the California statute of frauds should not apply to an oral promise to forgive money owing on mortgaged property at death.²⁶ Again, he avoided a territorial rule and instead examined policies served by the California statute of frauds, concluding that those policies would not be served by applying it to the facts.²⁷

2. Interest Analysis in False Conflicts

The Supreme Court of California applied its policy-oriented approach in a series of tort cases presenting false conflicts—cases where, despite a difference in laws, only one state had a governmental policy that would be served by applying its law. In *Reich v. Purcell*,²⁸ Ohio residents died in a car accident in Missouri while traveling to California. Missouri law limited wrongful death damages to \$55,000, but neither Ohio nor California limited damages.²⁹

The case provided Justice Traynor the occasion to announce new general principles for choice of law. Relying on scholarship that had in

24. This construction was further supported by evidence in an amendment to the statute that “plainly indicate[d]” that the Legislature was concerned with sales and security interests in California. *Id.* at 482.

25. *Bernkrant v. Fowler*, 360 P.2d 906 (Cal. 1961).

26. The oral promise induced the debtors to refinance and accelerate their payments on a prior note. *Id.* at 907. The facts are unclear as to the place where the property was located or where the decedent was domiciled at the time of the promise, but he died a resident of California. *Id.* at 906, 909.

Under California’s statute of frauds, an oral promise to forgive a debt in a will was “invalid.” *Id.* at 908 (providing that agreement to make any provision for person by will is invalid unless reduced to writing and subscribed by party to be charged or his agent) (quoting CAL. CIV. CODE § 1624(6) (1985)). But, under Nevada law, where the promise was made, the oral promise was valid. Absent a case on point from Nevada, the court assumed Nevada would follow the general rule followed by other states. *Id.* at 908–09 (citing cases from other states).

27. Justice Traynor separately considered the possibilities that the decedent was a resident of Nevada and California, concluding that California policies would not be served by applying its statute of frauds in either case. *Id.* at 910. The court’s evaluation of state interests may not be entirely convincing. What is important is that it did not conclude that the state statute did not apply for the simple reason that the promise was made outside the state. Rather, it evaluated the impact of the statute on party expectations and concluded that the California policies would not be served by applying the statute. *Id.* at 910.

28. 432 P.2d 727 (Cal. 1967).

29. *Id.* at 728.

turn benefited from his own seminal opinions in the field,³⁰ he announced: “The forum must search to find the proper law to apply based upon the interests of the litigants and the involved states.”³¹ This meant that “the law of the place of the wrong is not necessarily the applicable law for all tort actions” in California.³² And, he rejected pragmatic arguments that the law of the place of the wrong should apply as a matter of convenience, to promote uniformity, or to discourage forum shopping.³³

Because the plaintiffs were not residents of California law at the time of the accident, Justice Traynor concluded that California had no interest in applying its law.³⁴ He likewise dismissed Missouri’s interest in limiting damages.³⁵ This left Ohio as the only state with an interest in applying its full-recovery law, so the court applied Ohio law.³⁶

30. *Cf. id.* at 729 (citing BRAINERD CURRIE, SELECTED ESSAYS ON CONFLICT OF LAWS 10–18 (1963)). The cited work contained a full chapter on Justice Traynor’s conflicts decisions. *See* CURRIE, *supra*, at 629–89.

31. *Reich*, 432 P.2d at 729.

32. *Id.* at 730.

33. *Id.* (“Ease of determining applicable law and uniformity of rules of decision, however, must be subordinated to the objective of proper choice of law in conflict cases, i.e., to determine the law that most appropriately applies to the issue involved.”). So many jurisdictions had deviated from the traditional law of the place of the wrong rule by 1967 that Justice Traynor added “that law no longer even affords even a semblance of the general application that was once thought to be its great virtue.” *Id.*

34. Justice Traynor feared that applying forum law based on a post-accident change of residence would encourage forum shopping:

Although plaintiffs now reside in California, their residence and domicile at the time of the accident are the relevant residence and domicile [I]f the choice of law [was] made to turn on events happening after the accident, forum shopping would be encouraged Accordingly, plaintiffs’ present domicile in California does not give this state any interest in applying its law, and since California has no limitation of damages, it also has no interest in applying its law on behalf of defendant.

Id. at 730.

Critics have observed that the dangers of forum shopping might justify disregarding their post-accident change of domicile, but this does not logically eliminate their post-accident state of domicile from acquiring an interest in applying its loss-shifting rule. *See, e.g.*, LEA BRILMAYER & JACK GOLDSMITH, CONFLICT OF LAWS: CASES AND MATERIALS 305 n.1 (5th ed. 2002).

35. While acknowledging that Missouri had the “predominant interest” in regulating conduct in Missouri territory, Justice Traynor emphasized that Missouri’s caps on damages had little or no impact on conduct: “They are concerned not with how people should behave but with how survivors should be compensated. The state of the place of the wrong has little or no interest in such compensation when none of the parties reside there.” *Reich*, 432 P.2d at 731. The opinion cited Professor Currie in support of the conclusion that only the plaintiff’s state has an interest in the application of a pro-recovery loss-shifting rule. *Id.*

In *Hurtado v. Superior Court*,³⁷ the Supreme Court of California held that California law governed when the plaintiff's decedent was killed in a car accident in California. In the opinion by Justice Sullivan, the court made clear that California law governed the measure of damages, not because California was the location of the accident and death, but because Mexico had no governmental interest served by applying its limitation on damages in the case.³⁸ Mexico's cap on damages was designed to advance the local Mexican policy of avoiding excessive financial burdens on Mexican residents. Because the defendants were not Mexican residents, there was no reason to apply Mexican law.³⁹

(citing *CURRIE*, *supra* note 30). It considered the fact that Missouri's cap on damages limited liability but likewise concluded that only the defendant's home state had an interest in applying a loss-shifting rule that limited liability:

Missouri's limitation on damages expresses an additional concern for defendants, however, in that it operates to avoid the imposition of excessive financial burdens on them. That concern is also primarily local and we fail to perceive any substantial interest Missouri might have in extending the benefits of its limitation of damages to travelers from states having no similar limitation. Defendant's liability should not be limited when no party to the action is from a state limiting liability and when defendant, therefore, would have secured insurance, if any, without any such limit in mind. A defendant cannot reasonably complain when compensatory damages are assessed in accordance with the law of his domicile and plaintiffs receive no more than they would had they been injured at home.

Id. at 731.

36. *Id.* at 731.

37. 522 P.2d 666 (Cal. 1974).

38. The *Hurtado* decision formally announced the court's adherence to "the governmental interest approach" to choice of law. *Id.* at 669–70 (citing *Reich*, 432 P.2d at 729–30).

39. The finding of no Mexican interest might support a classification of the case as a so-called "unprovided for" case—a case in which neither state's interest was implicated. In such a case, Currie proposed applying forum law, and Justice Sullivan observed that "[a]s the forum, California 'can only apply its own law.'" *Hurtado*, 522 P.2d at 670 (citing *Reich*, 432 P.2d at 729–30). See generally HOFFHEIMER, *supra* note 16, at 206–07 (discussing different characterizations of the case by scholars).

Justice Sullivan identified a second reason to apply California law. Analyzing the state's interests, he concluded that California's rule of full compensation advanced both a loss-shifting policy of compensating California residents and a conduct-regulating policy of deterring dangerous conduct. In citing *Reich v. Purcell*, he concluded that a primary purpose in creating a wrongful death action is "to deter the kind of conduct within its borders which wrongfully takes life." *Hurtado*, 522 P.2d at 672. This deterrent interest "extend[s] to all persons present within its borders." *Id.* This would support a classification of the case as a "false conflict," indicating that California law should apply as the law of the only state with an interest. The classification of the case would make a difference in litigation in a third state that employed the interest analysis. If no state had an interest in applying its law, the third state might apply its own forum law. *But see* Allstate Ins. Co. v.

B. Comparative Impairment for True Conflicts

In confronting true conflicts—cases where more than one state had a governmental interest served by the application of its law—the Supreme Court of California adopted comparative impairment. In *Bernhard v. Harrah's Club*,⁴⁰ a California resident riding a motorcycle in California was seriously injured when a car driven by another California resident drifted across the center line into his lane.⁴¹ The car driver had been served drinks at a Nevada casino that advertised in California and knew that many California patrons would use California roads traveling to the casino.⁴²

California case law recognized tavern keeper liability to third persons injured by inebriated patrons.⁴³ Nevada, in contrast, refused to impose such liability.⁴⁴ These laws advanced the policies of the respective states, California's in deterring drunk driving accidents and Nevada's in limiting liability of Nevada tavern keepers. To resolve such a true conflict, the Supreme Court of California adopted the comparative impairment method. Justice Sullivan explained:

Once this preliminary analysis has identified a true conflict of the governmental interest involved as applied to the parties under the particular circumstances of the case, the "comparative impairment" approach to the resolution of such conflict seeks to determine which state's interest would be more impaired if its policy [was] subordinated to the policy of the other state. This analysis proceeds on the principle that true conflicts should be

Hague, 449 U.S. 302 (1981) (holding forum must have significant contact or significant aggregation of contacts creating state interests to apply its law). If, however, only California had an interest in applying its law, then the neutral forum should apply California law. *See generally* HOFFHEIMER, *supra* note 16, at 93.

40. 546 P.2d 719 (Cal. 1976) (holding that expressly characterizing the case as true conflict in contrast to earlier false conflicts).

41. *Id.* at 722.

42. *Id.*

43. *Vessly v. Sager*, 486 P.2d 151 (Cal. 1971). *Bernhard* clarified in hindsight that the imposition of such liability resulted from a common law expansion of civil duties based on a reevaluation of causal responsibility and was not limited to the theory of negligence per se for violation of a California criminal prohibition. *Id.* at 726–27. The judicial imposition of liability for torts of inebriated patrons was subsequently repudiated by the Legislature. CAL. BUS. & PROF. CODE ANN. § 255602(c) (West 1995).

44. *Bernhard*, 546 P.2d at 721 (citing *Hamm v. Carson City Nuggett, Inc.*, 450 P.2d 358, 359 (Nev. 1969)).

resolved by applying the law of the state whose interest would be the more impaired if its law [was] not applied.⁴⁵

The court then found that California's policy of imposing civil liability on tavern keepers for torts committed by their intoxicated customers would be seriously impaired if it was not applied to tavern keepers in neighboring states that advertised in California.⁴⁶ In contrast, it found that Nevada's policy of limiting liability of tavern keepers was purely financial. Relying on the supposition that Nevada, like California, prohibited furnishing alcohol to inebriated customers,⁴⁷ the court reasoned: "Since the act of selling alcoholic beverages to obviously intoxicated persons is already proscribed in Nevada, the application of California's rule of civil liability would not impose an entirely new duty . . ." ⁴⁸ Justice Sullivan concluded: "California has an important and abiding interest in applying its rule of decision to the case at bench, that the policy of this state would be more significantly impaired if such rule was not applied and that the trial court erred in not applying California law."⁴⁹

45. *Id.* at 723. While citing Baxter, *supra* note 6, Justice Sullivan also traced the origin of this method for resolving true conflicts to Justice Traynor's opinion in *People v. One 1953 Ford Victoria*. *Id.* at 724.

46. *Id.* at 725. The court elaborated:

It seems clear that California cannot reasonably effectuate its policy if it does not extend its regulation to include out-of-state tavern keepers such as defendant who regularly and purposely sell intoxicating beverages to California residents in places and under conditions in which it is reasonably certain these residents will return to California and act therein while still in an intoxicated state. California's interest would be very significantly impaired if its policy [was] not applied to defendant.

Id.

47. The court cited a Nevada criminal prohibition against furnishing alcohol to intoxicated persons or habitual drunkards. *Id.* (citing NEV. REV. STATS. 202.100). Commentators have pointed out that the Nevada statute had been repealed. HAY, *supra* note 1, at 830; WEINTRAUB, *supra* note 1, at 438.

48. *Bernhard*, 546 P.2d at 725. Moreover, the court noted that for tavern keepers who solicit business in California, the liability was a "foreseeable and coverable" business expense. *Id.* It dismissed the relevance of the fact that the defendant's conduct occurred in Nevada. It distinguished authority from other jurisdictions that applied the law of the place of sale as false conflicts. *Id.* at 725 n.3 ("[N]one of these cases involved a case of true conflict between two state interests where the court endeavored to resolve the conflict by resort to the principles of governmental interest analysis. They are therefore inapposite.").

49. *Id.* at 725–26. Scholars have criticized the court's application of comparative impairment in the case. See WEINTRAUB, *supra* note 1, at 438–39; William A. Reppy, *Eclecticism in Choice of Law: Hybrid Method or Mishmash?*, 34 MERCER L. REV. 645, 671 (1983) (arguing that California compensatory policy would not have been completely

C. *Guidance for Comparative Impairment*

The Supreme Court of California provided further guidance for how to apply comparative impairment to true conflicts in two other cases. In *Offshore Rental Company, Incorporated v. Continental Oil Company*,⁵⁰ a California corporation's vice president was injured in Louisiana through the defendant's negligence while visiting the defendant's premises. Though the vice president was compensated for his personal injuries, his employer brought a claim for its separate loss of services of a key employee.⁵¹ Consistent with the weight of authority from other jurisdictions, Louisiana courts had previously held that a corporation could not recover for the loss of services of its officer.⁵² In contrast, California law arguably granted a cause of action for loss caused by injury to a key employee.⁵³

Examining the governmental policies served by the rules in conflict, Justice Tobriner inferred that Louisiana's policy was "to protect negligent resident tortfeasors acting within Louisiana'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."⁵⁴ This policy would be served by applying Louisiana law in the case before the court.⁵⁵

At the same time, Justice Tobriner concluded that California's pro-liability rule served to advance the goal of full compensation of California employers for economic harm resulting from injury to their employees. Because employers experience economic harm regardless of the place of

frustrated because plaintiff had claim against drunk driver but that Nevada's interest in shielding tavern owner from excessive liability was completely frustrated).

50. 583 P.2d 721 (Cal. 1978).

51. *Id.* at 723.

52. *Id.* at 724 (citing *Bonfanti Indus., Inc. v. Teke*, 224 So. 2d 15 (La. Ct. App. 1969), *aff'd* 226 So. 2d 770 (La. 1969)). The Louisiana decision rejected a claim under broad language in the state's civil code that a "master may bring an action against any man for beating or maiming his servant." *Bonfanti Industries*, 224 So. 2d at 17 (quoting LA. CIV. CODE art. 174 (repealed by Acts 1990, No. 705, § 1)).

53. CAL. CIV. CODE § 49 (West 2007). The court observed that much of the authority consists of dicta, but assumed for purposes of its analysis that section 49 created a cause of action. *Offshore Rental Co.*, 583 P.2d at 724.

54. *Offshore Rental Co.*, 583 P.2d at 725.

55. *Id.* The court declared: "Clearly the present defendant is a member of the class which Louisiana law seeks to protect, since defendant is a Louisiana 'resident' whose negligence on its own premises has caused the injury in question. Thus Louisiana's interest in the application of its law to the present case is evident" *Id.* (citation omitted).

injury, this policy, too, would be served by applying California law in the case.⁵⁶

Having found that the case presented a true conflict, Justice Tobriner next considered which state's interest would be more impaired if its law was not applied.⁵⁷ He explained that the goal of comparative impairment analysis was not to identify the better law.⁵⁸ Nevertheless, he observed that in "allocating [] respective spheres of lawmaking influence,"⁵⁹ courts should recognize that state policies evolve, and a statute, still on the books, might not serve important policies. The fact that a state statute is archaic and isolated may be a sign that it no longer serves important policies. "Thus the current status of a statute is an important factor to be considered in a determination of comparative impairment"⁶⁰

Justice Tobriner further explained that one objective of comparative impairment is the maximum attainment of the goals of all states.⁶¹ He observed that the status of a particular law may indicate that the strength of state policies behind it have declined and that the law is, accordingly, less pertinent to the goal of maximizing the attainment of government policies. Similarly, he noted that the comparative pertinence of a particular statute might be reduced if its policy objectives could be readily satisfied by other means; he specifically mentioned insurance.⁶²

Acknowledging that insurance is theoretically available to all, the court suggested that the plaintiff-employer was "peculiarly able to calculate such risks and to plan accordingly."⁶³ Though the defendant might also have obtained insurance, the center of its activity in Louisiana made it reasonable for it to calculate liability under Louisiana's law. Hence, the "burden of obtaining insurance . . . is most properly borne by the plaintiff corporation."⁶⁴

56. In coming to this conclusion, the court noted: "California's policy of protection extends beyond such an injury inflicted within California, since California's economic and tax revenues are affected regardless of the situs of physical injury. Thus, California is interested in applying its law in the present case to . . . a California corporate employer that suffered injury in Louisiana . . ." *Id.*

Justice Tobriner made clear in this context that the determination of governmental policies in comparative impairment is a matter of law, not subject to rules of evidence, and reviewed de novo. *Id.* at 725 n.5.

57. *Id.* at 726.

58. *Id.*

59. *Id.* at 725 (quoting Baxter, *supra* note 6, at 11–12).

60. *Offshore Rental Co.*, 583 P.2d at 726.

61. *Id.* (quoting Baxter, *supra* note 6, at 12).

62. *Id.* at 727.

63. *Id.* at 728.

64. *Id.* at 729.

Applying these principles, the court noted that Louisiana followed the mainstream, majority rule, while California's approach was "obsolete"⁶⁵ and "antique."⁶⁶ It observed that California's statute was of minimal importance⁶⁷ to the state's policies while Louisiana's "stronger and more current" interest would be more impaired by not applying it in the case. Accordingly, it held that Louisiana law governed.⁶⁸ While it applied the law of the place where negligence and injury occurred, it did so for policy reasons: Louisiana's law served the "vital interest" of promoting investment "[w]ithin Louisiana's borders . . . [and] [t]he imposition of liability on defendant, therefore, would strike at the essence of a compelling Louisiana law."⁶⁹

In *Kearney v. Salomon Smith Barney, Incorporated*,⁷⁰ employees of a nationwide brokerage firm in Georgia recorded long-distance phone conversations with California residents without their permission in violation of a California statute.⁷¹ Georgia law permitted such recordings.⁷² Reaffirming California's commitment to comparative impairment,⁷³ Chief Justice George found that California had a strong interest in applying its privacy law under the circumstances.

For the first time since the court adopted interest analysis,⁷⁴ the Chief Justice addressed the argument that a presumption against

65. *Id.* at 727–28.

66. *Offshore Rental Co.*, 538 P.2d at 728.

67. *Id.* at 729.

68. *Id.*

69. *Id.* at 728.

70. 137 P.3d 914 (Cal. 2006).

71. The statute that the employees violated was CAL. PENAL CODE §§ 632, 637.2 (West 2010) (permitting recording of confidential communication only where "all" parties consent and providing for \$5,000.00 or treble actual damages for violation). Plaintiffs also stated claims for unfair business practices. *Kearney*, 137 P.3d at 919. The court focused its attention on the civil liability provided by the Penal Code while emphasizing that it was not addressing the territorial reach of criminal sanctions. *Id.* at 928 n.5.

72. *See Kearney*, 137 P.3d at 932 (quoting GA. CODE ANN. § 16-11-62 (2011)).

73. *Id.* at 917, 922–28.

74. The venerable case of *North Alaska Salmon Company v. Pillsbury*, 162 P. 93 (Cal. 1916) had both elaborated the presumption that state legislation did not apply extraterritorially and applied the doctrine of *lex loci delicti*. The Supreme Court of California cited the case as an example of the territorial reasoning that the court rejected, and the supreme court expressly overruled it. *Reich v. Purcell*, 432 P.2d 727, 729 (Cal. 1967).

After *Reich*, no California opinion mentioned *Pillsbury* until *Kearney*. Defense counsel urged the court of appeal to follow *Pillsbury's* presumption against extraterritoriality. The court of appeal rejected the case as archaic without observing that it had been overruled. *Kearney v. Salomon Smith Barney, Inc.*, 11 Cal. Rptr. 3d 749, 760 n.14 (Ct. App. 2004), *rev'd in part*, *Kearney v. Salomon Smith Barney, Inc.*, 137 P.3d 914 (Cal. 2006) (the court of appeal's opinion was officially superseded pursuant to California practice).

extraterritorial application of state legislation should prevent application of California's law.⁷⁵ Unfortunately, the Chief Justice did not reject the utility of the presumption outright, which would have promoted clarity. Instead, he observed that applying California's statute to the defendant's conduct in Georgia would not be extending its extraterritorial effect.⁷⁶

75. *Kearney*, 137 P.3d at 930–31 (rejecting defense argument based on *Pillsbury*). The presumption against extraterritorial legislation roughly implemented traditional choice of law values. The presumption also served additional purposes in an age when common law jurisdictions presumed the identity of sister-states' unwritten but not positive law and during the *Lochner* era when the constitutional authority of states to apply their own legislation to cross-border events was uncertain.

The presumption disappeared as a useful guide for choice of law for most of the twentieth century. Its resurgence in some recent state choice of law decisions derives from the adoption of the presumption against the extraterritorial application of federal statutes. See, e.g., *E.E.O.C. v Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991) (referring to “a longstanding principle” that federal statutes “apply only within the territorial jurisdiction of the United States”) [hereinafter *Aramco*]. See generally Caleb Nelson, *State and Federal Models of the Interaction between Statutes and Unwritten Law*, 80 U. CHI. L. REV. 657, 691 (2013) (observing that state courts sometimes apply presumption against extraterritorial application of state statutes under influence of federal precedents).

The *Aramco* presumption, however, is not a choice of law principle. When federal courts apply the law and decide that a federal statute does not provide a remedy, the courts must dismiss the federal claim.

The federal presumption against extraterritorial legislation advances principles of federalism that have little relevance for state legislation. It prevents Congress from preempting ubiquitous state law without clear evidence of its intent to do so. It avoids the expansion of federal judicial activity into disputes with significant components outside the U.S., thus preserving the primary role of the other branches of the federal government in the area of international affairs. Professor Nelson suggests persuasively that the federal presumption reflects a judicial policy of incorporating limits into federal statutes designed to eliminate the need for reference to background unwritten law. He traces the rise of this policy to the embrace of limits on the inherent lawmaking power of federal courts as embodied in the *Erie* doctrine and the much earlier prohibition against federal common law crimes. See generally Nelson, *supra*, at 728, 761.

76. The court noted:

Interpreting that statute to apply to a person who, while outside California, secretly records what a California resident is saying in a confidential communication *while he or she is within California*, however, cannot accurately be characterized as an unauthorized *extraterritorial* application of the statute, but more reasonably is viewed as an instance of applying the statute to a multistate event in which a crucial element—the confidential communication by the California resident—occurred *in California*.

Kearney, 137 P.3d at 931 (emphasis in original).

The explanation for how the territorial presumption is satisfied by applying it to conduct outside the state that is the basis of the statutory prohibition was not assisted by the Chief Justice's intuitive appeal to the situation where a defendant intentionally causes effects within the state. *Id.* (“A person who secretly and intentionally records such a conversation from outside the state effectively acts within California in the same way a

What guided the court, however, were not any intentions attributed to the Legislature; rather, what guided the court was the core policy and local purpose of the act: “to protect the privacy of confidential communications of California [sic] residents *while they are in California*.”⁷⁷ To achieve this core goal, the court found that the California statute should be applied to recordings made outside the state.⁷⁸

The court also found that Georgia had an interest in applying its law.⁷⁹ Because there was a true conflict, the court next determined which state’s interests would be more impaired if its law was not applied. In contrast to the archaic law that revealed a weak state policy in *Offshore Rental Company*, the court observed that the California Legislature and courts had vigorously protected California privacy rights, evidencing “a strong and continuing interest in the full and vigorous application of the [statute].”⁸⁰ It found that rights would be seriously impaired if the

person effectively acts within the state by, for example, intentionally shooting a person in California from across the California-Nevada border.”).

It is doubtful that the court would really equate shooting into a state with recording while standing outside the state. Moreover, the court’s own emphasis on the relevance of the residence of the injured party provides a strong signal that it is focused not on the location of the defendant’s behavior but rather on California’s interest in securing privacy interests of its residents.

77. *Id.* Although this was a conduct-regulating rule located in the Penal Code, the Chief Justice never explained why the statute was limited to protecting state residents.

78. *Id.* The court noted the volume of out-of-state businesses communicating by phone with people in California and concluded that allowing them to record confidential communications “would represent a significant inroad into the privacy interest that the statute was intended to protect.” *Id.* at 935. Moreover, failing to apply California privacy law to such out-of-state recordings could place in-state companies at a competitive disadvantage. *Id.* Chief Justice George might have gone still further and pointed out that the restrictive application of privacy law to in-state recordings would provide a legal incentive for companies to move jobs outside the state.

79. *Id.* at 933 (“Georgia has a legitimate interest in not having liability imposed on persons or businesses who have acted in Georgia in reasonable reliance on the provisions of Georgia law.”). While Georgia’s interest in protecting privacy would not be frustrated by applying the greater privacy protections of California law, Chief Justice George emphasized that Georgia law included the background principle of nonliability for recording telephone calls with one party’s consent. *Id.* Although the Chief Justice emphasized Georgia’s interest in protecting businesses that acted in reasonable reliance on Georgia law, he never identified the distinct interest, if any, the state had in a rule permitting secret recordings.

In *Jonczyk v. First National Capital Corporation*, the court held that Missouri law should apply in a similar case where the plaintiff was not a California resident. No. SACV 13-959-JLS (AGRx), 2014 WL 1689281, at *4 (C.D. Cal. Jan. 22, 2014). The court asserted that Missouri had an interest in extending its law imposing lower liability to nonresidents but did not explain what state interest was served other than lower liability for defendants.

80. *Kearney*, 137 P.3d at 935.

statute was not applied.⁸¹ In contrast, the court concluded that Georgia's interests would not be severely impaired by not applying its law.⁸² Accordingly, the court held that California law should apply.⁸³

The court considered separately whether its holding should apply retroactively to the remedy of money damages provided by the statute. It observed that Georgia had a legitimate state interest in preventing the imposition of new liability on persons who acted in Georgia with the reasonable expectation that Georgia law governed their conduct.⁸⁴ In contrast, it found that California's interests would not be significantly impaired by refusing to impose damages retroactively.⁸⁵ For these reasons, the court held that plaintiffs could obtain injunctive relief but that damages would only be available for future violations.⁸⁶

D. Statutes of Limitations

Traditionally, courts routinely applied forum statutes of limitations, and barred or permitted claims to proceed under their local law regardless of what law they applied to the substantive claims.⁸⁷ In

81. *Id.* at 935–36.

82. *Id.* at 936. First, applying California law did not violate any privacy protections under Georgia law. *Id.* Second, applying California law would only affect communications with people in California, and those communications could be easily identified by caller ID or other devices. *Id.* Third, requiring compliance with California law in such communications would not heavily burden a Georgia business's need for recording because the business could simply request consent from the person in California, thus satisfying both Georgia and California laws. *Id.*

83. *Id.* at 937.

84. The court expressed concern with unfair surprise when a business acting in reliance on local law “unexpectedly and unforeseeably [finds itself] subjected to liability for such actions.” *Id.* at 937. The record did not reveal any reliance, and the question of legal surprise was contested. *Id.* at 937–38 n.15–16 (discussing NASD notice alerting members to possible application of other states' privacy laws in multistate conversations and *Koch v. Kimball*, 710 So. 2d 5 (Fla. Dist. Ct. App. 1998) (holding that Florida law governed recording in Georgia of communication with speaker in Florida)).

85. The court reasoned that monetary value is difficult to determine and damages for past violations “cannot affect conduct that already has occurred.” *Kearney*, 137 P.3d at 938.

86. *Id.*

87. *See, e.g., Ohio ex rel. Squire v. Porter*, 129 P.2d 691 (Cal. 1942). The rule was grounded on the theory that matters of limitations were procedural. *See* FIRST RESTATEMENT, *supra* note 1, §§ 603–04. In exceptional cases, where the lapse of time extinguished substantive rights, as, for example, with the extinction of title by adverse possession, traditional courts applied the law of the place where the property was located or the claim arose. *See* FIRST RESTATEMENT, *supra* note 1, § 224.

Most statutes of limitations were not classified as procedural. The undesirable consequence of litigating claims, time barred elsewhere, with no relationship to the forum, led most states to enact borrowing statutes. California enacted one in 1872. *See* CAL. CIV. PROC. CODE § 361 (1872) (barring causes of action that have arisen in foreign states or

Ashland Chemical Company v. Provence,⁸⁸ the California Court of Appeal affirmed the application of California's statute of limitations, but did so by analyzing the governmental interests.⁸⁹ Federal courts applying California choice of law rules similarly applied comparative impairment, holding that California law should apply in those cases where it was the only state with an interest.⁹⁰ In 2010, the Supreme Court of California in

countries and that are barred there by reason of lapse, but providing exception for California citizens who held the causes of action from the time they accrued).

88. 181 Cal. Rptr. 340 (Ct. App. 1982).

89. It reasoned that California's statute of limitation was designed "to protect the enacting state's residents and courts from the burdens associated with the prosecution of stale cases in which memories have faded and evidence has been lost." *Id.* at 341; *see also* *Macasa v. Dole Food Co.*, No. B245138, 2014 WL 1254688, at *5 (Cal. Ct. App. March 27, 2014) (opining that California has interest in extending benefits of its shorter statute of limitations to nonresident businesses in order to attract them to do business in the state). Where a Kentucky plaintiff sought to enforce a note executed and payable in Kentucky, the court reasoned that Kentucky had no interest in applying its longer limitations period because there were no Kentucky defendants to protect and because Kentucky was not the forum state. *Ashland Chemical*, 181 Cal. Rptr. at 341. The court's analysis implied that a state did not have an interest in applying its longer statute of limitations period in order to provide a greater measure of protection for its residents. *Id.* *Ashland Chemical* left the case a false conflict.

The opinion also held that the express choice of Kentucky law did not extend to the Kentucky statute of limitations because Kentucky did not have a substantial interest in the case. *Id.* at 342. The court suggested in dictum that the choice of Kentucky law would be valid if the defendant was from Kentucky because that would establish a substantial relationship with Kentucky. *Id.* at 342 n.2.

90. *Nelson v. Int'l Paint Co.*, 716 F.2d 640, 644-45 (9th Cir. 1983) (holding that California's shorter statute of limitations applied under California choice of law rules because California was only state with interest when sole defendant was California resident) (citing *Ashland Chemical*, 181 Cal. Rptr. at 341). Though the plaintiff was a resident of Texas and sought recovery for injuries suffered from exposure to the defendant's product in Alaska, the Ninth Circuit did not find that either of those states had an interest in applying their longer statute of limitations so as to regulate conduct in the state or to provide a greater measure of protection for their residents. *Id.*

In *Ledesma v. Jack Stewart Produce, Incorporated*, the Ninth Circuit applied California choice of law rules, and concluded that claims brought by four California residents injured in Arizona by Oklahoma and Arkansas residents presented a true conflict when the claims would be time barred under California law but not Arizona. 816 F.2d 482, 484-85 (9th Cir. 1987). The court reasoned that the plaintiff's residence in California weakened the forum's interest in barring the claims. *Id.* at 485. It also reasoned that the place of injury had an interest in applying its longer statute of limitations in order to deter injuries. *Id.* at 485-86 (citing *Hurtado v. Superior Court*, 522 P.2d 666, 672 (Cal. 1974)).

Ledesma was wrongly decided. The Ninth Circuit did not recognize that both *Ashland Chemical* and *Nelson*, in finding false conflicts, necessarily determined that the place of contract performance and place of injury did not have an interest in applying their longer limitations periods to provide greater protection for nonresidents. Judge Noonan dissented on the theory that California would follow the *Second Restatement* on matters of procedure and because California had an interest in applying its law to avoid the burdens of stale claims regardless of the residence of the plaintiff. *Id.* at 486-87 (Noonan, J., dissenting).

McCann expressly approved the application of comparative impairment for resolving conflicts involving defenses based on lapse of time.⁹¹

III. COMPARATIVE IMPAIRMENT IN RECENT DECISIONS

This Part discusses the California decisions that show a resurgence of territorial values in chronological order. First, it considers three opinions of the Court of Appeal that were cited with approval by recent decisions of the Supreme Court of California. Then it examines the supreme court's decisions in *McCann* and *Sullivan*.

A. Territorial Reasoning in Court of Appeal Opinions

1. *Cable v. Sahara Tahoe Corporation*: Minimizing California's Compensatory Interest When Injury Occurs Outside the State

In *Cable v. Sahara Tahoe Corporation*,⁹² a passenger injured in a car accident brought an action against a Nevada tavern keeper alleging that it served the driver of the car alcohol after he had become intoxicated. The driver was a California resident, and the accident occurred in Nevada.⁹³ The court of appeal affirmed the application of Nevada law

While not expressly overruled, subsequent Ninth Circuit decisions have recognized that California has a strong interest in applying its shorter statute of limitations subject only to "rare exceptions." *See, e.g.,* *Deutsch v. Turner Corp.*, 324 F.3d 692, 716–17 (9th Cir. 2003) (citation omitted); *Carlton v. Hertz Corp.*, No. CV 12-07178JGB (MRWx), 2013 WL 394894, at *3 (C.D. Cal. Jan. 28, 2013) (barring personal injury claim under California statute of limitations where California resident was injured in Florida even though still timely under Florida law).

91. *McCann v. Foster Wheeler LLC*, 225 P.3d 516, 527 (Cal. 2010). The court observed:

[N]ow that the earlier methodology for resolving choice-of-law issues has been replaced in this state by the governmental interest mode of analysis [citation omitted], in those instances in which [the borrowing statute] does not mandate application of another jurisdiction's statute of limitations or statute of repose the question whether the relevant California statute of limitations (or statute of repose) or, instead, another jurisdiction's statute of limitations (or statute of repose) should be applied in a particular case must be determined through application of the governmental interest analysis that governs choice-of-law issues generally.

Id. (citing *Nelson*, 716 F.2d at 644; *Ashland Chemical*, 181 Cal. Rptr. at 341).

92. *Cable v. Sahara Tahoe Corp.*, 155 Cal. Rptr. 770 (Ct. App. 1979).

93. *Id.* at 771–72. The casino advertised in California and depended on California patronage. *Id.* at 772. The Supreme Court of California had recently recognized third party liability of taverns for injuries caused by their inebriated patrons. *See Bernhard v. Harrah's Club*, 546 P.2d 719, 722 (Cal. 1976) (discussed *supra* notes 40–49 and accompanying text).

that shielded tavern keepers from liability for injuries caused by their inebriated patrons.⁹⁴ The court found a true conflict between California's interest in providing compensation for injured California residents and Nevada's interest in limiting excessive liability for Nevada casinos.⁹⁵

In resolving the true conflict under the comparative impairment evaluation, *Cable* gave great weight to the place of the tort and injury. The court found that Nevada had the predominant interest in regulating the conduct at issue⁹⁶ and reasoned that California's compensatory interests were reduced when residents were injured in other states.⁹⁷

2. *Tucci v. Club Méditerranée, S.A.*: Finding a Local Interest in Applying Local Law

In *Tucci v. Club Méditerranée, S.A.*,⁹⁸ a California resident recruited by phone to work at a Club Med resort in the Dominican Republic

94. *Id.* at 779. Notwithstanding the appellate court's characterization of the case as a true conflict, the facts, in contrast to *Bernhard*, arguably presented neither a conflict nor a true conflict. There was arguably no conflict because by the time of litigation, the California Legislature had repudiated the California courts' short-lived recognition of third-party liability of tavern keepers. *Id.* at 773. The legislative repeal of *Bernhard* postdated the accident in *Cable*, and the court of appeal assumed that the repeal could not operate retroactively to eliminate an "existing cause of action;" nevertheless, the court saw the repeal as a repudiation of a policy that meant that California's interest would not be seriously impaired by applying Nevada law. *Id.* at 779.

Even if there was a conflict, there was arguably no true conflict because the injured passenger may not have become a California resident until after the accident. The facts indicate that the plaintiff was employed by the Nevada casino, held a Nevada driver's license, and stayed at least occasionally in Nevada. *Id.* at 772. The court observed "there was room for argument" whether the plaintiff resided in Nevada. *Id.* While the plaintiff returned to California after the accident, the court found this insufficient to establish a state interest in compensating the plaintiff. *Id.* at 779.

95. *Id.* at 774-77 (identifying Nevada's interest in limiting the liability of Nevada tavern keepers). The limitation of liability advanced the legitimate policy of protecting local business from financial hardship. *Id.* "This is a 'true' conflicts case If we assume [for the sake of analysis] that the application of California law would result in the imposition of liability upon defendant, the laws of California and Nevada are directly in conflict." *Id.* at 774. The court inferred the state interest from the fact that "[w]hen a California resident is incapacitated, so as to become a public charge, 'California's economy and tax revenues are affected regardless of the situs of the physical injury.'" *Id.* at 775-76 (quoting *Offshore Rental Co. v. Cont'l Oil Co.*, 583 P.2d 721, 725 (Cal. 1978)).

96. *Id.* at 777. The problem with the court's analysis is that, if California's interest was solely regulatory, then the case would be a false conflict because California would have had no legitimate interest in regulating conduct in Nevada.

97. The *Cable* court noted that while *Bernhard* has also found a loss-shifting policy of protecting California residents, that opinion had confined the "broadest limits" of the policy to "persons injured in California." *Id.* at 777-78 (quoting *Bernhard v. Harrah's Club*, 546 P.2d 719, 724 (Cal. 1976) (emphasis removed)).

98. 107 Cal. Rptr. 2d 401 (Ct. App. 2001).

suffered a work-related injury in the Dominican Republic. The employer's French insurance carrier provided benefits that constituted the exclusive remedy under Dominican law.⁹⁹ The employee commenced a civil action in California, asserting claims based on common law tort and on violation of a California statute requiring workers' compensation from a state-authorized insurer.¹⁰⁰

The court of appeal focused on conflicting remedies for work-related injuries, emphasizing California's interests in prompt compensation for employees and in encouraging employers to obtain adequate insurance.¹⁰¹ Because both California and the Dominican Republic sought to limit employer tort liability for work-related injuries, the court reasoned that California's statute permitting tort recovery against employers that did not obtain state-authorized insurance was aimed at providing strong incentives for employers to obtain adequate insurance, not at advancing advance tort policies of full compensation.¹⁰²

Although this analysis might have supported the conclusion that California had no interest in applying its specific statutory prerequisites for the workers' compensation defense,¹⁰³ the court observed that there was a true conflict and proceeded to evaluate the comparative impairment of state interests.¹⁰⁴ It found that California's interests would not be seriously impaired by not applying its law.¹⁰⁵ In contrast, it found

99. *Id.* at 403, 406–07.

100. *Id.* at 403.

101. *Id.* at 407–08.

102. *Id.* at 407. The court did not elaborate, but prior to the enactment of limited coverage under the state's workers' compensation statutes, state laws did not seek to provide full compensation. On the contrary, state law prevented any compensation under a variety of now archaic defenses, such as contributory negligence and the doctrine of fellow servant.

103. It is not clear that California's goal of incentivizing adequate insurance would be frustrated by not recognizing the California defense under the facts of the case. First, it appears that the employer had in fact obtained adequate insurance. Second, it is questionable whether foreign employers would anticipate the application of California law and therefore conform their insurance to the requirements of the statute. Imposing a financial penalty on foreign employers who failed to follow the California statute would raise interesting Due Process and Commerce Clause issues that were not presented to the court. The opinion later observed: "The goals behind California's workers' compensation scheme would not be harmed by applying Dominican Republic Law." *Tucci*, 107 Cal. Rptr. 2d at 411.

104. *Id.* at 409.

105. California, like all U.S. jurisdictions, sought to limit employer liability for work-related injuries. Because the employee would fully recover the maximum amount that she was entitled to under either Dominican or California worker compensation provisions, California had little interest in permitting additional recovery under a tort theory. Doing so would frustrate both California and Dominican policies without advancing the purposes of the requirement that an insurer be state-authorized. *Id.* at 409–10.

that the Dominican Republic had strong interests in the application of its law providing a defense. The court postulated two governmental policies: (1) a “critical goal of fostering business investment and development;”¹⁰⁶ and (2) a goal of “seeing that [Dominican] law determines the consequences of actions within its borders causing injury to people there.”¹⁰⁷ In finding that these policies would be “significantly undermined” if Dominican law was not applied, the court focused almost exclusively on the territorial location of events giving rise to the claim.¹⁰⁸

3. *Castro v. Budget Rent-a-Car System, Inc.*: Attributing to the Place of an Accident the Predominant Interest in Applying its Vicarious Liability Law

The court of appeal relied on territorial considerations still more decisively in *Castro v. Budget Rent-a-Car System, Incorporated*,¹⁰⁹ holding that Alabama law governed the scope of a rental truck owner’s liability for injuries caused in Alabama by the driver of the truck.¹¹⁰ Departing from established principles of interest analysis,¹¹¹ the court assumed that the scope of vicarious liability was conduct regulating; this in turn supported its finding that Alabama had an interest in applying

106. *Id.* at 411.

107. *Id.*

108. *See id.* at 411–12. In failing to explain why the place of the injury was relevant to the loss-shifting defense at issue, the court seemed to assume that a state automatically has an interest in applying its law to the legal effects of conduct in its territory.

This form of the territorial principle is particularly unsound—and it was rejected for workers’ compensation a generation before most states repudiated *lex loci* for torts. *Cf. Alaska Packers Assoc. v. Indus. Accident Comm’n*, 294 U.S. 532, 538–41, 550 (1935) (holding that California could constitutionally apply its workers compensation laws to an injury in another state when the employment relationship was formed in California); RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 398 (1934) (permitting workers compensation recovery for out-of-state injuries).

The Dominican Republic would have an equally strong interest in applying its workers’ compensation defense to a case with similar facts to *Tucci* but where the employee was injured while temporarily working in Haiti. Conversely, the Dominican Republic would have virtually no interest in applying its workers compensation *limits* to a claim brought by a California employee injured in the Dominican Republic while working for a California employer.

109. *Castro v. Budget Rent-a-Car Sys., Inc.*, 65 Cal. Rptr. 3d 430 (Ct. App. 2007).

110. *Id.* at 442–44. Additional facts about the accident are described in the plaintiff’s brief. *See* Appellants’ Opening Brief at 5–7, *Castro v. Budget Rent-a-Car Sys., Inc.*, 65 Cal. Rptr. 3d 430 (Ct. App. 2007) (No. B189140).

111. Vicarious liability is classified as a loss-shifting rule—or a primarily loss-shifting rule. *See Padula v. Lilarn Properties Corp.*, 644 N.E.2d 1001, 1003 (N.Y. 1994) (“Loss allocating rules . . . are those which prohibit, assign, or limit liability after the tort occurs, such as . . . vicarious liability statutes . . .”) (citation omitted).

its law to regulate conduct in the state. The opinion gave voice to values of territorial sovereignty in asserting that the plaintiffs “voluntarily exposed” themselves to the risks of less favorable Alabama law by entering the state’s territory.¹¹²

Chief Justice George would later cite *Castro* in giving a territorial construction to interest analysis’s allocation of “spheres of lawmaking influence,”¹¹³ asserting that the state where conduct occurs has the predominant interest in applying its law when it limits or denies liability.¹¹⁴

Paradoxically, the dramatic resurrection of territorial values occurred in a case where no choice of law was required and where, consequently, no party had an interest in challenging the new thinking.¹¹⁵ The sole basis of the plaintiff’s appeal in *Castro* had been the trial court’s failure to apply a federal regulation imposing vicarious liability on the lessor of rental trucks.¹¹⁶ For some reason, the defendant’s lawyers framed the issues on appeal to include a choice between Alabama and California

112. *Castro*, 65 Cal. Rptr. 3d at 444. The principle that a state had the exclusive authority to control events and persons in its territory was a central principle of the nineteenth-century conflicts jurisprudence of James Kent and Joseph Story, both of whom attributed it to Ulrich Huber (1647–1714). See generally Michael H. Hoffheimer, *Conflicting Rules of Interpretation and Construction in Multi-Jurisdictional Disputes*, 63 RUTGERS L. REV. 599, 604–06 (2011) (discussing origins of the territorial approach to choice of law).

113. *McCann v. Foster Wheeler LLC*, 225 P.3d 516, 536 (Cal. 2010) (“[California’s interest in compensating a California resident injured in Alabama is] not sufficient to reallocate Alabama’s and California’s ‘respective spheres of lawmaking influence . . .’ [B]y entering and driving in Alabama, [the California resident] voluntarily exposed himself to the risks of that ‘territory. . . .’”) (quoting *Castro*, 65 Cal. Rptr. 3d at 444).

114. *Id.*

115. The plaintiff and his wife brought claims against Budget based on the theory that federal law imposed vicarious liability on Budget as a carrier and also under California tort law which imposed vicarious liability on vehicle owners for torts caused by permissive drivers. *Castro*, 65 Cal. Rptr. 3d at 432–33.

Granting summary judgment to Budget, the trial court held that federal law did not apply because Budget was not a carrier; it also applied California choice of law rules and determined that Alabama tort law should apply, under which a truck owner is not vicariously liable for the torts of its lessees. The two grounds of the trial court decision are described in greatest detail in Respondents’ Brief at 11, *Castro v. Budget Rent-A-Car Sys., Inc.*, 65 Cal. Rptr. 3d 430 (Ct. App. 2007) (No. B189140).

There is no indication that the supreme court, in later quoting *Castro*, was aware that the court of appeal lacked the benefit of adversarial briefing on the issue.

116. Appellant’s Opening Brief at 4, *Castro v. Budget Rent-A-Car Sys., Inc.*, 65 Cal. Rptr. 3d 430 (Cal. Ct. App. 2007) (No. B189140). Nor did the plaintiffs raise the issue in their Reply Brief. See Appellants’ Reply Brief at 1–6, *Castro v. Budget Rent-A-Car Sys., Inc.*, 65 Cal. Rptr. 3d 430 (Ct. App. 2007) (No. B189140) (repeating argument that claim was asserted under federal, not state law).

state law;¹¹⁷ and only the defendant's lawyers briefed the appellate court on this non-issue. In doing so, the defense brief made no mention of any possible California governmental interest in compensating residents. Instead, it presented the novel argument that Alabama's rejection of vicarious liability for owners is primarily conduct regulating.¹¹⁸ Because the plaintiffs based their claim on federal law, they did not respond to gaps in the defendant's arguments.¹¹⁹

Having decided that federal law supported no claim, the court of appeal should have affirmed. Instead, it proceeded to make an unnecessary choice between Alabama and California law. Guided by one party's theories, it concluded that Alabama's lack of permissive user liability was conduct regulating and that Alabama thus had the predominant interest in applying its law.¹²⁰

B. *McCann v. Foster Wheeler LLC*

1. Facts

In 1957, Terry McCann, a recent college graduate residing in Oklahoma, went to work as an engineering sales trainee for a construction company.¹²¹ He was exposed to asbestos insulation over a two-week period while observing the installation of an industrial boiler at an oil refinery in Oklahoma.¹²² The boiler was designed and manufactured by Foster Wheeler LLC, a corporation with its

117. Respondents' Brief at 11–12, *Castro v. Budget Rent-A-Car Sys., Inc.*, 65 Cal. Rptr. 3d 430 (Ct. App. 2007) (No. B189140).

118. *Id.* at 24–25.

119. This fact appears to fully explain the mystery observed by the court of appeal that “[p]laintiffs do not explain why California law should be applied to the issue of Budget’s liability for their injuries.” *Castro*, 65 Cal. Rptr. 3d at 439 n.10.

120. *Id.* at 442. While the opinion acknowledged a California compensatory interest, it concluded with the broad language cited by Chief Justice George that a person who enters another state’s territory exposes himself to the “risks of that ‘territory,’” and should not expect to recover under a “hazard” (i.e., form of liability) that was not created under the law of the place. *Id.* (citation omitted).

121. *McCann v. Foster Wheeler LLC*, 225 P.3d 516, 518 (Cal. 2010).

122. Facts as alleged by the plaintiff are described by the court. *Id.* at 516, 518, 520. Foster Wheeler shipped the boiler without asbestos insulation. The asbestos was installed by an unidentified independent contractor. The plaintiff’s theory was that Foster Wheeler specified the need for insulation and knew or should have known that it would contain asbestos. *Id.* at 520. Other potential defendants settled. See Telephone Interview with Paul C. Cook, Appellate Attorney for Terry McCann (Feb. 7, 2013) (notes on file with author); Telephone Interview with Frederick D. Baker, Appellate Attorney for Foster Wheeler (July 23, 2013) (notes on file with author).

headquarters in New York. Foster Wheeler LLC shipped the components to Oklahoma for installation.

In the following decades, McCann worked in Minnesota and Illinois¹²³ before settling in California in 1975 to take a position as executive director of Toastmasters International.¹²⁴ In 2005, McCann was diagnosed with mesothelioma, a form of cancer caused by exposure to asbestos.¹²⁵ Within three months of the diagnosis, McCann and his wife commenced a civil action against various defendants, including Foster Wheeler.¹²⁶

The exact mechanism by which asbestos exposure causes mesothelioma in some individuals is unknown. Accordingly, it is uncertain whether McCann suffered an injury in Oklahoma in 1957 that first manifested itself nearly fifty years later in California, or whether he

123. *McCann*, 225 P.3d at 518, 520. McCann moved to Minnesota in 1965 and Illinois in 1967. *Id.* A student-athlete in college, he won a gold medal in the 1960 Summer Olympics in the bantamweight division of freestyle wrestling and later helped found the United States Wrestling Federation. He was inducted into the National Wrestling Hall of Fame and Museum in 1977. McCann died in 2006 at age seventy-two, survived by his wife, seven children, eighteen grandchildren and two great-grandchildren. For biographical information about McCann, including his wrestling career, see *Olympic Wrestler Succumbs to Rare Cancer: Terry McCann 1932–2006*, TOASTMASTERS INTERNATIONAL (June 8, 2006), <http://mediacenter.toastmasters.org/index.php?s=19219&item=316060>; *Terry McCann, 72; Olympic Gold Winner Headed Toastmasters*, LOS ANGELES TIMES (Jun. 8, 2006), <http://articles.latimes.com/2006/jun/08/local/me-passings8.2>.

124. *McCann*, 225 P.3d at 520. He held that position until he retired in 2001. *Id.*

125. *Id.* The plaintiff did not assert a claim for asbestosis. *Cf.* Amicus Curiae Brief of the Civil Justice Ass'n of Cal. in Support of Defendant and Respondent at 1, *McCann v. Foster Wheeler LLC*, 225 P.3d 516, 536 (Cal. 2010) (No. S162435) (summarizing issue as whether Oklahoma statute bars “tort action for asbestosis”). Terry McCann did not in fact suffer from asbestosis. Telephone Interview with Paul C. Cook, Appellate Attorney for Terry McCann (Feb. 7, 2013) (notes on file with author).

Neither appellate decision described the medical context. The Supreme Court of California’s opinion emphasized the fact that the exposure occurred “nearly fifty years prior to the time plaintiff was diagnosed.” *McCann*, 225 P.3d at 520. This might give rise to the impression that such long periods of time between exposure and illness are unusual.

Mesothelioma is a “relatively rare” malignant cancer of the mesothelium, the membrane that surrounds the lungs and other internal organs. NATIONAL CANCER INSTITUTE, MESOTHELIOMA: RESEARCH REPORT 1–2 (1988). The strong link to asbestos exposure is well established. Asbestos exposure had been suspected as a risk factor since 1943 and was conclusively shown to be a risk factor in a population study of South African miners in 1960. *Id.* at 2–3. Risk of mesothelioma is specifically associated with workers who installed asbestos insulation. *Id.* at 3. Cigarette smoking and other common risk factors for other forms of cancer are not linked to mesothelioma. *Id.* at 4. By 1988, asbestos was identified as the only known risk factor for mesothelioma. *Id.*

Despite the known link between exposure and illness, the onset of the disease is normally delayed for decades. “The time lag for developing mesothelioma following asbestos exposure is usually thirty to forty years.” *Id.* at 3 (emphasis added).

126. *McCann*, 225 P.3d at 520–21.

was exposed to a substance that made him more susceptible to an injury that occurred in California closer in time to his discovery of the effects of the exposure.¹²⁷

2. Procedural History

The trial court held that the McCann's claims were barred by the Oklahoma statute of repose.¹²⁸ The plaintiffs appealed on two grounds. First, they contended that California law should govern the timeliness of the claims, either under the specific provisions of the California borrowing statute or under California's choice of law rules.¹²⁹ Second, they contended that the trial court erroneously determined that the Oklahoma statute of repose applied to the facts of the case.¹³⁰

The court of appeal agreed with the plaintiffs' first contention that the claims were governed by California limitations law and reversed.¹³¹ The court found that the California borrowing statute did not resolve the issue of which limitations law governed. The borrowing statute bars claims that arise in foreign states when they are time barred under the

127. See generally *Buttram v. Owens-Corning Fiberglas Corp.*, 941 P.2d 71, 76–77 (Cal. 1997) (discussing lack of scientific explanation of mechanism of cause of disease and observing: “No temporally discrete event exists that encompasses the defendant’s breach and the plaintiff’s injury. Instead, insidious disease litigation involves an extended chronology of causation unlike traditional snapshot torts.”).

128. The trial court noted:

No action in tort to recover damages . . . for any deficiency in the design, planning, supervision or observation of construction or construction of an improvement to real property . . . shall be brought against any person . . . performing or furnishing the design, planning, supervision or observation of construction or construction of such an improvement more than ten (10) years after substantial completion of such an improvement.

McCann, 225 P.3d at 522 (quoting OKLA. STAT. tit. 12, § 109 (1978)). First, the trial court determined that the Oklahoma ten-year statute of repose barred tort claims arising from an improvement to real property in Oklahoma. *Id.* at 527. Then, in a separate hearing, the trial court found that Foster Wheeler’s activity qualified it as a designer and found that the boiler constituted an improvement to real property for purposes of the Oklahoma statute. *McCann*, 225 P.3d at 519; see also *McCann v. Foster Wheeler LLC*, 73 Cal. Rptr. 3d 96, 98 (Ct. App. 2008).

129. *McCann*, 225 P.3d at 522.

130. The plaintiffs argued that the boiler was not an improvement to real property under the Oklahoma statute of repose in part because Foster Wheeler had failed to prove that the boiler was taxed as real property. *Id.* at 522–23.

131. *McCann*, 73 Cal. Rptr. 3d at 99. This conclusion made “it unnecessary to decide whether the trial court also erred in determining that Foster Wheeler was the designer of an improvement to real property, and therefore is entitled to the protection of the Oklahoma statute of repose.” *Id.*

law of the place where they arose, but it provides an exception for claims brought by California citizens:

When a cause of action has arisen in another State, or in a foreign country, and by the laws thereof an action thereon cannot there be maintained against a person by reason of the lapse of time, an action thereon shall not be maintained against him in this State, except in favor of one who has been a citizen of this State, and who has held the cause of action from the time it accrued.¹³²

The court of appeal rejected the McCann's argument that the exception requires courts to apply California limitations law to all claims brought by California citizens.¹³³

Because the borrowing statute did not resolve the matter, the court of appeal applied California's general choice of law rules. First, it found that the laws were in conflict: the Oklahoma statute of repose barred all tort actions arising from improvements to real property ten years after the substantial completion of the work,¹³⁴ but the California statute of limitations was tolled until McCann was first diagnosed with mesothelioma.¹³⁵ Second, the court considered whether each state had an

132. CAL. CIV. PROC. CODE § 361 (1872). California courts have applied the statute when a cause of action arises in another state and is time barred under that state's law "unless the holder of the cause of action is a California citizen who has held the cause of action from the time of accrual." *McCann*, 73 Cal. Rptr. 3d at 99 (quoting *Geist v. Sequoia Ventures, Inc.*, 99 Cal. Rptr. 2d 476, 478 (Ct. App. 2000)).

133. The court of appeal stated:

[T]he statute, on its face, permits the court to apply California law when the plaintiff is a citizen of California, but it does not expressly require the court to do so; it merely excepts California citizens from the mandatory application of foreign law. We doubt, therefore, that the statutory exception for plaintiffs who were citizens when their causes of action accrued requires the court to apply California law, in circumstances where the application of California's choice of law principles would dictate otherwise.

McCann, 73 Cal. Rptr. 3d at 100.

134. *Id.* (citing *Riley v. Brown and Root, Inc.*, 836 P.2d 1298, 1300 (Okla. 1992)). McCann argued that there was no conflict because no claim arose in Oklahoma inasmuch as he suffered the resulting injury in California. The court of appeal rejected this argument as "specious" and observed that statutes of repose applies to bar a cause of action even before an injury results. *Id.* at 101 n.4.

135. *Id.* at 100–01 (citing *Ashdown v. Ameron Internat. Corp.*, 100 Cal. Rptr. 2d 20, 26 (Ct. App. 2000) and *Buttram v. Owens-Corning Fiberglas Corp.*, 941 P.2d 71, 77 n.4 (Cal. 1997)).

interest in applying its law. It found that California had a strong interest in applying its law governing the timeliness of the McCann's claims.¹³⁶ In contrast, it found that Oklahoma had either little or no interest in applying its statute of repose. It reasoned that the policy Oklahoma's statute served was "providing for a measure of security for building professionals whose liability could otherwise extend indefinitely."¹³⁷ And it found that this interest was confined to protecting potential defendants affiliated with Oklahoma.¹³⁸

Thus, the court found no real Oklahoma interest in applying Oklahoma law in the case where Foster Wheeler was not a citizen of Oklahoma and Foster Wheeler's design and manufacturing occurred outside Oklahoma.¹³⁹ Accordingly, the court of appeal indicated that the case presented a false conflict.¹⁴⁰

Third, the court of appeal decided that, even if the case presented a true conflict, California's interest would be more impaired if its law was

The statute protects persons injured by exposure to asbestos by permitting them to bring an action within a year after suffering a disability from exposure. No matter how long ago the person was exposed, the statute provides that the person will have a remedy when the injury manifests itself. In addition, by virtue of its borrowing statute, California has expressly indicated that, even if a cause of action arose in another state, a citizen of California should not necessarily be subjected to the time limitations of the other state.

Id. at 102 (citation omitted).

136. *Id.* at 101. Although the opinion identified sources of California law that provided a rule of decision, the analysis is incomplete insofar as it does not identify what California interests require the application of its statute to cases where the exposure occurs out of state.

137. *Id.* (quoting *St. Paul Fire & Marine Ins. Co. v. Getty Oil Co.*, 782 P.2d 915, 921 (Okla. 1989)).

138. *Id.* at 102 ("The state of the place of the wrong has little or no interest in [limiting damages for wrongful death] when none of the parties reside there" and the state's interest in avoiding excessive financial burdens on defendants is "primarily local." And, "Oklahoma's interest is substantially a local one, that is, an interest in protecting Oklahoma defendants from liability for conduct occurring in Oklahoma.") (citing and quoting *Reich v. Purcell*, 432 P.2d 727, 731 (Cal. 1967)).

139. *McCann*, 73 Cal. Rptr. 3d at 102-04.

140. *Id.* ("[A] 'true conflict'—is difficult to discern.") ("[A] state's interest in limiting recovery in wrongful death actions is in protecting resident defendants from excessive financial burdens.") (citing and quoting *Hurtado v. Superior Court*, 11 Cal. 3d 574, 586 (1974)); see also *id.* at 102 n.5 (permitting a California resident to proceed under a longer California statute of limitations and finding a "false conflict" because Kentucky had no state interest in application of its shorter limitations period in the case where there was no Kentucky defendant and Kentucky was not the forum) (citing *Ashland Chem. Co. v. Provence*, 181 Cal. Rptr. 340, 341-42 (1982)).

not applied.¹⁴¹ The court found that California had a “strong”¹⁴² and “obvious”¹⁴³ interest in applying its statute of limitations.¹⁴⁴ The court reasoned that the balance of interests behind the more generous California limitations period expressed a policy favoring recovery and that such a policy would be served by applying the statute in favor of long-term residents when the resulting disease manifested itself in the state.¹⁴⁵ The court rejected the argument that California’s interest was eliminated or reduced because McCann had been exposed to asbestos before establishing residence in California.¹⁴⁶

In contrast, the court of appeal found no Oklahoma interest in applying the Oklahoma statute of repose.¹⁴⁷ The court reasoned that the purpose of Oklahoma’s statute was to establish a balance “between the

141. *McCann*, 73 Cal. Rptr. at 102.

142. *Id.* at 101.

143. *Id.* at 102.

144. *Id.* The court found this interest chiefly in the content of the California rule: No matter how long ago the person was exposed, the statute provides that the person will have a remedy when the injury manifests itself. In addition, by virtue of its borrowing statute, California has expressly indicated that, even if a cause of action arose in another state, a citizen of California should not necessarily be subjected to the time limitations of the other state.

Id.

The court asserted on three occasions that California had a state interest in applying its limitations law to permit litigation of an asbestos claim by a long-term California resident when the asbestos-related injury manifested itself in California. *Id.* at 102–04. Although one of these passages cross-referenced to a later one—observing that California has “obvious interest in providing a remedy to its long-term residents who sustain asbestos-related injuries as discussed further in part 3”—the subsequent discussion did little more than repeat the assertions that “California’s remedial statute is expressly designed to preserve asbestos claims during the latency of asbestos-related injuries,” and that “California has a significant interest in permitting McCann to seek compensation for asbestos-related injuries manifesting themselves in California.” *Id.* In one passage, the opinion characterized such an action as accruing in California. *Id.* at 103.

145. *McCann*, 73 Cal. Rptr. 3d at 103. The court also identified a state interest in assuring adequate compensation in order to provide resources to reimburse in-state health care providers. It observed that McCann had been treated at in-state health care facilities: “California has an interest in limiting health care costs that accrue as a result of barred claims. This is particularly important in light of the prevalence of debilitating asbestos-related disease.” *Id.* at 103–04.

146. *Id.* at 103 n.6. The court distinguished the case from *Reich v. Purcell*, where the state supreme court held that California’s law governing the measure of damages does not apply in favor of a plaintiff who moved to California after suffering a personal injury. *See supra* note 34.

147. *McCann*, 73 Cal. Rptr. 3d at 101. In the “unprovided for” case where neither state has a governmental interest in applying its law, Currie proposed that forum law should apply. CURRIE, *supra* note 4, at 156.

rights of claimants and those of the architects and builders.”¹⁴⁸ Because it construed this interest as focusing on providing protection for Oklahoma defendants, it found that Oklahoma had no interest in extending such protection to nonresident businesses such as Foster Wheeler that had engaged in design and manufacturing activity outside the state.¹⁴⁹ In sum, Oklahoma had minimal compensatory interest in limiting the liability of a nonresident business, and it had no regulatory interest in controlling Foster Wheeler’s conduct outside the state.¹⁵⁰

The court expressly rejected Foster Wheeler’s contention that it might have relied on Oklahoma’s statute of repose when it bid on the project in the 1950s to design and build the boiler as “def[ying] credulity.”¹⁵¹ If Oklahoma had any interests in applying its statute of repose, those interests were so weak that they would not be impaired by applying California law.¹⁵²

148. *McCann*, 73 Cal. Rptr. 3d at 101 (quoting *Riley v. Brown & Root, Inc.*, 836 P.2d 1298, 1300 (Okla. 1992)). The absolute cutoff of claims provided by the Oklahoma statute served to provide “security for building professionals whose liability could otherwise extend indefinitely” and to avoid “difficulties in proof which arise from the passage of time.” *Id.* at 101 (citing *St. Paul Fire & Marine Ins. Co. v. Getty Oil Co.*, 782 P.2d 915, 921 (Okla. 1989)).

149. *Id.* at 102.

Oklahoma’s interest is substantially a local one, that is, an interest in protecting Oklahoma defendants from liability for conduct occurring in Oklahoma In this case, however, Foster Wheeler is not a citizen of Oklahoma, and is therefore not among the defendants in whose favor Oklahoma’s statute of repose is primarily directed. Moreover, Foster Wheeler’s allegedly tortious conduct was in the design and fabrication of the boiler, which conduct occurred in New York or some location other than Oklahoma.

Id.

The opinion cited *Reich* for the proposition that the state of the place of the wrong has no governmental interest in applying its law to limit recovery by a non-domiciliary. *Id.* The opinion also cited cases that found false conflicts where foreign statute of limitations were raised as defenses by parties that were not affiliated with those states. *Id.* at 102 n.5 (citing *Am. Bank of Commerce v. Corondoni*, 169 Cal. App. 3d 368 (1985) and *Ashland Chem Co. v. Provence*, 129 Cal. App. 3d 790 (1982)).

150. *Id.* at 102–03.

151. *Id.* at 103. The court was not informed that the statute postdated the conduct and could not possibly have been the basis for any reliance. See *infra* note 187.

152. *McCann*, 73 Cal. Rptr. 3d at 103.

3. The Supreme Court Decision

a. Characterization of the Facts and Holding Below

In reversing,¹⁵³ the Supreme Court of California characterized the facts differently. In writing for a unanimous court, Chief Justice George emphasized the lapse of time between McCann's exposure in 1957 and his move to California in 1975.¹⁵⁴ Chief Justice George avoided characterizing McCann as a long-term resident. And, he provided details that tended to minimize the extent of McCann's exposure to asbestos in 1957.¹⁵⁵

While engaging in a plenary review of the record, Chief Justice George described the lower court's choice of law analysis in ways that highlighted differences between the approaches of the two courts. He observed that the court of appeal had found minimal Oklahoma interest in applying its statute of repose because the defendant's headquarters were in New York rather than Oklahoma.¹⁵⁶ And, he criticized the lower

153. The Supreme Court of California did not elaborate on the standard of appellate review but assumed, as had the court of appeal, that the application of interest analysis to conflicting laws was itself a matter of law subject to de novo review. *See Ghirardo v. Antonioli*, 883 P.2d 960, 965–66 (1994) (choice of law determination is reviewable as de novo).

154. *McCann v. Foster Wheeler LLC*, 225 P.3d 516, 518 (Cal. 2010). The opinion of the court of appeal had, of course, provided the dates. But, the supreme court opinion emphasized that 1975 was “[e]ighteen years later” than the initial exposure, and that the exposure occurred “nearly fifty years” prior to diagnosis of mesothelioma. *Id.* at 518, 520.

155. The court explained, for example, that [p]laintiff acknowledged he did not assist in the actual application or installation of the insulation, but stated he observed the installation work for brief periods and occasionally stepped inside the boiler to take a look [P]laintiff stated that a “wild guess” would be [that he was near the boiler for] two or three days in total.”

Id. at 520. The opinion's reference to these details is difficult to understand given that the defendant's liability and causation were not at issue. But, the factual characterization reveals, perhaps, suspicion of plaintiffs' claims or the broad scope of manufacturers' liability to persons casually exposed to asbestos as additional reasons for limiting the corporation's liability to McCann. The opinion revealed a similar attitude in characterizing the Oklahoma statute as “relatively lengthy.” *Id.* at 529. This suggests that the ten-year bar was reasonable or even generous. Because the scientific literature indicates that mesothelioma *usually* manifests itself after twenty years, *see supra* note 125, a perspective sympathetic to victims would not describe a ten-year time period as unreasonable.

156. *Id.* at 519. This characterization was necessary to bring the case within an issue on which the court had granted review: whether “Oklahoma's interest in the application of its statute of repose is substantially limited to companies headquartered in Oklahoma and does not equally encompass out-of-state companies who design or construct improvements to real property located in Oklahoma.” *Id.* This was a subtle but significant

court for finding a strong California interest and for failing to appreciate the weight of prior decisions, which established that California's interest was reduced when the plaintiff was injured outside the state."¹⁵⁷

b. Construction of the Borrowing Statute

The Supreme Court of California agreed with the lower court that the borrowing statute did not mandate application of California limitations law. But, Chief Justice George explained that the borrowing statute, with its exception, was enacted at a time when the prevailing practice was to apply forum law to the issue of limitations.¹⁵⁸ This historical context left no room for doubt that the nineteenth-century Legislature assumed California courts would apply California statutes of limitations to cases not covered by the borrowing statute—or subject to its exception. This understanding required a more complete explanation for why the borrowing statute's exception for California citizens did not *compel* application of California limitations law.¹⁵⁹

shift: the court of appeal had not placed such exclusive weight on the fact that Foster Wheeler was headquartered in New York. It had relied rather on the fact that Foster Wheeler was "not a citizen of Oklahoma." *McCann*, 73 Cal. Rptr. 3d at 102. Equally important for the court of appeal was the fact that all of the defendant's conduct relating to the plaintiff's exposure occurred outside of Oklahoma. *Id.* at 102–03. Foster Wheeler lacked a legal relationship with Oklahoma that might give it the status of being a corporate citizen because it neither maintained a corporate headquarters in the state nor was incorporated under the laws of the state. Nothing in either opinion suggests that Foster Wheeler maintained any office in the state of Oklahoma or even that it was a nonresident that was qualified to do business in the state in 1957.

157. *McCann*, 225 P.3d at 519. The court wrote:

Further, although California has a legitimate interest in affording a remedy to a resident of California whose asbestos-related illness first manifests itself when the individual is a California resident, past 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 in (and, in the present situation, a resident of) that other state, and where the 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.

158. *Id.* at 524–25. Chief Justice George explained that the typical form of borrowing statutes that borrowed the shorter law of the place where the action arose was designed to prevent the application of forum law under the traditional rule. *Id.* at 525.

159. *Id.* at 526–27 (citations omitted).

Unlike the court of appeal, Chief Justice George considered it possible that plaintiffs who moved after exposure did not qualify under the exception for California residents, and that the California borrowing statute borrowed the Oklahoma statute of repose.¹⁶⁰ In the end, however, he too concluded that the matter was not resolved by statute and that the court must make a choice of law determination.

c. A Finding of True Conflict

Applying California's three-part choice of law analysis, the supreme court, like the court of appeal, found that the applicable laws of Oklahoma and California were in conflict.¹⁶¹ In a footnote, however, the Chief Justice added the information that the Oklahoma statute of repose was not enacted until 1978.¹⁶² This was the first and only time the court acknowledged that Oklahoma's statute postdated the manufacturing and design activity that was the basis of the McCanns' claims.¹⁶³ Though

[W]e agree with the [c]ourt of [a]ppeal that this statute cannot properly be interpreted to *compel* application of the California statute of limitations without consideration of California's generally applicable choice of law principles. Although at the time section 361 was adopted, the then-prevailing choice-of-law doctrine generally would have called for the application of the relevant California statute of limitations in a case in which section 361 did not mandate application of another jurisdiction's law, nothing in section 361 indicates that this statute was intended to freeze the then-prevailing general choice-of-law rules into a statutory command, so as to curtail the judiciary's longstanding authority to adopt and modify choice-of-law principles pursuant to its traditional common law role.

Id.

160. Notwithstanding California authority holding that an action for a latent injury does not accrue until the plaintiff discovers or reasonably should have discovered the injury, the Chief Justice pointed out that other jurisdictions had reached different conclusions about when actions arose or accrued for purposes of their borrowing statutes. *Id.* at 526. He then suggested that it was debatable whether policies of deterring forum shopping should prevent the application of California's rule on accrual applied in favor of a nonresident who was exposed to a toxic substance before becoming a resident. *Id.*

161. The claims were timely under California law while Oklahoma's statute barred all tort claims against manufacturers and designers of improvements to real property that arose more than ten years after the substantial completion of the improvement to real property. *Id.* at 527–28 (quoting *Riley v. Brown and Root, Inc.*, 836 P.2d 1298, 1300 (Okla. 1992)).

162. *Id.* at 529 n.6.

163. The McCann's argument before the court of appeal focused on the application of the borrowing statute. In arguing that California law should apply under California's choice of law rules, they limited their argument to the contention that Oklahoma's state interest in limiting liability did not extend to nonresident businesses. Accordingly, they neither

pointing out that the statute was enacted “well after the boiler in question was designed and installed,”¹⁶⁴ the opinion did not further consider whether this meant the claim was barred for the first time only after McCann became a citizen of California. Instead, it simply observed that Oklahoma cases applied the statute retroactively to bar claims that predated the statute.¹⁶⁵

Unlike the court of appeal, the Chief Justice found that both states had a governmental interest in applying their laws to the facts of the case. Because the California Legislature had amended the state statute to permit asbestos-related claims for up to one year after discovery¹⁶⁶—and because the broad language of the statute did not limit its application to California citizens—the Chief Justice found that California had an interest in applying its statute to a person who was a California resident at the time of discovery of an asbestos-related injury or illness, even when the exposure occurred elsewhere.¹⁶⁷ The Chief Justice discussed two California cases that supported the conclusion that California has an interest in applying its own law to provide a remedy or benefit for a California resident injured outside the state.¹⁶⁸

addressed the effective date of the statute of repose nor subsequent Oklahoma legislation exempting asbestos-related tort claims from the statute’s operation. *See* Appellants’ Opening Brief at 27, *McCann v. Foster Wheeler LLC*, 225 P.3d 516, 518 (Cal. 2010) (No. S162435); Appellants’ Reply Brief at 12, *McCann v. Foster Wheeler LLC*, 225 P.3d 516, 518 (Cal. 2010) (No. B189898).

164. *McCann*, 225 P.3d at 529 n.6.

165. *Id.* (citing *Mooney v. YMCA of Greater Tulsa*, 849 P.2d 414, 416 (Okla. 1993); *Jaworsky v. Frolich*, 850 P.2d 1052, 1054–56 (Okla. 1992); *St. Paul Fire & Marine Ins. Co. v. Getty Oil Co.*, 782 P.2d 915, 918–21 (Okla. 1989)).

166. *Id.* at 532.

167. *Id.*

168. *Id.* (discussing *Offshore Rental Oil Co. v. Cont’l Oil Co.*, 22 Cal. 3d 157 (1978) (finding that California had interest in applying its statute authorizing employer to recover for injury to key employee where employer was a California company even though injury occurred in another state) and *Castro v. Budget Rent-A-Car Sys., Inc.*, 65 Cal. Rptr. 3d 430 (Ct. App. 2007) (finding that California had interest in applying California law permitting recovery from owner for negligence by permissive user when the person injured was a resident of California even though the conduct and injury occurred in another state)).

The Chief Justice did not consider additional interests that California might have in applying its statutes of limitations without regard to the citizenship of the parties. High among these might be the traditional procedural interests in ease and certainty of application. Courts have concluded that forums have a self-evident governmental interest in applying shorter forum statutes. Doing so leads to dismissal and preserves public resources. However, public resources are similarly conserved when a rule of universal application yields clear results that will allow the extrajudicial settlement of claims. Applying a longer forum statute regardless of the plaintiff’s residence will have such a result. The failure to identify stronger California interests would subsequently affect the court’s evaluation of the extent to which each state’s policies would be impaired.

Chief Justice George also found that Oklahoma had a governmental interest in applying its statute of repose to the case. He attributed to its statute of repose the general purpose of all statutes of limitations: providing defendants a measure of security for claims that might extend indefinitely and eliminating problems of proof that become more difficult over time.¹⁶⁹ He criticized the lower court's view that Oklahoma's interests were limited to protecting Oklahoma businesses from excessive liability and thus did not apply to Foster Wheeler or its conduct outside the state.¹⁷⁰ On the contrary, the Chief Justice attributed an additional purpose to Oklahoma's statute of repose: he reasoned that it provided an incentive for business enterprises to engage in business activity in Oklahoma. In doing so, the Chief Justice announced a broad new rule that states have an interest in applying pro-business defenses in favor of out-of-state businesses:

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, to 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 law to comparable

169. *Id.* at 529–30 (quoting *St. Paul Fire*, 782 P.2d at 920–21 (Okla. 1998)).

170. *McCann*, 225 P.3d at 530.

activities engaged in by local businesses situated within the jurisdiction.¹⁷¹

The court's finding of an Oklahoma interest in protecting nonresident businesses might be read as enlarging the group of parties protected by a state's loss-shifting rules to encompass businesses engaged in in-state commercial activity.¹⁷² But, the Chief Justice did not explain concretely how the Oklahoma statute of repose encourages out-of-state businesses to engage in activity in Oklahoma. The statute provides a defense regardless of the economic motivations behind improvements to real estate, so the statute's purposes of providing security and eliminating stale claims might apply to all defendants regardless of their commercial motivations. The Chief Justice specifically found that the lower court erred in relying on the fact that design and manufacture of the boiler system occurred outside of Oklahoma:

The statute of repose here at issue protects not only construction-related businesses that engage in their activities at the Oklahoma site of the improvement, but also commercial entities, such as establishments performing architectural and other design-improvement work, that conduct their activities away from the location of the improvement but whose potential liability flows from a plaintiff's interaction with, or exposure to, the real property improvement in Oklahoma.¹⁷³

In contrast to his broad claims about pro-business laws, the Chief Justice appears here to have been making a more limited argument that Oklahoma's statute of repose promotes a state interest of encouraging improvements to real property in Oklahoma. To achieve the maximum benefit, the Chief Justice assumed the defense of the statute should be

171. *Id.*

172. The Chief Justice's discussion of the tax and other benefits that a state receives from nonresident businesses doing business in the state suggests strongly that he means to say that interest analysis theory should be modified so as to focus on the real relationship of parties to a state; and that a state has real interests in applying its loss-shifting rules to benefit nonresidents that are present and active in the state. This suggestion comports with observations of scholars critical of interest analysis and with the constitutional analysis of interests proposed by the Supreme Court. The majority in *Allstate Insurance Company v. Hague* concluded that a state had an interest in applying its loss-shifting rule that permitted insured parties to stack uninsured motorists in favor of a nonresident who was a long-term worker in the state. 449 U.S. 302 (1981).

173. *McCann*, 225 P.3d at 531.

extended to nonresident entities that design and manufacture components outside the state which contribute to improvements within the state.

d. Resolving the True Conflict

After finding a true conflict, the Chief Justice evaluated which state's interest would be more impaired if its law was not applied.¹⁷⁴ He found that "failure to apply Oklahoma law would significantly impair Oklahoma's interest."¹⁷⁵ This followed from his previous determination that the policy behind Oklahoma's statute of repose extended to out-of-state design and manufacturing businesses that contribute to the improvement of real property located in Oklahoma.¹⁷⁶ But, rather than identifying narrow policy objectives that would be frustrated, he characterized the defense broadly as pro-business. This characterization prevented him from considering whether the statute's objectives were pro-business in the sense that they encouraged activity resulting in capital improvements or pro-business in the sense that they protected profit-making entities that engaged in the improvements.¹⁷⁷

The finding that Oklahoma's strong policy extended to nonresident businesses did not completely resolve the comparative impairment analysis. To be sure, as the Chief Justice pointed out, businesses protected by Oklahoma's law could not control the subsequent move of

174. *Id.* at 533–34.

175. *Id.*

176. *Id.* This finding of broad Oklahoma policies is reflected in the following assertion:

In the present case, in the event Foster Wheeler [was] to be denied the protection afforded by the Oklahoma statute of repose and be subjected to the extended timeliness 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* defendant engaged in the allegedly tortious conduct in Oklahoma, plaintiff happened to move to a jurisdiction whose law provides more favorable treatment to plaintiff

Id. at 534.

177. The finding of serious impairment based on abstract pro-business policies also failed to consider whether concrete pro-business objectives would be less seriously impaired by a narrower construction of Oklahoma's statute—a construction, for example, that refused to extend it to nonresident business entities that were not actively present in the state. In other words, the Chief Justice did not contemplate the possibility that the main objectives of the statute could be achieved without its application to a nonresident business entity that engaged in design and manufacturing activity outside the state without such extensive contacts with the state that it would likely rely on Oklahoma's law.

prospective plaintiffs. But, excluding from its protection those plaintiffs who leave Oklahoma might not erode the purposes of the statute. In finding substantial impairment of Oklahoma interests in a case like the McCann's where a plaintiff later moved to another state, the Chief Justice turned to an entirely different consideration. Rather than evaluating the impact that permitting recovery would have on Oklahoma's statutory objectives, he baldly asserted a territorial principle. Disregarding the Oklahoma statute when plaintiffs later leave the state would interfere with Oklahoma's territorial control over the consequences of conduct in the state: "[S]ubjecting such a defendant to a different rule of law based upon the law of a state to which a potential plaintiff ultimately may move would significantly undermine Oklahoma's interest in establishing a reliable rule of law governing a business's potential liability for conduct undertaken in Oklahoma."¹⁷⁸

Territorial expectations likewise decisively influenced the Chief Justice's conclusion that California's interest in applying its "liberal statute of limitations"¹⁷⁹ was reduced when tortious conduct occurred in another state. In doing so, the Chief Justice followed earlier court of appeal opinions that had found a diminished California interest in applying loss-shifting rules outside the state.¹⁸⁰ From *Offshore Rental* and *Castro*, he discerned the general territorial rule:

[W]hen the law of the other state limits or denies liability for the conduct engaged in by the defendant in its territory, that state's interest is predominant, and California's legitimate interest in providing a remedy for, or in facilitating recovery by, a current California resident properly must be subordinated because of this

178. *McCann*, 225 P.3d at 535.

179. *Id.*

180. *Id.* at 535.

California decisions have adopted a restrained view of the scope or reach of California law with regard to the imposition of liability for conduct that occurs in another jurisdiction and that would not subject the defendant to liability under the law of the other jurisdiction. Our view is that a similar restrained view of California's interest in facilitating recovery by a current California resident is warranted in evaluating the relative impairment of California's interest that would result from the failure to apply California law in the present setting.

Id.

state's diminished authority over activity that occurs in another state.¹⁸¹

In concluding that Oklahoma law governed, the Chief Justice thus went through the motions of engaging in a comparative evaluation of the impact of state policies. Yet, in the end, his evaluation was decisively influenced by the assumption that the place of conduct has a powerful and predominant interest in regulating consequences of the conduct and by the concomitant assumption that other states have a reduced interest in regulating legal consequences of conduct outside their state territories.¹⁸²

By amalgamating conduct-regulating and loss-shifting policies, the court's analysis transmutes interest analysis and comparative impairment into convoluted forms of territorial choice of laws rules.¹⁸³ Indeed, by according conclusive effect to the limitations law at the place of exposure, it gives even greater effect to territorial values than did traditional courts, for in the heyday of territorialism courts effectuated local remedial interests by applying their own statutes of limitations.¹⁸⁴ In turning to territorial rules, the opinion ultimately recommitted the court to the traditional, vexing task of identifying the proper place of the wrong.¹⁸⁵

181. *Id.* at 536.

182. The opinion found additional support for this in a decision where the court of appeal had applied California law, permitting an asbestos claim as timely against an Illinois corporation where the corporation had been dissolved under Illinois law and the claims against the dissolved corporation were time barred under the law of the place of the defendant's incorporation. *Id.* (citing *N. Am. Asbestos Corp. v. Superior Court*, 180 Cal. App. 3d 902, 907–08 (Ct. App. 1986)).

Chief Justice George explained that California had the “predominant interest” in applying its law in *North American Asbestos* because the conduct occurred “*in California*.” *Id.* (emphasis in original). Though the court of appeal had indeed noted that the conduct occurred in California in that case, it found more generally that “California has a strong interest in permitting its residents to seek compensation for injuries caused by hazardous substances and in ensuring that damages are appropriately shared by codefendants.” *North American Asbestos*, 180 Cal. App. 3d at 907. In explaining why permitting the claim would not greatly interfere with Illinois's interest in expediting winding up the affairs of Illinois corporations after dissolution, the court of appeal did not refer to the place of liability-creating conduct. *Id.* at 906–07.

183. “[P]laintiff [sought] to hold Foster Wheeler legally responsible for exposing him to asbestos in Oklahoma, and it is Oklahoma that bears the primary responsibility for regulating the conduct of those who create a risk of injury to persons within its borders.” *McCann*, 225 P.3d at 537.

184. *See supra* note 87 and accompanying text.

185. The *McCann*'s argued that California's interest was enhanced because some part of the injury occurred in state; and therefore, identification of the place of the injury became relevant for identifying appropriate precedents. Plaintiffs argued that *Offshore*

e. The Triumph of Territorialism and Defeat of Conflict-Avoiding Constructions

In treating the Oklahoma statute of repose as conduct regulating, the Supreme Court of California departed from conventional interest analysis. Its opinion in *McCann* made no effort to explain how the court of appeal erred in its finding that the Oklahoma statute could not have influenced the defendant's decision to design or manufacture equipment installed in Oklahoma when its activity occurred outside Oklahoma.¹⁸⁶

Moreover, unlike the lower court, which had not been briefed on the date of the Oklahoma statute,¹⁸⁷ the Supreme Court of California knew

Rental and *Castro* were less applicable than *Kearney*. *McCann*, 225 P.3d at 537. The Chief Justice responded, ignoring special problems of causation in cancer cases and likening the case to a simple personal injury suffered in Oklahoma. He saw no greater California interests than in a case where a person physically injured outside the state later moved to or returned to the state:

In arguing that Foster Wheeler should be viewed as having caused an injury that occurred in California, plaintiff relies heavily upon the circumstances that he was a resident of California when his exposure to asbestos many years earlier in Oklahoma ultimately manifested itself as an illness and caused him to incur considerable medical expenses resulting from the disease. Those circumstances, however, do not realistically distinguish the present matter from a case, such as *Castro* [citation omitted], in which a California resident is seriously injured in an automobile accident in another state and returns home to California for extensive medical treatment and long-term care.

Id. at 537.

186. See *supra* text accompanying note 151.

187. The *McCann*'s made the chronology of the Oklahoma statute a central part of their choice of law argument in their brief to the Supreme Court of California:

[T]he chronology of events demonstrates beyond dispute that none of the parties, including Foster Wheeler, had formed any expectation that the Oklahoma statute of repose would limit liability for injuries from defects in the boiler. The contract for installation of the boiler was executed in 1956 [citation to record omitted], 22 years prior to the enactment of the Oklahoma statute of repose in 1978, rendering it literally impossible for any party to have taken that limitation into account. Foster Wheeler's assessment of future liability insurance needs could not have been affected by consideration of this non-existent Oklahoma statute.

Answer Brief on the Merits at 27, *McCann v. Foster Wheeler LLC*, 225 P.3d 516 (Cal. 2010) (No. S162435).

Foster Wheeler did not address this issue in its reply. See Foster Wheeler's Opening Brief on the Merits at 8–11, *McCann v. Foster Wheeler LLC*, 225 P.3d 516 (Cal. 2010) (No. S162435).

Amicus briefs urging reversal, all filed after the *McCann*'s brief, also ignored the fact that the statute postdated the conduct at issue. Indeed, their arguments evinced a belief that the statute was in effect at the time of *McCann*'s exposure. The American Tort Reform

its enactment postdated the defendant's conduct.¹⁸⁸ The fact that Oklahoma first provided a defense only two decades after the defendant's conduct effectively eliminated any plausible argument that the defendant relied on it in making business decisions at the time of its liability-generating conduct.¹⁸⁹

There are at least two reasons to question the validity of the court's assertion that Oklahoma had a conduct-regulating interest in applying its statute of repose. First, even though several Oklahoma decisions appeared to give it retroactive effect, thus showing the strength of Oklahoma's policies behind its rule, the statute still could not have affected conduct that already occurred. Second, due to the difficulty of detecting the delayed onset of cancer resulting from exposure to asbestos,

Association argued that "there was a reasonable expectation on the part of both litigants that Oklahoma law would govern an injury arising out of activity in the state," without evincing any awareness that the Oklahoma law did not include the statute of repose. Amici Curiae Brief of Am. Tort Reform Ass'n et al. at 8–11, *McCann v. Foster Wheeler LLC*, 225 P.3d 516 (Cal. 2010) (No. S162435). The Civil Justice Association of California argued: "Oklahoma's statute of repose has as its purpose the protection of those who do business with residents of that state and reasonably expect the manufacture and sale of their products in that state would be governed by Oklahoma law." Civil Justice Ass'n of Cal., *supra* note 125, at 8, *McCann v. Foster Wheeler LLC*, 225 P.3d 516 (Cal. 2010) (No. S162435). Ingersoll-Rand Company represented to the court that the defendant was exposed to asbestos from Foster Wheeler's equipment in Oklahoma, "which equipment was affixed to *Oklahoma real estate*, subject to a 10-year *Oklahoma* statute of repose." Amici Curiae Brief of Ingersoll-Rand Co. & Leslies Controls, Inc. at 2, *McCann v. Foster Wheeler LLC*, 225 P.3d 516 (Cal. 2010) (No. S162435) (emphasis in original).

188. The supreme court noted:

Although section 109 was enacted in 1978, well after the boiler in question was designed and installed, Oklahoma decisions make clear that section 109 applies to tort actions for injuries resulting from improvements that predated the statute, and that such application does not improperly infringe upon an injured plaintiff's rights.

McCann, 225 P.3d at 527 n.6 (citing *Mooney v. YMCA of Greater Tulsa*, 849 P.2d 414, 416 (Okla. 1993); *Jaworsky v. Frolich*, 850 P.2d 1052, 1054–56 (Okla. 1992); *St. Paul Fire & Marine Ins. Co. v. Getty Oil Co.*, 782 P.2d 915, 918–21 (Okla. 1989)).

189. Professors Symeonides and Perdue pose a series of rhetorical questions that make clear that they think little of the court's identification of expectations:

[W]hat about the fact that at the *time* of conduct, and for 31 year[s] thereafter, Oklahoma did *not* have a statute of repose? Is it not true that . . . the California court allowed Oklahoma to: (1) retroactively shield the out-of-state defendant from liability; and (2) extinguish the cause of action of a plaintiff (who . . . had become a California domiciliary) before he ever had a chance to know of it?

SYMEONIDES & PERDUE, *supra* note 4, at 311.

the Oklahoma Legislature in 2009 provided that the limitations period for such claims would not begin to run until discovery.¹⁹⁰

As with the chronology of the statute of repose, Chief Justice George acknowledged this provision only in a footnote.¹⁹¹ He dismissed its relevance to the McCann's claims, observing correctly that the legislation, by its terms, did not apply to claims like the McCann's, which had already become time barred under the statute of repose at the time of the 2009 amendment.¹⁹² But, he did not consider the analytically distinct question of whether the change in law signaled a diminished Oklahoma interest in extending its time bar to asbestos-related claims.

It is possible to identify a number of governmental interests that might be served by Oklahoma's decision not to apply the 2009 elimination of the defense retroactively.¹⁹³ Yet, it is difficult to imagine how any Oklahoma interest would be served by applying the prospective construction in another state's judicial system to claims that predated the original statutory source of the bar. The supposition that Oklahoma has an interest in applying its law solely because Oklahoma courts would in fact apply Oklahoma law represents a sort of formalism that modern

190. *McCann*, 225 P.3d at 528 n.8 (quoting H.R. 1603, 2009 Leg., Reg. Sess. (Okla. 2009)).

[W]ith respect to any asbestos or silica claim not barred as of the effective date of this act, the limitations period shall not begin to run until the exposed person or claimant discovers, or through the exercise of reasonable diligence should have discovered, that the exposed person or claimant is physically impaired as set forth in this chapter by an asbestos- or silica-related condition.

Id.

191. *Id.* The California Supreme Court expressed interest in this statute at oral argument. Telephone Interview with Frederick D. Baker, Attorney for Defendant (July 23, 2013) (notes on file with author). The court requested supplemental briefing on the effect of the legislation. Foster Wheeler submitted a brief, asserting that the 2009 legislation "by its express terms, has no effect on the claims asserted by plaintiff here because . . . the statute does not revive claims already barred at the time of its enactment." Supplemental Letter Brief of Respondent at 1–2, *McCann v. Foster Wheeler LLC*, 225 P.3d 516 (Cal. 2010) (No. S162435).

192. "[T]he Oklahoma statute of repose continues to represent the relevant Oklahoma law for purposes of the present proceeding." *McCann*, 225 P.3d at 528 n.8.

193. Prospective application would reduce the litigation burden on the Oklahoma courts. Prospective application would also protect insurance decisions made in reliance on the expiration of old claims. The record does not disclose whether Foster Wheeler had liability insurance that would cover a judgment. The plaintiff's attorney believes it did. Telephone Interview with Paul C. Cook, Attorney for Plaintiff (Feb. 7, 2013) (notes on file with author). The defendant's attorney explained that Foster Wheeler, in his opinion, probably had liability insurance to cover claims in the 1950s but speculates that the policy limits would likely have been exhausted long ago. Telephone Interview with Frederick D. Baker, Attorney for Defendant (July 23, 2013) (notes on file with author).

policy-oriented approaches to choice of law aimed to eliminate. The opinion's lack of attention to the effect of its holding on Oklahoma's concrete policy objectives serves to place in clear relief the decisive importance ascribed to the location of the place of exposure.

f. Scope of Holding: Importance of "Business-Friendly" Laws

The scope of *McCann's* holding remains uncertain. On the one hand, the case presented an unusual form of cross-border tort in a legal setting that is unlikely to reoccur frequently.¹⁹⁴ On the other hand, the Chief Justice took pains to assert the strength of Oklahoma's interest in applying a "business-friendly" law in favor of a non-Oklahoma defendant. And, he announced the new conflicts doctrine that recognizes states' governmental interest in applying their laws limiting liability for commercial activity to out-of-state enterprises—at least when applying the law could provide incentives for out-of-state enterprises to engage in commerce in or related to the state.¹⁹⁵

This doctrine potentially converts any liability-limiting defense available to a business under foreign law into a conduct-regulating rule, and it tends to assure that the foreign law will prevail over California loss-shifting laws.¹⁹⁶ The broad reach of the doctrine is signaled by *McCann's* failure to examine either the concrete legislative purposes or the practical commercial consequences of Oklahoma's statute of repose. On its face, the statute provided an outer cutoff for claims against

194. Given the long delay in the manifestation of asbestos-caused cancer, *see supra* note 125, and the popularity of California as a destination for relocation during the last century, it is foreseeable that future tort claims may be presented by persons who discover their illnesses after establishing residency in California and seek to apply California law to their claims when it is more favorable. However, few such cases will present the narrower issue of a statute of repose first enacted by the state where exposure took place, after the time of the exposure, and after the injured person left the state, and by a state that enacted an additional statute, prospectively suspending the statute of repose for asbestos-related claims. *See supra* notes 182–84.

195. *McCann*, 225 P.3d at 530.

196. *Id.* at 534.

Although California no longer follows the old choice-of-law rule that generally called for application of the law of the jurisdiction in which a defendant's allegedly tortious conduct occurred without regard to the nature of the issue that was 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.

Id. (citing *Reich v. Purcell*, 432 P.2d 727, 731 (Cal. 1967); *Cable v. Sahara Tahoe Corp.*, 93 Cal. App. 3d 384, 394 (1979)).

construction entities.¹⁹⁷ Because the defense was raised by a defendant corporation that was actively engaged in business, the court simply assumed without further analysis that the defense encouraged business activity.

It remains uncertain whether a foreign state's business-friendly defenses would apply equally against California plaintiffs who are injured while visiting the foreign state. Chief Justice George emphasized that McCann's post-exposure move long before the discovery of cancer did not reduce Oklahoma's interest in applying its business-friendly defense. He reasoned that the application of the law from a plaintiff's post-exposure residence would render it impossible to ascertain what law might apply at the time of the original exposure and would thus frustrate the security that Oklahoma sought to achieve with its statute of repose.¹⁹⁸

But, a defendant's need to plan on the application of law where it acts might equally suggest that Oklahoma's pro-business defense should trump claims by California residents who travel to Oklahoma where they are injured. In rejecting the argument that California law should apply because McCann resided in California at the time of his discovery of his illness, the Chief Justice cited *Castro*,¹⁹⁹ a court of appeal decision that applied the foreign law of the place of a car accident when the plaintiff

197. See OKLA. STAT. tit. 12, § 109 (1978); see also *McCann*, 225 P.3d at 522. Because the statute was applicable retroactively, it almost certainly was not principally concerned with encouraging business behavior but was aimed rather at putting an end to claims that could arise long after construction projects had been completed.

198. *McCann*, 225 P.3d at 530.

[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— notwithstanding the innocent motivation of the move—nonetheless significantly impair the interest of Oklahoma served by the statute of repose. If Oklahoma's statute [was] 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. Because a commercial entity protected by the Oklahoma statute of repose has no way of knowing or controlling where a potential plaintiff may move in the future, subjecting such a defendant to a different rule of law based upon the law of a state to which a potential plaintiff ultimately may move would significantly undermine Oklahoma's interest in establishing a reliable rule of law governing a business's potential liability for conduct undertaken in Oklahoma.

Id. at 534–35.

199. *Castro v. Budget Rent-A-Car Sys., Inc.*, 65 Cal. Rptr. 3d 430 (Ct. App. 2007).

had been a California resident at all times.²⁰⁰ And, courts following *McCann* have deferred to defenses available under foreign laws that have no pro-business objective.²⁰¹

g. Expectations

Chief Justice George indicated that a significant factor in choice of law is the expectation of parties about what law will apply at the time and place of their conduct.²⁰² This was evident in his extension of business-friendly defenses to nonresident businesses causing effects in the state that could be the basis for liability²⁰³ and also in his rejection of the argument that California's interest was enhanced because the plaintiff moved there before he was first diagnosed.²⁰⁴

Chief Justice George's treatment of two cases underscores the importance of expectations and illustrates how they reinforce territorial considerations. In *Offshore Rental*,²⁰⁵ the California Supreme Court had refused to apply California law establishing a cause of action for injury to

200. *McCann*, 225 P.3d at 537. The court observed the California interest in providing compensation but noted that it yielded to the "predominant interest" of the foreign state in "determining the appropriate parameters of liability for conduct undertaken within its borders." *Id.*

201. Courts following *McCann* applied Turkish and Mexican statutes of repose that were not designed to promote business in either case and were not raised by a business defendant in one case. See case cited *infra* notes 314 and 336.

202. Amicus briefs argued for party expectations as a reason for applying the Oklahoma statute of repose. See Am. Tort Reform Ass'n et al., *supra* note 187; see also Civil Justice Ass'n of California, *supra* note 125; Ingersoll-Rand Co. & Leslie Controls, Inc., *supra* note 187.

203. *McCann*, 225 P.3d at 534; see *supra* notes 170–71 and accompanying text.

204. The court rejected the relevance of cases in which torts were caused in the state as a result of conduct outside the state:

The present situation is not similar to that presented in *Kearney*, in which the defendant, while outside of California, participated in an *interstate* telephone call with a California resident who was *in California* and, where the defendant, in violation of California privacy law, recorded (without the California resident's knowledge or consent) the words that were spoken by the California resident *in California*. Nor is this a case similar to one in which a defendant manufactures a product in another state and places the product in the stream of commerce under circumstances in which it is reasonably foreseeable that the product will make its way to California, and the product ultimately injures a person who uses it in California.

McCann, 225 P.3d at 537.

205. *Offshore Rental Co. v. Cont'l Oil Co.*, 583 P.2d 721 (Cal. 1978), see *supra* text accompanying notes 50–69.

a key employee when the key employee was injured in Louisiana. The court had concluded that Louisiana's interests would be more significantly impaired by non-application of its law.²⁰⁶ In contrast to *Offshore Rental's* labored analysis of conflicting compensatory interests, the Chief Justice in *McCann* reduced that case's rationale to a general preference for applying the law of the place where the defendant acted.²⁰⁷

In *Castro*,²⁰⁸ the California Court of Appeal had held that a rental company's liability for the torts of an intoxicated driver was governed by Alabama law. Chief Justice George approvingly quoted the court of appeal's conclusion that California law must give way to Alabama's greater interest in applying its law because the California resident "voluntarily exposed himself to the risks of that 'territory,' and therefore . . . should not expect to subject [the defendant] to a 'financial hazard' that Alabama law had not created."²⁰⁹

The Chief Justice's reading of *Offshore Rental* and *Castro* supported his formulation of a general territorial rule that a defendant's liability is governed by the law of the place of the defendant's conduct.²¹⁰ He grounded this rule on the supposition that the defendant expected the law of that place to apply or that the plaintiff could not reasonably have expected any other law to apply and that it would be unfair for the plaintiff to benefit from another jurisdiction's law by later moving

206. The original decision elaborated on the weakness of California's compensatory interests, the ability of employers to protect their interests by obtaining insurance, and the archaic nature of California's cause of action. *Offshore Rental*, 583 P.2d at 726–29.

207. "[T]he court in *Offshore Rental* ultimately concluded that Louisiana law should apply, reasoning in part that '[b]y entering Louisiana, plaintiff exposed [i]tself to the risks of the territory, and should not expect to subject defendant to a financial hazard that Louisiana law had not created.'" *McCann*, 225 P.3d at 535 (quoting *Offshore Rental*, 583 P.2d at 721).

208. *Castro v. Budget Rent-A-Car Sys., Inc.*, 65 Cal. Rptr. 3d 430 (Ct. App. 2007).

209. *McCann*, 225 P.3d at 536 (quoting *Castro*, 65 Cal. Rptr. 3d at 444). The Chief Justice was plainly unaware of the fact that the court of appeal had not been fully briefed on the choice of law issue in *Castro*. See *supra* notes 115–20 and accompanying text.

210. The Chief Justice noted:

As these decisions demonstrate, in allocating the "respective spheres of lawmaking influence" in cases in which a California resident is injured by a defendant's conduct occurring in another state, past California choice-of-law decisions generally hold that when the law of the other state limits or denies liability for the conduct engaged in by the defendant in its territory, that state's interest is predominant, and California's legitimate interest in providing a remedy for, or in facilitating recovery by, a current California resident properly must be subordinated because of this state's diminished authority over activity that occurs in another state.

McCann, 225 P.3d at 536 (internal citations omitted).

there.²¹¹ These principles supported the Chief Justice's conclusion that Oklahoma's law should govern Foster Wheeler's defense because McCann did not expect California law to apply at the time when he was exposed to the asbestos.²¹²

The court's resort to expectations as a guide for choice of law in a tort case is troubling. Expectations are an uncertain rationalization for choosing law in torts where, as a general matter, parties did not act in reliance on the law. This is doubly true when the law at issue limits the time for litigating a claim: first, because it is questionable whether defendants, even if they make business decisions based on potential liability, do so after consulting the limitations that apply to claims; and second, because, if defendants in the 1950s consulted the law that governed time limits for claims against them, they would have learned that those limits were not governed by the law of the territory but by the law of the forum where plaintiff chose to litigate.²¹³

C. *Sullivan v. Oracle Corporation*

1. Case History

In *Sullivan v. Oracle Corporation*,²¹⁴ the Supreme Court of California responded to questions certified by the Ninth Circuit²¹⁵ regarding the territorial scope of California overtime provisions. The case stemmed from claims against Oracle Corporation, a software firm headquartered in California, brought by employees who were nonresidents of California. Oracle had avoided paying overtime compensation by incorrectly classifying some employees as "teachers" who were exempt from overtime laws. In 2003, as the result of class action litigation, Oracle reclassified

211. *Id.* at 534–35

212. The court explained:

By parity of reasoning, because plaintiff in the present case was in (and, indeed, a resident of) Oklahoma at the time of his exposure to asbestos . . . it is reasonable to conclude that he "should not expect to subject defendant to a financial hazard that [Oklahoma] law had not created," and that California has a lesser interest in applying its law

Id. at 535.

213. *See supra* note 87.

214. 254 P.3d 237 (Cal. 2011) (unanimous opinion). Decided a year after *McCann*, the opinion was authored by Justice Werdegar, who had concurred in *McCann*. Four other justices who had concurred in *McCann* also concurred in *Sullivan*.

215. *Sullivan v. Oracle Corp.*, 557 F.3d 979 (9th Cir. 2009).

these employees and began to pay overtime.²¹⁶ The employees had worked mostly in their home states, but they had also worked in California and other states.²¹⁷ The Ninth Circuit certified the question of whether California law applied to claims by non-California residents against a California employer for work performed in California²¹⁸ and the question of whether California overtime law applied to claims by nonresidents for work performed in other states.²¹⁹

2. Application of California Law to Work Performed in California

The *Sullivan* court devoted most of its attention to the question of whether California law applied to work performed in California for a California employer. Justice Werdegar first determined whether

216. The 2003 litigation resulted in settlements and dismissals with prejudice of claims for damages under the California Labor Code and the Fair Labor Standards Act (FLSA). *Sullivan*, 557 F.3d at 981. The litigation did not dispose of claims under the Labor Code by nonresidents for work in California. *Id.* This litigation history apparently explains both why plaintiffs did not assert claims for work in other states based directly on violations of the overtime provisions in the California Labor Code or for violations based directly on the overtime provisions of the FLSA. It does not fully explain, however, why the related unfair competition claims based on failure to pay overtime under the FLSA did not merge in the judgment in the prior cases and bar the separate claims as a matter of res judicata.

217. The Ninth Circuit sets forth the facts more fully. Oracle, a Delaware corporation with its principal place of business in California, employed instructors through a subsidiary, Oracle Corporation Canada. *Id.* at 980 (The appellate decisions do not explain the basis for the parent corporation's liability). Three named plaintiffs sought to recover for overtime work from 2001 to 2004. *Id.* at 981. Two were Colorado residents who worked at least 760 days in Colorado, 154 days in California, and ninety-eight days in other states. *Id.* The third was an Arizona resident who worked at least 160 days in Arizona, twenty days in California, and eighty days in other states. *Id.* at 981. The plaintiffs sought class certification for all claims. *Id.* at 982.

The trial court initially held that the California Labor Code does not apply to nonresidents who work primarily in other states and that it would violate the Due Process Clause to so apply it. *Id.* (describing trial court decision granting summary judgment to Oracle). It further held that the state unfair competition law does not apply to failures to pay overtime in violation of the FLSA for work performed outside the state. *Id.* The Ninth Circuit initially reversed the trial court's judgment on claims based on work in California and affirmed the decision for claims based on work outside the state. *Sullivan v. Oracle Corp.*, 547 F.3d 1177 (9th Cir. 2008) (withdrawn). It withdrew the opinion when it certified the issues to the Supreme Court of California. *Sullivan v. Oracle Corp.*, 557 F.3d 979 (9th Cir. 2009) (withdrawing opinion).

218. *Sullivan v. Oracle Corp.*, 254 P.3d 237, 240 (Cal. 2011) (quoting *Sullivan*, 557 F.3d at 983).

The Ninth Circuit order makes clear that the employees were seeking to recover overtime pay for work in California only for days when the full day was worked in California and for full weeks, not for "only a part of a day's work or part of a week's work that was performed in California." *Sullivan*, 557 F.3d at 982.

219. *Sullivan*, 254 P.3d at 240 (quoting *Sullivan*, 557 F.3d at 983).

nonresident employees were covered by California's overtime provisions while working in the state.²²⁰ She concluded that they were.²²¹ She explained the policies served by limits on overtime and observed that excluding nonresidents from such limits "would tend to defeat their purpose by encouraging employers to import unprotected workers from other states."²²²

Having determined that California overtime provisions applied as a matter of California local law, Justice Werdegar considered whether these provisions should still govern if they conflicted with the laws of other states. Applying the court's three-part approach to choice of law, she first found that the laws differed.²²³ She then considered whether the different states had an interest in applying their laws to the dispute and found that the existence of a true conflict in the case was "doubtful, at best."²²⁴ Finally, she found California had a strong interest in applying its overtime law to work within the state based on policies of "protecting health and safety, expanding the labor market, and guarding against the evils of overwork."²²⁵ But, she found that neither Colorado nor Arizona had an interest in applying their law—not because she found no state interests served by their lower wage levels²²⁶ but rather because those

220. Claims stemmed from full days and weeks of work performed in California, and "one cannot necessarily assume the same result would obtain for any other aspect of wage law." *Id.* at 243.

221. From broad legislation addressing in-state employment without regard to the residence of the employee, Justice Werdegar surmised that the Legislature meant to cover nonresident employees. *Id.* at 241. ("The Legislature knows how to create exceptions for nonresidents when that is its intent.") (citing provisions of Labor Code that create exceptions for workers compensation law where nonresident employers send employees temporarily into state).

222. *Id.* at 242. The court noted in this context that the Legislature expressly declared that protection under the labor code "[is] available to all individuals . . . who are or who have been employed [] in this state." *Id.* (citing CAL. LAB. CODE § 1171.5(a) (2003)). The court's elaborate consideration of whether California protections applied in favor of nonresidents seems strained. The failure to apply a local law written in general terms to a nonresident arguably would violate the Equal Protection Clause. U.S. CONST. amend. XIV.

223. The plaintiff-employees' home states, Colorado and Arizona, provided less generous overtime protection. For example, California required pay at twice the hourly rate under certain circumstances, but Colorado and Arizona never required compensation at a level greater than one and one-half times the hourly rate. *Sullivan*, 254 P.3d at 245 (describing details of differences between California and Colorado law and observing that Arizona incorporated federal standards by default).

224. *Sullivan*, 254 P.3d at 245.

225. *Id.* at 244 (citing *Gentry v. Superior Court*, 165 P.3d 556, 563 (Cal. 2007)).

226. In discussing the public policy objectives of California overtime law, the court observed that these interests were generally shared by Colorado and Arizona. *Id.* at 246. But, the asserted conflicts arose from the different levels of compensation. The court did not consider how the lower levels in Colorado and Arizona served to protect defendants from

states would not apply their overtime law to work performed outside the states.²²⁷ Even if there was a true conflict, Justice Werdegar concluded that California law would govern because its strong interest would be more impaired by not applying its law.²²⁸

The court's analysis effectively converted interest analysis into a territorial approach where California's governmental interest was established by the fact that the regulated conduct was performed in California. Conversely, it found that other states lacked an interest in applying their law due to the fact that the conduct was not performed in those states.

3. California Law Stops at the State Line

In contrast to her finding that California law governed claims by nonresidents for work performed in California, Justice Werdegar concluded that nonresidents had no claim under California law for overtime work performed for the California employer outside

higher levels of liability, and that the state interest in limiting such liability would be promoted by applying it to claims for work performed in other states.

Defense counsel made the argument that the other states' lower levels of overtime protection were designed to create a more business-friendly economic environment. The court dismissed the argument on the ground that those states could not force California to apply their law. *Id.* The court's categorical assertion that the foreign states' laws did not apply to work in California prevented it from considering whether those states meant for their (lower) levels of overtime compensation to limit employers' liability so as to secure a pro-business environment or whether, if so, applying the other states' laws in the case would promote those goals. It seems doubtful that either state would seek to limit liability of California employers arising from work performed by their own residents in California.

227. *Id.*

228. The court's conclusion that not applying California's overtime law would "completely sacrifice" the state's public policy goals, *see id.* at 247, is plainly hyperbolic, for those goals are similarly promoted by the overtime protections available under Colorado and federal law. It is uncertain how much additional leverage the greater recovery available under California law would apply.

But, the court is certainly right in repeating, in the comparative impairment context, the observation that holding that California law does not apply would encourage employers to hire workers from other states, frustrating important economic objectives of the Labor Code. *Id.*

In this context, Justice Werdegar again relied on territorial principles, finding that the adverse effect on Colorado and Arizona interests impacted those states "negligibly" because those states did not apply their overtime laws to work performed in other states. *Id.* The court similarly observed that any Colorado or Arizona interest in promoting a pro-business environment "within their own boundaries" was "not perceptibly impaired by requiring a California employer to comply with California overtime law for work performed here." *Id.*

California.²²⁹ She grounded the holding on the territorial limits of California legislation:

Plaintiffs' claim implicates the so-called presumption against extraterritorial application. However far the Legislature's power may theoretically extend, we presume the Legislature did not intend a statute to be "operative, with respect to occurrences outside the state . . . unless such intention is clearly expressed or reasonably to be inferred from the language of the act or from its purpose, subject matter or history."²³⁰

She reasoned that applying California law to the claims would give it extraterritorial application because no conduct that was the basis of the claims occurred in California.²³¹ She avoided evaluating the policies behind the California unfair competition law and, indeed, failed to discuss the policies behind the laws of the federal government and other

229. *Id.* at 249. The issue of what law applied in connection with work performed outside the state was complicated by the fact that the workers were not asserting claims based directly on California's overtime law. Instead they asserted claims based on California's unfair competition law premised, in turn, on alleged violations outside the state of federal overtime standards. Federal law provides a cause of action for violations of the FLSA, but the plaintiffs sought to recover under state law for violations that were time barred under federal law. "Plaintiffs candidly explained at oral argument in the Ninth Circuit that their reason for suing under the UCL is to obtain recovery for a year the FLSA no longer reaches by invoking the UCL's four-year statute of limitations." *Id.* at 248 n.8.

230. *Sullivan*, 254 P.3d at 248 (quoting *Diamond Multimenda Sys., Inc. v. Superior Court*, 968 P.2d 539, 553–54 (Cal. 1999), and *N. Alaska Salmon Co. v. Pillsbury*, 62 P. 93 (Cal. 1916)) (citations and footnote omitted).

The court also observed that applying California law might also violate due process as articulated in *Phillips Petroleum Company v. Shutts*, 462 U.S. 797, 818 (1985). The court did not address the constitutional issue because it found California law did not apply as a matter of state law. *Sullivan*, 254 P.3d at 248 n.9.

The constitutional digression is gratuitous. The Constitution would not normally bar California's application of California unfair competition law to a California employer. Moreover, because the effect of California law would be an enlargement of the statute of limitations time for recovering for violations of a federal statute, the California law would presumably fall under the "procedure" exception. *See Sun Oil Co. v. Wortman*, 486 U.S. 717 (1988) (holding that Kansas courts could apply forum statute of limitations as matter of procedure without violating Constitution notwithstanding fact that Constitution prohibited Kansas from applying its substantive law to claims).

231. *Sullivan*, 254 P.3d at 248–49. One basis of the claims was the erroneous determination that certain employees were exempt "instructors." This classification was made in California. But, the court concluded that the classification was not unlawful by itself. What made the classification unlawful was the failure to pay overtime when due. The record did not establish any basis for finding that the failure to pay overtime occurred in California. *Id.* at 249.

states that provided no recovery. She concluded simply that the nonresident employees had no claims under California law because California law was presumed to stop at the state line.

While the holding in *Sullivan* is defensible on any number of grounds, the general territorial presumption Justice Werdegar chose for her principal ground of decision stands in tension with leading California decisions that reject the utility of the presumption for choice of law.²³² The decision is not supported by the one opinion cited as authority.²³³

Sullivan's use of the presumption against extraterritoriality illustrates objections to its utility. In finding the absence of conduct and legal consequences in California territory, Justice Werdegar relied on the lack of evidence of the "place of payment" and other acts or omissions in the State of California.²³⁴ Among other reasons for questioning the place of payment rule is that it may be subject to manipulation.²³⁵

232. See, e.g., California cases cited *supra* at notes 20, 25, 40, 50, and 70, all of which involved statutes and none of which resolved the choice by employing a presumption against extraterritoriality.

233. See, e.g., *Diamond Multimedia Sys., Inc. v. Superior Court*, 968 P.2d 539, 554 (Cal. 1999). *Diamond Multimedia Systems* quoted 1916 authority against extraterritoriality because the defendants relied on it. The *Diamond Multimedia Systems* court pointed out that the argument failed because California had never applied the presumption to an injured person's right to recover for unlawful acts or omissions in California, citing ample authority that California law would apply to defective products manufactured in-state that caused injuries elsewhere. *Id.* at 553–54. The court also expressly addressed and rejected the federal causes identified as authority for the presumption against extraterritoriality on the ground that the federal presumption promotes federalist values absent from state proceedings. *Id.* at 553 n.20.

234. *Sullivan*, 254 P.3d at 248–49. Place of payment is a problematic criterion. It may be arranged solely for the convenience of parties and seems unrelated to the purposes of unfair competition law. In the age of electronic funds transfers, place of payment can be difficult to identify. Even in a case involving the mailing of a paper check, it is uncertain whether place of payment is the place where the employer wrote the check, where the employee cashed or deposited it, or where the bank is located on which the check was drawn.

235. If place of payment is truly decisive, as the court implied, then California employers wishing to avoid application of the state's unfair competition law could avoid its application with respect to unpaid overtime claims by nonresident employees by simply specifying payment out of state. But, an employer's designation of the place of payment seems to bear little relationship to the question of whether systematically underpaying nonresidents for work performed outside the state is a violation of the state's unfair competition law.

Manipulation would not be troubling if the application of provisions of the labor code and unfair competition law were properly within the sphere of private party autonomy. But, such laws are aimed precisely at limiting party behavior in specific, economically sensitive contexts.

IV. IMPLICATIONS

This Part considers theoretical and practical implications of California's turn to territorial principles in choice of law.

A. Implications for Choice of Law Theory

1. Slightly Modifying Interest Analysis

It is possible to read recent California decisions as narrowly as possible, limiting each largely to its own facts and interpreting them as offering only slight modifications or clarifications of the comparative impairment methodology employed in prior cases. Professor Symeonides, for example, proposes that *McCann* can be read narrowly as authority for avoiding an overly restrictive interpretation of foreign business friendly defenses.²³⁶

Such a restrained reading will appeal to litigants seeking to limit the precedential value of recent decisions. But, it does not offer a persuasive explanation for what the California courts have meant to do. First, the narrowest possible reading of each case overlooks the fact that the cases are not isolated and that individual opinions acknowledge that they are part of a cluster. Reading *McCann* as limited to its unique facts involving a statute of repose and a plaintiff who later moved to California is unconvincing when *McCann* itself cites *Castro*, a case in which the plaintiff had been a California resident at the time of the accident.²³⁷ Second, the narrowest possible reading of the cases is inconsistent with a careful reading of the opinions, which reveals that the authors deliberately avoided strategies for framing the issues narrowly.²³⁸ Third, the narrowest possible reading is incompatible with the reasons the courts themselves offered for results in individual cases.²³⁹

236. See SYMEONIDES & PERDUE, *supra* note 4, at 325–30. Professors Symeonides and Perdue also offer some probing criticisms of the decision's treatment of party expectations. *Id.* at 311.

237. *McCann v. Foster Wheeler LLC*, 225 P.3d 516, 532–33 (Cal. 2010).

238. The clearest example is *Castro*, where the court of appeal raised and decided a choice of law issue that was not raised by appellant or required to decide the case. See *supra* note 115 and accompanying text. The Supreme Court of California in *McCann* also avoided the possible constructions of Oklahoma interests that would have permitted a finding of a false conflict. See *supra* notes 186–93 and accompanying text.

239. The *McCann* court referred to the reasonable expectations of defendants that they would be immune under defenses available where they acted. See *supra* text accompanying notes 171, 179.

2. Historical Context: Correcting an Excessive Reliance on the Principle of Personality

In historical perspective, California's turn to territorial principles may confirm an international judicial trend observed by Professor Symeonides. Professor Symeonides describes the history of conflict of laws as embodying a balance of rules that enforce competing values of personality (the power of states over persons affiliated with them) and territoriality (the power of states to control persons in their territory).²⁴⁰ If traditional conflicts doctrine gave excessive weight to territorial values, then modern approaches that emerged in the 1950s arguably give too little weight to them. California's turn to territorialism may correspond to a trend that Professor Symeonides observes more generally as jurisdictions, responding to the excessive role of personality in modern theory, move to restore territorial values.²⁴¹

3. Fashioning *Lex Loci* as Default Rule

While retaining the language of comparative impairment, recent California decisions give decisive importance to territorial values in ways that are in tension with the state's choice of law methodology. It may be possible to see the cases as part of a pattern that suggests the need for an alternative approach. For example, *Castro's* choice of Alabama vicarious liability law and *McCann's* choice of Oklahoma's statute of repose comport with the *Second Restatement's* direction to consider a variety of factual contacts²⁴² and the *Second Restatement's* presumptive deployment of the law of the territory in particular instances.²⁴³ Moreover, all the recent California cases present disputes between parties from different

240. See Symeon C. Symeonides, *Territoriality and Personality in Tort Conflicts*, in INTERCONTINENTAL COOPERATION THROUGH PRIVATE INTERNATIONAL LAW: ESSAYS IN MEMORY OF PETER NYGH 25–27 (T. Einhorn & K. Siehr eds., 2004), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=904669.

241. *McCann*, for example, illustrates a split-domicile loss-distribution conflict, in which Symeonides observes that “personality has made modest gains in analysis but not in results . . .” *Id.* at 19.

242. RESTATEMENT (SECOND) CONFLICT OF LAWS § 145(2) (1969).

243. *Id.* at §§ 146–47, 175 (liability for personal injury, injury to land and tangible things, and wrongful death are governed by the law of the place of injury, or by the law of the place of the conduct resulting in death, unless some other state has a more significant relationship to the occurrence and the parties); cf. *Castro v. Budget Rent-A-Car Sys., Inc.*, 65 Cal. Rptr. 3d 430, 442 (Ct. App. 2007) (“The accident and Castro’s injury occurred within Alabama’s borders, thus giving Alabama a presumptive interest in controlling the conduct of those persons who use its roadways, absent some other compelling interest to be served by applying California law.”).

states; accordingly, the application of a territorial rule can be seen as expressing a de facto adoption of the approach that prevails in some other jurisdictions of applying the law of the place of the wrong as the default rule in disputes between persons who do not share a common domicile.²⁴⁴

4. Vindicating Critiques of Interest Analysis

Skeptics about the merits of policy-oriented approaches to choice of law may regard California's turn to territorial principles as vindicating longstanding theoretical criticisms of interest analysis. Scholars have questioned whether state laws advance the sorts of jurisdiction-specific interests required as a predicate for interest analysis;²⁴⁵ whether, if they do, the implementation of those interests is good or lawful;²⁴⁶ and whether the practice of interest analysis employed by courts actually corresponds to the theory.²⁴⁷ Uncertainties and confusion in modern approaches have led some states to refuse to depart from traditional rules.²⁴⁸ The weight given by *McCann* and *Castro* to expectations that the law of the territory applies and *Sullivan's* presumption that legislation stops at the border may exhibit a similar dissatisfaction with the interpretive principle of interest analysis that loss-shifting rules apply with unique force to domiciliaries.²⁴⁹

244. See, e.g., *Neumeier v. Kuehner*, 286 N.E.2d 454, 455–58 (N.Y. 1972) (directing courts to apply the law of the common domicile in guest statute conflicts and the law of the place where the accident occurred when parties do not share domicile, unless applying some other law would “advance . . . substantive law purposes without impairing the smooth working of the multistate system or producing great uncertainty . . .”); see also *Schultz v. Boy Scouts of Am.*, 480 N.E.2d 679, 683–87 (N.Y. 1985) (extending *Neumeier* rules to all loss-regulating laws); EU States Regulation, No. 864/2007, of the European Parliament and of the Council of 11 July 2007 on the Law Applicable to Non-Contractual Obligations, art. 4 (directing application of the law of common habitual residence and, when the parties do not have a common habitual residence, the law of the country where the damage occurs).

245. See, e.g., Lea Brilmayer, *Interest Analysis and the Myth of Legislative Intent*, 78 MICH. L. REV. 392, 393 (1980) [hereinafter *Interest Analysis*].

246. See, e.g., Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249, 250, 336 (1992) (arguing that making the result depend on the domicile of a party violates the Constitution).

247. Lea Brilmayer, *Rights, Fairness, and Choice of Law*, 98 YALE L.J. 1277, 1286–87 (1989) (examining the judicial practice of disregarding post-occurrence changes in domicile, like that in *McCann*, and explaining the practice as rooted in notions of rights and fairness, not the implementation of forum policy).

248. See, e.g., *Paul v. Nat'l Life*, 352 S.E.2d 550, 551–56 (W. Va. 1986) (discussing inconsistency and lack of predictability in modern approaches and retaining *lex loci delicti*).

249. Cf. Brilmayer, *Interest Analysis*, *supra* note 245, at 402–17 (questioning interest analysis assumptions that Legislatures mean to protect domiciliaries by loss-shifting rules and mean to extend such protection extraterritorially).

5. Choosing the Better Rule

Finally, the shift in California's decisions may provide evidence that the courts are seeking to implement the better rule of law.²⁵⁰ Past decisions gave considerable attention to the content of laws in conflict. In the 1960s and 1970s, the California courts tended to choose the law that provided compensation to injured plaintiffs²⁵¹ except when the law was perceived as "obsolete."²⁵²

The territorial turn may reflect a shifting attitude towards the content of the laws in conflict and a response to the perception that the judicial environment in California is hostile to business.²⁵³ The single factor that appears most strongly correlated to the outcome of decisions since 2000 is whether the chosen law favors commercial defendants.²⁵⁴ This need not necessarily reflect an objectionable form of bias. Plaintiffs enjoy the initial choice of forum and may be bringing cases in California courts that lack merit.

Opinions in *Castro*, *Sullivan*, and *Tucci* did not openly relate the states' interests to the content of laws in conflict. In contrast, *McCann* was guided by the court's characterization of the Oklahoma law as "business-friendly" in finding that Oklahoma had a strong interest in applying its law to the consequences of conduct in Oklahoma.²⁵⁵ The obstacle to reading *McCann* as an example of better law jurisprudence lies in the difficulty of separating preference for law (promoted by the

250. Under the better rule approach to choice of law proposed by Professor Leflar, courts can and should consider the qualitatively better rule of law in conflicts cases. Robert A. Leflar, *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U. L. REV. 267, 324–27 (1966); Robert A. Leflar, *Conflicts Law: More on Choice-Influencing Considerations*, 54 CALIF. L. REV. 1584, 1588 (1966) (observing that a court will prefer to apply "rules of law which make good socio-economic sense for the time when the court speaks, whether they be its own or another state's rules").

251. See cases cited *supra* notes 25, 28, 37, 40.

252. *Offshore Rental Co. v. Cont'l Oil Co.*, 583 P.2d 721, 727 (Cal. 1978).

253. See Wade, *supra* note 15 (discussing report of American Tort Reform Foundation).

254. Chief Justice George criticized the skepticism expressed by a federal judge as to whether a state ever has a "legitimate interest" in applying its law to provide an avenue for recovery for its residents injured outside the state. *McCann v. Foster Wheeler LLC*, 225 P.3d 516, 533 n.13 (Cal. 2010) (quoting and criticizing *Arno v. Club Med, Inc.*, 22 F.3d 1464, 1468 n.5 (9th Cir. 1994)). However, with the exception of the prospective application of *Kearney v. Saloman Smith Barney, Inc.*, 137 P.3d 914 (Cal. 2006), apparently no California decisions have rejected defenses when the conduct occurred in a foreign state and that place's law provided a defense. In every case since 2000 where it has arguably departed from the traditional approach, it has done so by applying business-friendly law that favored defendants.

255. *McCann*, 225 P.3d at 534.

better rule theory) with preference for parties (discouraged by the law).²⁵⁶ In a case like *McCann*, when the court defers to a foreign business-friendly law enacted long after the conduct it was designed to promote, it becomes difficult to see how choosing law that promotes business activity is different from choosing law that favors the business entity. Selecting law that is good for business may be good for business, but it threatens to convert California choice of law into a form of better law that leaves the court's rationalizations open to a charge of systematic bias in favor of a class of parties.

B. Implications for Practice

1. Uncertainties

California's turn to territorialism does not restore the rule of *lex loci*. Recent decisions question neither the state's continuing commitment to comparative impairment nor the holding of prior cases. Moreover, decisions looking to the location of events have done so unevenly—in cases like *Sullivan* involving the territorial reach of a California statute; in *Castro*, involving personal injuries suffered in other states;²⁵⁷ and in *McCann* where the Supreme Court deferred to foreign state interests in applying business-friendly laws that provided a defense.

These decisions raise many new questions. Areas of uncertainty include the relation between the presumption that legislation does not apply extraterritorially and judicial choice of law;²⁵⁸ the exact meaning of business-friendly law;²⁵⁹ and the extent to which new territorial principles displace other rules.²⁶⁰

256. See, e.g., U.S. CONST. amend. XIV (requiring equal protection of laws).

257. *Castro v. Budget Rent-a-Car Sys., Inc.*, 65 Cal. Rptr. 3d 430, 442 (Ct. App. 2007) (recognizing Alabama's "presumptive interest in controlling the conduct of those persons who use its roadways . . .").

258. When is a case governed by California's comparative impairment, and when is it governed by the territorial reach of a statute? If a statute fails to apply extraterritorially, may the courts employing comparative impairment nevertheless find that California law applies and proceed to apply or create a state common law rule? Does a dismissal of a claim brought under a California statute that the court construes to apply only in-state operate as a bar on future claims brought under the law of other states?

259. Is a general statute of repose business friendly? One that applies to medical malpractice? Is a statute of repose that generally encourages business investment still business friendly if it is raised as a defense by an individual criminal who is sued by a group of businesses he defrauded?

260. For example, will a California business get the benefit of a foreign business-friendly law when it injures a California plaintiff in the foreign state?

2. Confusion in the Courts²⁶¹

a. Judicial Response to Aggressive Territorial Arguments

The territorial turn in recent California decisions has encouraged parties to push more aggressively for courts to apply the law of the place of contracting in contract disputes and the law of the place of injury or conduct in tort cases when that law favors their claims²⁶² or defenses.²⁶³ The emphasis on territorial principles has significantly influenced the application of comparative impairment analysis by lower courts.

A. Revival of Law of the Place of Contracting

In *Freemantlemedia North America, Incorporated v. Hilb, Rogal & Hobbs*,²⁶⁴ a corporation doing business in California brought an action in California state court against an insurance broker. It sought to have the California court apply the longer New York statute of limitations on the theory that the broker was licensed in New York. The court of appeal correctly affirmed the trial court's dismissal under the California limitations period. But, what should have been an easy decision under the traditional rule calling for forum law²⁶⁵ or under interest analysis calling for the law of the only state with an interest,²⁶⁶ became unnecessarily complicated by the court's search for territorial

261. This section does not discuss the occasional case that is resolved because it falls squarely within one of the recent holdings by the Supreme Court of California. *See, e.g.*, *Deirmenjian v. Deutsche Bank, A.G.*, No. CV 06-00774, 2010 WL 3034060, at *14 n.121 (C.D. Cal. July 30, 2010) (holding that Turkish statute of repose governs where acts giving rise to claims occurred in Turkey, finding case indistinguishable from *McCann*). The large number of decisions from federal courts in this section reflects the fact that those courts publish opinions explaining their application of California choice of law. Federal courts must apply California choice of law rules in diversity cases that are commenced in districts in California or removed from California state court. *See Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941).

262. *See, e.g.*, *Carlton v. Hertz Corp.*, No. CV 12-07178 JGB MRWX, 2013 WL 394894, at *3 (C.D. Cal. Jan. 28, 2013) (California resident alleging personal injury in Florida caused by defendant's negligence in Florida sought to have court apply Florida's longer limitations law).

263. *See, e.g.*, *Cortez v. Global Ground Support, LLC*, No. 09-4138 SC, 2010 WL 5173861, at *1 (N.D. Cal. Dec. 15, 2010) (defendant that designed and manufactured product in Kansas that was shipped through stream of commerce to California where it seriously injured plaintiff at plaintiff's workplace argued that product liability claims should be barred under Kansas statute of repose).

264. No. B211270, 2010 WL 1077909 (Cal. Ct. App. Mar. 25, 2010).

265. *See supra* note 87.

266. *See supra* note 90.

connections. The court of appeal quoted *McCann*'s language that a state ordinarily has the predominant interest in regulating conduct within its borders.²⁶⁷ Rather than analyzing interests and finding that California was the only state with an interest in applying its limitations law, the court reasoned that, in the absence of a choice of law provision, the limitations period governing claims on the contract was governed by the law of the place of performance, or if no place of performance was designated in the contract, by the law where the contract was made.²⁶⁸

This revival of traditional territorial rules for contracts—and the nontraditional application of the rules to matters of limitations—reached a sound result in the case. But, following such an approach consistently would commit the courts to the fruitless search for the magic place of contracting in many other cases and would often select the wrong law. Neither signing of the contract in New York, nor a choice of New York law by the parties would provide any reason to tolerate the litigation of stale claims in California courts.²⁶⁹

B. Revival of Law of the Place of the Wrong

In *Sabo v. Fiskars Brand, Incorporated*,²⁷⁰ the federal court in Idaho, applying California choice of law rules, held that Idaho caps on noneconomic damages and Idaho's more restrictive tort law applied to defective product claims brought by a California domiciliary against a Wisconsin corporation for injuries caused in Idaho by an exploding flashlight.²⁷¹ The case appeared to present a false conflict: California had

267. *Freemantlemedia*, 2010 WL 1077909, at *8 (quoting *McCann v. Foster Wheeler LKC* [sic], 48 Cal. 4th 68 (2010)).

268. *Id.* (citing CAL. CIV. CODE § 1646 (enacted in 1872) (providing that contract should be interpreted according to the law and usage of place where performed, or, if none indicated, the place where made)).

269. For example, the court in *IBLC Abogados, S.C. v. Bracamonte*, No. 11-cv-2380-GPC-KSC, 2013 WL 3829401 (S.D. Cal. July 23, 2013) did not give decisive effect to the place of contracting in its choice of law analysis. The dispute involved claims for attorney services related to the development of Mexican property. *Id.* at *3–4. Though the oral contract had been made in California and most of the services had been performed in California, the court held that California law should apply, not because that was the place where the services were provided, but because, as the place of litigation, the policies behind California's shorter statute of limitations, such as permitting defendants to gather evidence, would be more impaired, and its strong policy against one-way fee shifting similarly would be more impaired. *Id.* at *4, *6, *10–11.

270. No. 2:12-cv-00503-EJL-CWD, 2013 WL 5818549 (D. Idaho Oct. 28, 2013) (applying California choice of law rules after removal and inter-district transfer).

271. *Id.* at *3. The plaintiff alleged that his primary residence and domicile were in California. *Id.* He also owned a restaurant and lived in Idaho. *Id.* While the parties disputed the issue of permanent residence and domicile, the court found that the issue was “not

an obvious interest in providing sufficient compensation to its injured residents, but Idaho had no obvious interest in applying its loss-limiting rule to nonresidents. Indeed the Idaho Supreme Court had even explained that the purpose of the Idaho caps was to reduce the cost of insurance for Idaho residents.²⁷² Nevertheless, the federal court created a true conflict by suggesting the Idaho caps might further benefit Idaho residents by facilitating the availability of products or lowering their cost.²⁷³

The court then relied on language in *McCann* to convert loss-shifting policies into a conduct-regulating policy. It followed *McCann* in reasoning that a law that lowered liability would provide a more favorable economic environment for business generally, and from this it reasoned that the state had a legitimate interest in extending such a defense to nonresident businesses in order to attract out-of-state businesses.²⁷⁴ It distinguished California cases holding that the place of the wrong has no interest in applying its loss-shifting law to disputes involving nonresidents.²⁷⁵ It insisted that the place of the accident was not “merely fortuitous” in this case because the plaintiff owned a restaurant and second residence in Idaho, was visiting the state to make repairs to the restaurant, and had bought the flashlight in Idaho.²⁷⁶ In effect the location of the tort by itself created a true conflict:

The issue in this case [was] not solely the compensation of a California resident for injuries sustained in an accident, but also Idaho’s interest in striking a balance between tort recovery and a favorable business climate. By entering Idaho, living here, and considering himself a resident even though he considers California his “permanent” home [and the court did not find to the contrary],

material” to its disposition of the case. *Id.* at *4. Hence, the decision would be valid even if the plaintiff was domiciled in California.

The opinion explains that the plaintiff purchased the flashlight in Idaho and that it was manufactured and marketed by the defendant. *Id.* It does not explain where the manufacturing occurred; nor does it identify the source of the defective component, lithium batteries, that caused the explosion. *Id.*

272. *Id.* at *8 (citing *Kirkland v. Blaine Cnty. Med. Ctr.*, 4 P.3d 1115, 1121 (Idaho 2000)).

273. *Id.* at *9.

274. *Id.* The court observed: “In [*McCann*] . . . the California Supreme Court held that, in focusing on the respective residences of the parties, the appellate court ignored Oklahoma’s interest in having local law applied to activities conducted within the state.” *Id.* at *10 (citing *McCann v. Foster Wheeler LLC*, 225 P.3d 516, 531 (Cal. 2010)).

275. *Id.* at *11 (citing *Kasel v. Remington Arms Co.*, 101 Cal. Rptr. 314 (Ct. App. 1972); *Browne v. McDonnell Douglas Corp.*, 504 F. Supp. 514 (N.D. Cal. 1980)).

276. *Sabo*, 2013 WL 5818549, at *12.

[the plaintiff] voluntarily exposed himself to the risks of Idaho and its laws.²⁷⁷

Having established a true conflict, the court readily found that Idaho's pro-business development interest would be more seriously impaired. While appearing to engage in comparative impairment analysis, the court gave decisive weight to the place of the tort. On the one hand, it insisted that Idaho's pro-business policy applied "with equal force" to nonresident defendants. On the other, it concluded that the plaintiff's domicile in California should not result in displacing Idaho law.²⁷⁸ The place of the tort simultaneously created a local interest in applying local law while reducing the potential impairment of California interests.²⁷⁹ Under the elaborate analytic steps of comparative impairment, the court created and discounted state interests in such a way that the law of the place of the wrong will always apply—at least when it provides a defense for business defendants

A return to territorial rules appears in particularly sharp form in *Hill v. Novartis Pharmaceutical Corporation*,²⁸⁰ where a California citizen

277. *Id.* (citing *Castro v. Budget Rent-A-Car Sys., Inc.*, 65 Cal. Rptr. 3d 430 (Ct. App. 2007)).

278. *Id.* at *13.

279. *Id.* at *13 ("California decisions have adopted a restrained view of the scope or reach of California law with regard to the imposition of liability for conduct that occurs in another jurisdiction and that would not subject the defendant to liability under the law of the other jurisdiction.") (quoting *McCann*, 225 P.3d at 535).

280. No. 1:06-CV-00939-AWI-DLB, 2012 WL 967577 (E.D. Cal. Mar. 21, 2012). The decision preceded *Scott v. Ford Motor Company*, 169 Cal. Rptr. 3d 823 (Ct. App. 2014), in which the operator of a car repair business in California contracted mesothelioma after exposure to asbestos in Ford Motor Company products. The trial court applied Michigan law and prevented the jury from considering a claim for punitive damages available under California law. *Scott*, 169 Cal. Rptr. 3d at 825. The court of appeal reversed, holding that Michigan had no interest in applying its policy against non-compensatory damages to claims based on defective products marketed in California. *Id.*

The court of appeal found that the case presented a false conflict because Michigan's policy against punitive damages reflected local concerns about limiting jury discretion that were not implicated in litigation in other court systems. *Id.* at 833–34. The court rejected the argument that the limitation of liability advanced a pro-business economic interest. *Id.* at 833 n.9.

But, the court also opined that, even if Michigan's policy was designed to protect Michigan businesses from excessive liability, "the state would have no legitimate interest in imposing that intent in California." *Id.* at 835. The court similarly rejected the argument that Michigan's law should govern because of the state's interest in regulating consequences of conduct in Michigan. *Id.* at 836. The court relied in part on the lack of evidence that conduct-regulation was a goal of the Michigan rule precluding punitive damages. *Id.* More obvious is the fact that, if conduct regulating, the state interest stops at the state line and does not extend to sickness caused in California. *Id.*

allegedly injured in California brought a product liability claim against a New Jersey manufacturer. The manufacturer argued that the issue of punitive damages should be governed by New Jersey law because New Jersey was the place where corporate employees made decisions that led to marketing the product and resulting injuries in California.²⁸¹ The federal court applying California choice of law rules rejected the argument and correctly concluded that California law must govern. But, instead of doing so because applying the law of the place of manufacture or design would frustrate California's safety and regulatory goals, the court engaged in a search for the proper territorial rule. Its search was further complicated by the "general interest in ensuring predictability of result" acknowledged in *McCann*.²⁸² In response to defense arguments that New Jersey law should apply as the law of the place of conduct, the court responded that the proper place of conduct was not New Jersey but California, because some conduct, including marketing and failure to warn, occurred in California.²⁸³ Finally, the court announced the rule that the place of the wrong has the predominant interest in applying its law and defined the place of the wrong as the "the state where the last event necessary to make the actor liable occurred."²⁸⁴

Territorial values also appeared ascendant in *Liberty Synergistics, Incorporated v. Microflo Limited*.²⁸⁵ In that case, a corporate citizen of California commenced a malicious prosecution action in California against non-California corporations that had previously sued it in New York.²⁸⁶ In resolving the true conflict,²⁸⁷ the federal court concluded that

281. New Jersey law limited punitive damages to the greater of \$350,000 or five times the amount of compensatory damages. *Hill*, 2012 WL 967577, at *2 (quoting N.J. STAT. ANN. § 2A:15-5.14(b) (2006)).

282. *Id.* at *6 n.4 (citing *McCann*, 225 P.3d 516).

283. *Id.* at *7.

284. *Id.* (quoting *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 593 (9th Cir. 2010), and citing *McCann*, 225 P.3d 516) (internal quotation marks omitted).

The Seventh Circuit succumbed to a similar fallacy in reasoning that because a tort claim only arises *when* the injury was sustained that the claim therefore arises in the place *where* it was sustained. *Chang v. Baxter Healthcare Corp.*, 599 F.3d 728, 734 (7th Cir. 2010) (citing *McCann*, 225 P.3d 516). This is the correct result because it is the interpretation of the California borrowing statute by California courts, not because the "tort occurred in Taiwan" as the place of the wrong. As the Seventh Circuit correctly observed, California law would apply in the absence of the borrowing statute because the case presented a false conflict: California had no interest in applying its longer limitations period. *Id.* This would be true irrespective of the country of injury for a legal issue that was not conduct regulating.

285. No. CV 11-0523(SJF)(ETB), 2011 WL 4974832 (E.D.N.Y. Oct. 19, 2011).

286. Both state actions were removed; the first resulted in a stipulated dismissal, and the second was transferred to the Eastern District of New York, which applied California choice of law rules. *Id.* at *2-3. Although the defendants moved to strike the

New York law governed as the place with the predominant interest in regulating conduct and also as the place of conduct on which the defendant had “a right to rely.”²⁸⁸

C. Class Action Cases

Some of the most extreme forms of territorial reasoning emerge in federal court decisions holding that California law cannot govern nationwide class actions. In *Mazza v. American Honda Motor Company*, the Ninth Circuit held that California choice of law rules would not support the application of California consumer protection and other laws to claims by non-California residents who bought products outside California.²⁸⁹ First, the court found material differences between the law of California and other states.²⁹⁰ Then, it reasoned that the law in each state reflected a careful balancing between pro-consumer compensatory policies and pro-business development limitations of excessive liability.²⁹¹ Further reasoning that foreign states would have their interest in precisely fixing the balance of liability most impaired by applying California law, the Ninth Circuit concluded that California law could not govern all claims under the state’s comparative impairment approach.²⁹² To bolster this reasoning, the circuit emphasized that *McCann* had recognized the predominant interest of the place of conduct in applying its law.²⁹³ It read *McCann* as defining the “place of the wrong” as “the

claim under a defense provided by a California statute designed to protect free speech and encourage litigation, the trial court treated the choice of law as a choice between California and New York law of malicious prosecution—under which New York required more elements and thus provided a greater measure of protection to defendants. *Id.* at *1, *9.

287. It is not clear there actually was a true conflict if California’s statute was designed to promote free litigation by all parties (including nonresidents) and if New York’s more onerous elements were designed to protect New York residents.

288. *Liberty Synergistics*, 2011 WL 4974832, at *10 (citing *McCann*, 225 P.3d at 533–35).

289. *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 591 (9th Cir. 2012).

290. California did not require either scienter or reliance, but some other states did. *Id.* States also differed in the remedies available and in the elements required for the common law unjust enrichment claim. *Id.*

291. *See id.* at 591–92 (finding trial court erred in finding false conflict by denying state interest in limiting recovery by state’s residents because states also have pro-business interest in limiting liability). Judge Nelson dissented, contending in part that the majority failed to identify any concrete state interests in the application of state law limiting liability. *See id.* at 598 (Nelson, J., dissenting).

292. *Id.* at 593 (majority opinion).

293. *Id.* The Ninth Circuit did not consider whether any of the materially different laws were conduct regulating but, like *McCann*, assumed that any pro-business development defense was conduct regulating. *See id.*

state where the last event necessary to make the actor liable occurred.”²⁹⁴ This definition occurs nowhere in *McCann* but just happens to be identical verbatim to the definition of the *First Restatement*.²⁹⁵

Lower federal courts have routinely followed *Mazza* in refusing to certify nationwide class actions where claims arise in different states with laws that potentially yield different outcomes.²⁹⁶ For example, in *Gianino v. Alacer Corporation*,²⁹⁷ plaintiffs sought to certify a nationwide class of consumers asserting claims under California law against a California manufacturer.²⁹⁸ Although corporate decisions involving allegedly false marketing claims occurred in California,²⁹⁹ the trial court found that there were material differences between the laws of California and other states.³⁰⁰ Without separately considering whether states had an interest in applying their more or less restrictive laws, the court reasoned that because the differences between state laws could affect outcomes, California’s choice of law rules would not apply California law

294. *Id.* at 593 (citing *McCann v. Foster Wheeler LLC*, 225 P.3d 516, 531 (Cal. 2010)). The *McCann* opinion, at the place cited, merely established that Oklahoma had an interest in applying its law and that this finding was strengthened by plaintiff’s theory that the defendant failed to warn where the failure to warn occurred in Oklahoma. *McCann*, 225 P.3d at 531.

295. FIRST RESTATEMENT, *supra* note 1, § 377 (“The place of wrong is in the state where the last event necessary to make an actor liable for an alleged tort takes place.”). While employing language deriving from the *First Restatement*, neither *Mazza* nor any court following it has cited the *First Restatement*. See *Gianino v. Alacer Corp.*, 846 F. Supp. 2d 1096, 1100–02 (C.D. Cal. 2012).

296. In addition to *Gianino*, discussed *infra* notes 297–306, see *Holt v. Globalinx Pet LLC*, No. SA CV 13–0041 DOC(JPRx), 2014 WL 347016, at *1 (C.D. Cal. Jan. 30, 2014) (refusing to certify nationwide class in tainted dog food case); *Astiana v. Kashi Co.*, 291 F.R.D. 493, 510 (S.D. Cal. 2013) (refusing to certify nationwide class in allegedly false labeling of “all natural” product where state consumer laws presented same sorts of differences as those in *Mazza*); *Thurston v. Bear Naked, Inc.*, No. 3:11–CV–02890–H (BGS), 2013 WL 5664985, at *12 (S.D. Cal. July 30, 2013) (containing same language verbatim as *Astiana* in refusing to certify a nationwide class in false labeling of all natural product case); *Horvath v. LG Elecs. Mobilecomm USA, Inc.*, No. 3:11–CV–01576–H–RBB, 2012 WL 2861160, at *3 (S.D. Cal. Feb. 13, 2012) (refusing to certify a nationwide class in defective cellphone case); *Schwartz v. Lights of Am.*, No. CV 11–1712–JVS(MLGx), 2012 WL 4497398, at *10 (C.D. Cal. Aug. 31, 2012) (refusing to certify a nationwide class in false advertising case involving LED lamps).

297. 846 F. Supp. 2d 1096 (C.D. Cal. 2012).

298. *Id.* at 1099. The defendant’s corporate headquarters were in California, a large number of the class members resided in California, and almost half of the products were manufactured in the state. *Id.* at 1103.

299. *Id.*

300. *Id.* at 1100–01. State laws differed regarding the elements of injury, reliance, and knowledge, as well as regarding the procedures for asserting claims and the remedies available. *Id.*

to all claims.³⁰¹ “The Court must recognize the importance of federalism and every state’s right to protect its consumers and promote those businesses within its borders.”³⁰² Despite the fact that manufacturing and coordination of marketing occurred in California, the court found that California’s interest in applying California law was attenuated when sales occurred outside the state to non-California residents. The court announced: 1) that California recognizes the place of the wrong as having the predominant interest in applying its law;³⁰³ 2) that “California considers the geographic location of the omission or where the misrepresentations were communicated to the consumer as the place of the wrong;”³⁰⁴ and 3) that California defines the place of the wrong as the place where “the last events necessary for liability” occur.³⁰⁵ In a revealing expression of obiter dictum, the court noted not only that California law would not apply to all claims, but that “[e]ach class member’s claims instead must be governed by and decided under the law of the state in which the transaction took place.”³⁰⁶

Responding to bold defense strategies, federal courts have warned against reading *Mazza* as an absolute prohibition against certifying any nationwide consumer class action.³⁰⁷ In one case, a federal judge was

301. *Id.* at 1103.

302. *Id.* (citing *Mazza v. Am. Motor Co.*, 666 F.3d 581, 593 (9th Cir. 2012)).

303. *Gianino*, 846 F. Supp. 2d at 1103.

304. *Id.* (citing *McCann v. Foster Wheeler LLC*, 225 P.3d 516, 516 (Cal. 2010)); *see supra* note 284 for the source of this claim and for a discussion of the error in confusing the time when a claim arises with the place where it arises.

305. *Id.* at 1103 (quoting *Mazza v. Am. Honda Motor Co., Inc.*, 666 F.3d 581, 593–94 (9th Cir. 2012)). All that was required to deny certification in *Gianino* was to find that common questions of law did not predominate. Fed. R. Civ. P. 23(b)(3); *Gianino*, 846 F. Supp. 2d at 1103. The court did not convincingly establish lack of predominance of California law because it did not explain concretely how the failure to apply parties’ home-state laws would frustrate the governmental interests of those states. *See Gianino*, 846 F. Supp. 2d at 1104.

306. *Gianino*, 846 F. Supp. 2d at 1103. A similar erroneous observation revealing the force of territorial conviction appears in *Schwartz*: “California cannot create laws that reach conduct occurring in other states, even if a California corporation is the culprit.” *Schwartz v. Lights of Am.*, No. CV 11–1712–JVS(MLGx), 2012 WL 4497398, at *7 (C.D. Cal. Aug. 31, 2012). *But see* *Alaska Packers Ass’n v. Indus. Accident Comm’n*, 294 U.S. 532 (1935) (holding state could apply workers compensation law where employee was injured out of state). The Ninth Circuit in *Mazza* made clear that the application of California law to all claims would be constitutional where the defendant was a California business and coordinated its advertising campaign from California. 666 F.3d at 590.

307. *See In re POM Wonderful LLC Marketing and Sales Practices Litig.*, No. ML 10–02199 DDP (RZx), 2012 WL 4490860 (C.D. Cal. Sept. 28, 2012) (rejecting argument that a nationwide consumer class may never be certified under *Mazza* and granting certification of nationwide class in case involving false health claims where manufacturer, a California business that developed marketing strategies in California and produced its product in

obliged to remind the defendant that the mere occurrence of a loss outside California did not warrant reversal and that the defendant still needed to show the existence of a conflict between the laws of different jurisdictions.³⁰⁸

Although most decisions after *Mazza* give only cursory attention to the actual laws in conflict or the state interests behind the decisions to deny certification of nationwide classes, one federal court certified a nationwide class action against a California manufacturer for false health claims made in marketing homeopathic products.³⁰⁹ The court found that the defendant's conclusory assertions and citations to other cases failed to meet its burden of a case-specific and factually intensive showing of why some other state's law should displace California law.³¹⁰ Though the defendant identified differences in state laws, it did not show how the differences affected outcomes or how the failure to apply the foreign laws would impair other states' interests.³¹¹ Moreover, the court concluded that California law would normally apply due to defendant's marketing conduct in California.³¹²

California, failed to show that foreign law should apply); *see also* *Forcellati v. Hyland's, Inc.*, No. CV 12-1983-GHK (MRWx), 2014 WL 1410264, at *4 (C.D. Cal. April 9, 2014) ("*Mazza* did not 'categorically rule out application of California law to out-of-state members'" (quoting *Allen v. Hylands, Inc.*, No. CV 12-01150 DMG (MANx), 2012 WL 1656750, at *2 (C.D. Cal. May 2, 2012)). In *Czuchaj v. Conair Corporation*, the court denied a motion to dismiss non-California plaintiffs' claims under California consumer protection law, noting that "California law may be applied to a nationwide class in certain circumstances." No. 13-CV-1901-BEN (RBB), 2014 WL 1664235, *7 (S.D. Cal. Apr. 18, 2014). Conceding that plaintiffs might as well fail to qualify for certification after discovery provided a factual basis for choice of law analysis, the court still concluded that dismissal required a premature choice of law and was thus inappropriate. *Id.* at *9.

308. In *Tasion Communications, Incorporated v. Ubiquiti Networks, Incorporated*, plaintiffs commenced an action on behalf of a putative world-wide class of persons injured by a Canadian company that marketed computer cables unsuitable for outdoor conditions. No. C-13-1803 EMC, 2013 WL 4530470, at *1 (N.D. Cal. Aug. 26, 2013). All the damage apparently occurred in Panama. *Id.* at *2. The defendant moved to dismiss, contending that California law could not govern. *Id.* at *1. In denying the motion, the court observed: "Defendant fails to meet its burden at the first step in the choice of law analysis. It has offered no evidence of the relevant law in Panama, Canada, or any other relevant jurisdiction, and thus has not established that there is any material difference in the relevant law." *Id.* at *12. The court also rejected the assumption that California could have no interest in applying its law, observing that states have an interest in regulating corporate conduct in their borders. *Id.* Finally, the court pointed out that dismissal would not necessarily be required even if California law did not apply. *Id.*

309. *Forcellati*, 2014 WL 1410264, at *1, *13.

310. *Id.* at *2.

311. *Id.* at *2, *3.

312. The court recognized that a state "ordinarily has the predominant interest in regulating conduct" in its territory, *id.* at *3 (quoting *McCann v. Foster Wheeler LLC*, 225 P.3d 516, 530 (Cal. 2010)), and then reasoned that "in a false advertising case the state from

D. Territorialism Without Interest Analysis

Other reported decisions show lower courts reaching reasonable results, but inspection of the opinions reveals that the new emphasis on territorial values leaves the courts without clear guidance and leads to questionable grounds offered in support of the decisions.³¹³ One example is *Deirmenjian v. Deutsche Bank, A.G.*, where the trial court applied California choice of law rules and held that claims by heirs of persons who had property expropriated during the Armenian genocide were

which the misrepresentation was disseminated often has the predominant interest.” *Id.* at *3 (citing *Wershba v. Apple Computer, Inc.*, 110 Cal. Rptr. 2d 145 (Ct. App. 2001)).

313. *Fremantlemedia N. Am. Inc. v. Hilb, Rogal & Hobbs*, No. B211270, 2010 WL 1077909, at *1, *8 (Cal. Ct. App. Mar. 25, 2010) (affirming the trial court’s dismissal of action under California statute of limitations, but rationalizing that the court was obligated to apply California law as the place of contract in absence of choice of law provision under a general law directing courts to interpret contract under the law of the place of performance, or, if none indicated in the contract, the law of the place where made) (citing CAL. CIV. CODE § 1646 (enacted in 1872)). For this novel approach, the court cited *McCann* for the principle that California recognizes that a jurisdiction has the predominant interest in regulating conduct in its territory. *Id.* at *8.

In *Carlton v. Hertz Corporation*, the court concluded reasonably that the case presented a false conflict because California had strong interests in applying its limitations law to dismiss stale claims and Florida had no interest in applying its law. No. CV 12–07178 JGB (MRWx), 2013 WL 394894, at *4 (C.D. Cal. Jan. 28, 2013). Even so, the court did not adequately rebut the plaintiff’s argument drawn from *McCann* that Florida had an interest in establishing a rule of law to govern liability for conduct in its borders. *See id.* at *3. The *McCann* decision forestalled the correct response—that limitations law is not conduct regulating and that businesses do not rely on it. The court instead distinguished *McCann* on its facts (including the fact that the case did not arise in Florida) and on the basis that the law in *McCann* “limited the liability” of the actor rather than extended it. *Id.* at *3.

The court in *Cortez v. Global Ground Support, LLC*, recognized instinctively that a manufacturer’s attempt to rely on a defense based on the place of design and manufacture was so weak it “border[ed] on frivolous.” No. 09–4138 SC, 2010 WL 5173861, at *4 (N.D. Cal. Dec. 15, 2010). But, the court was wrong in finding that Kansas had no legitimate interest in the application of its law. *Id.* It is arguable that Kansas had a strong interest in applying its shorter law to discourage stale claims, and it had an interest in limiting the substantive liability of Kansas manufacturers for product liability after the expiration of the useful safe life of products—such an interest certainly extended to the defendant, which maintained its principal place of business in Kansas even before *McCann* found that states had an interest in applying business-friendly statutes of repose to foreign businesses. The correct analysis should have led the *Cortez* court to recognize that California had a powerful interest in applying tort law to regulate workplace safety and that permitting another state to export its weaker protections would substantially undermine its interest. Instead, the court distinguished *McCann* on its facts, including the fact that the plaintiff there was not a resident of California, and also found that *McCann* required application of California law because that was where the plaintiff was injured. *Id.* at *3, *4.

barred by foreign statutes of limitations.³¹⁴ After an extended discussion, quoting much of the language of *McCann* emphasizing the predominant interest of the place of conduct, the court concluded: “*McCann* is indistinguishable from this case. Applying *McCann*’s reasoning, California’s interest is subordinate to Turkey’s.”³¹⁵ While the application of the shorter foreign statutes was reasonable,³¹⁶ the case differs significantly from *McCann* where the Supreme Court of California expressly found that the goal of the foreign law was to encourage improvements to real property, and that this goal would be advanced by applying the foreign statute of limitations. In contrast, the shorter limitations law of Turkey was not designed to promote crimes against humanity.

If not decisive, the place of the wrong tipped the balance in *In re TFT-LCD (Flat Panel) Antitrust Litigation*³¹⁷ where the federal court found a true conflict between California and Texas unfair competition laws. On the one hand, California had deterrent and compensatory interests in applying its law requiring full disgorgement of profits from illegal price-fixing; on the other hand, Texas had an interest in preventing duplicative litigation that supported applying its law preventing claims by indirect purchasers.³¹⁸ The court held that Texas law should apply because, though “a close question,” it found that Texas interests would be more impaired.³¹⁹ In doing so, it emphasized that “much, perhaps most, of the actionable conduct in this case took place in Texas.”³²⁰

E. Restrained Considerations of Territorial Interests

In *Munguia v. Bekins Van Lines*,³²¹ a Bekins Van Lines tractor trailer en route from California to Utah overturned in Nevada, blocking the

314. *Deirmenjian v. Deutsche Bank, A.G.*, No. CV 06–00774 MMM (CWx), 2010 WL 3034060, at *1, *8, *16 (C.D. Cal. July 30, 2010).

315. *Id.* at *13, *14.

316. The foreign statutes were arguably prescribed by the California borrowing statute. *See supra* note 132 and accompanying text. If the borrowing statute did not apply, then under California’s interest analysis, the case appears to present a false conflict: California would have no interest in applying its law in favor of persons who became residents after the wrongful conduct, while Turkey and Germany would have loss-shifting interests in the application of their limitations’ law.

317. No. M 07–1827 SI, 2013 WL 4175253, at * 3 (N.D. Cal. July 11, 2013).

318. *Id.* at *2.

319. *Id.* at *3.

320. *Id.*

321. Nos. 1:11–cv–01134–LJO–SKO, 1:11–cv–01675–LJO–SKO, 2012 WL 5198480 (E.D. Cal. Oct. 19, 2012) (findings and recommendation of magistrate judge).

interstate.³²² Two cars, each with two occupants, collided with the overturned truck.³²³ The defendant corporation's principal place of business was in Illinois, and the truck driver was a resident of Illinois.³²⁴ Three of the occupants of the cars were California residents at the time of the collision; the fourth was a resident of Nebraska.³²⁵

The parties sought a preliminary determination of whether the tort claims were governed by California's form of comparative negligence or Nevada's.³²⁶ The magistrate judge reasonably concluded that California law should govern the issue of comparative negligence. The judge found that California has an interest in seeing its residents compensated for their injuries.³²⁷ But, instead of finding a false conflict,³²⁸ the judge followed *Castro*, projected a conduct-regulating interest on the law of the place of the accident,³²⁹ and characterized the case as a true conflict. In struggling to determine which state's interest would be more impaired, the judge acknowledged authority that the place of the wrong has the predominant interest in regulating conduct in its borders.³³⁰ Probably recognizing that applying Nevada law would make little sense, the judge surveyed the fact patterns of California decisions. She sought to limit the territorial principle in *Castro* and *McCann*, observing that in both cases the defendants had some nexus with the foreign states where they were

322. *Id.* at *2.

323. *Id.*

324. *Id.*

325. *Id.* at *4.

326. *Id.* at *2. Under California's pure comparative negligence fault system, a party recovers in proportion to the tortfeasor's fault. *Id.* at *4. Under Nevada's system, a tortfeasor has a complete defense when the plaintiff's fault is greater than the tortfeasor's. *Id.*

327. *Munguia*, 2012 WL 5198480, at *5. This governmental interest does not explain why California has an interest in applying its law to the claim by the Nebraska plaintiff, and the court did not separately consider that issue.

328. It would have been reasonable to find that Nevada's form of comparative negligence was loss shifting, not conduct regulating (the rule was not designed to promote a government interest in promoting risk-taking by persons in Nevada so long as the risk did not exceed 50% of the risk incurred by injured persons). This would have led to the application of California law for California residents because there was a false conflict; and for the Nebraska resident because it presented a so-called unprovided-for case where no state had an interest. *See generally* HOFFHEIMER, *supra* note 16, at 193 n.1 (discussing nomenclature of unprovided-for case and application of forum law in cases where no state has an interest in application of its law.).

329. "Nevada's interest . . . arises from the fact that the accident occurred in Nevada and Nevada 'has presumptive interest in controlling the conduct of persons on its roadways.'" *Munguia*, 2012 WL 5198480, at *5 (quoting *Castro v. Budget Rent-A-Car Sys., Inc.*, 65 Cal. Rptr. 3d 430, 442 (Ct. App. 2007)).

330. *Id.*

conducting business.³³¹ Lacking such “nexus,” she concluded that the defendant did not get the benefit of Nevada’s law.³³²

At least one court disregarded or discounted the territorial principle in a case where it arguably applied. In *Wehlage v. EmpRes Healthcare, Incorporated*,³³³ the court held that Washington law applied to efforts to pierce the corporate veil of a Washington corporation and held corporate investors personally liable for torts of the corporation committed in California.³³⁴ The court applied the law of the place of incorporation instead of the place of conduct or injury, reasoning that California’s interests were adequately protected by Washington’s own doctrine of piercing corporate veils.³³⁵

F. The Return to Formalism

The troubling consequences of applying presumptive territorial rules to all issues are illustrated by *Rodriguez v. Mahony*.³³⁶ In that case, a priest who had assaulted twenty-six children in California was permitted by California church officials to return to Mexico.³³⁷ After returning to

331. *Id.* at *9.

332. *Id.* at *10–11. The court’s lengthy and sensitive discussion of the cases results in a sensible new choice of law rule that produces a sound result, but it is not entirely consistent with the territorial reasoning announced by the California appellate courts. Moreover, it is difficult to see why providing commercial transportation on a state’s roads is not a sufficient nexus to support application of the territory’s tort law—supposing always that the law is conduct regulating (which it is not).

In sum, the judge’s effort to preserve the core of California’s comparative impairment approach while grappling with the implications of *Castro* and *McCann* in applying that approach results in an unnecessarily lengthy opinion supporting a reasonable solution that may not ultimately either settle the matter or withstand appellate scrutiny.

333. *Wehlage v. EmpRes Healthcare, Inc.*, 821 F. Supp. 2d 1122 (N.D. Cal. 2011).

334. *Id.* at 1132.

335. *Id.* at 1130.

336. No. CV 10-02902-JST JEMX, 2012 WL 1057428 (C.D. Cal. Mar. 26, 2012). The court confronted the dilemma of determining whether the place of criminal child abuse (Mexico) or the place where the named defendants aided and abetted the criminal’s flight and evasion of justice (California) was the place where the action arose for purposes of the California borrowing statute. Finding the answer uncertain, the court applied governmental interest analysis and then found that Mexico had a stronger interest in applying its law under the principle that a jurisdiction ordinarily has the predominant interest in regulating conduct in its borders. *Id.* at *6–11 (The court also cited Supreme Court authority for the presumption against extraterritorial application of federal statutes, which is not relevant). Curiously, the court did not appear to realize that the same uncertainty as to the place for purposes of the borrowing statute applied to the determination of the location of the conduct.

337. *Id.* at *1–2. Church officials had received repeated reports of rapes and other criminal assaults from January 27, 1987 to January 8, 1988. On January 9, 1988, Monsignor Curry confronted the abusive priest. The priest told the monsignor that he was

Mexico, the priest criminally assaulted other victims.³³⁸ In 1997, the priest raped and sexually assaulted a twelve-year-old Mexican child.³³⁹ In 2010, this victim commenced a civil action in California against California church officials.³⁴⁰ The defendants moved to dismiss under the shorter Mexican statutes of limitations; the plaintiff responded that California's statute should apply under which a plaintiff may bring a lawsuit for childhood sexual abuse up to eight years after reaching adulthood.³⁴¹

Like the *McCann* court, the district court was uncertain whether the California borrowing statute applied³⁴² and so applied California's choice of law rules. Like the *McCann* court, it found that the foreign limitations law applied.³⁴³ But, it did so almost entirely because it found the "gravamen of Plaintiff's case" to be the sexual abuse that occurred in Mexico, and it asserted that Mexico had the predominant interest in regulating conduct in its borders.³⁴⁴

It would be hard to imagine an analysis that departs more radically from first principles of interest analysis. The search for the "gravamen" is authorized by neither traditional territorial rules nor by interest analysis.³⁴⁵ The court's passing attention to governmental interests is unconvincing and inconsistent. On the one hand, California, as the court recognized, has a powerful interest in applying its longer statute of limitations because that longer statute is expressly designed to provide a greater measure of protection for victims of childhood sexual abuse and to prevent the unfair protection of persons responsible for facilitating the

going to return to Mexico. No one in the church attempted to stop him or inform law enforcement before he left the country.

338. *Id.* at *2.

339. *Id.*

340. *Id.* at *3.

341. *Id.* at *5 (citing CAL. CIV. PROC. CODE § 340.1(a) (2003)).

342. *Rodriguez*, 2012 WL 1057428, at *7. The court rightly observed that *McCann* expressly refused to find that a claim arises for purposes of the borrowing statute where the damages are sustained. *Id.*

The court did not observe that the facts were further distinguishable from *McCann*'s in that the place of wrongful conduct was California and that the conduct was intentional and possibly criminal. As noted below, the court also did not observe that the case was distinguishable in that California's extraordinarily long limitations period was designed expressly to deter conduct and prevent wrongdoers from escaping liability due to the reluctance of children or their parents to assert their rights.

343. *Id.* at *7.

344. *Id.* at *10–11 (citing *McCann v. Foster Wheeler LLC*, 225 P.3d 516 (Cal. 2010)).

345. The court's deployment of the term seems to illustrate Professor Garner's claim that its usage is frequently "recondite on its own and infelicitously redundant." BRYAN A. GARNER, A DICTIONARY OF MODERN LEGAL USAGE 391 (2d ed. 1995).

abuse.³⁴⁶ In contrast, Mexico would appear to have no conceivable interest in applying its shorter limitations law to claims against California church officials for their conduct in California.³⁴⁷ Nevertheless, the court found that Mexico had an interest solely because it was the sovereign where the last event necessary for the claim occurred:

While the California Defendants' conduct occurred entirely in California, Plaintiff's injury occurred entirely in Puebla. Therefore, the tort for which Plaintiff seeks to hold the California Defendants liable was completed and accrued in Puebla. *See City of Vista v. Robert Thomas Secs., Inc.*, 84 Cal. App. 4th 882, 886–87 (2000) (“When damages are an element of a cause of action, the cause of action does not accrue until the damages have been sustained [W]hen the wrongful act does not result in immediate damage, the cause of action does not accrue prior to the maturation of perceptible harm.”). In light of these facts, Puebla's interest would be most significantly impaired by a failure to apply its statute of limitations to Plaintiff's claims.³⁴⁸

The court's analysis led to a second error on top of its assertion of a nonexistent Mexican interest. The court employed territorial reasoning to reduce California's interest in applying its longer statute. The court found that California's interest was “weak” because the claim was brought by a victim with no connection to California and based on abuse that did not occur in California.³⁴⁹ In doing so, the court overlooked California's interest, which it had previously acknowledged, in preventing persons who engaged in wrongful conduct in California from escaping liability.³⁵⁰

346. *Rodriguez*, 2012 WL 1057428, at *9.

347. The court committed an elementary error in inferring from the fact that Mexico had an interest in applying its law. *Id.* at *10. Mexico would apply its statute of limitations presumably because the matter is procedural and governed by forum law. But, to the extent the short limitations protects Mexican courts from stale claims or even Mexican defendants from extended liability, the Mexican interest is not affected by a California court applying a longer statute in claims against California residents.

348. *Id.* at *10.

349. *Id.* at *11. This can be questioned to the extent that legislative evidence of broad remedial goals of the longer statute was not limited to California residents.

350. The court rephrased the interest more narrowly as a California interest in deterring conduct in California. *Id.* at *11. It is debatable how much the longer limitation period deters conduct. However, it does not seem debatable that—if it does deter such conduct—the deterrence value would be significantly eroded if potential defendants with

b. Presumptive Confusion

Sullivan's revival of the 1916 presumption against the extraterritorial application of California statutes would seem to promise the benefit of greater certainty and reduce the work of the courts. Yet, lower courts applying the presumption do not seem to have realized this benefit, and they are divided over the meaning of the presumption for pleading requirements.³⁵¹

For a number of courts, the *general* presumption provides no new certainty and no easier route to a decision because, like *Sullivan*, those courts apply it to claims under the California Unfair Competition Law³⁵² or other statutes that had already been construed before *Sullivan* to extend only to claims based on conduct in California.³⁵³ For other courts, the presumption permits dismissal of claims so weak that they might have been readily disposed of on the merits or on other grounds.³⁵⁴

knowledge of criminal conduct could escape liability by sending criminals to jurisdictions with short statutes of limitations.

351. *Compare* *Czuchaj v. Conair Corp.*, No. 13-CV-1901-BEN (RBB), 2014 WL 1664235, at *9 (S.D. Cal. April 18, 2014) (holding that dismissal of nationwide consumer class action was premature), *with* *Fontenberry v. MV Transportattion, Inc.*, 984 F. Supp. 2d 1062, 1069, (E.D. Cal. Nov. 25, 2013) (dismissing class action claims for unpaid overtime under California law where complaint did not allege payment or nonpayment of nonresidents occurred in California).

352. While citing this general presumption, a number of lower court decisions are based on a restrictive construction of the scope of protections under the state's Unfair Competition Law. *See, e.g.,* *Stocco v. Gemological Inst. of Am.*, No. 12-CV-1291 WQH (DHB), 2013 WL 76220, at *12 (S.D. Cal. Jan. 3, 2013) (dismissing UCL claim where nonresidents allegedly injured in Italy did not allege any unfair business practices in California); *Gentges v. Trend Micro Inc.*, No. C 11-5574 SBA, 2012 WL 2792442, at *6 (N.D. Cal. July 9, 2012) (applying general presumption to bar claims brought under state unfair competition and consumer protection statutes); *McKinnon v. Dollar Thrifty Automotive Group, Inc.*, No. 12-4457 SC, 2013 WL 3357929, at *18–20 (N.D. Cal. July 3, 2013) (barring claims under UCL where wrongful conduct occurred in Oklahoma but permitting claims where fraudulent scheme included conduct in California and loss in California); *Red v. Kraft Foods, Inc.*, No. CV 10-1028-GW(AGRx), 2011 WL 4599833, at *17 (C.D. Cal. Sep. 29, 2011) (holding that some manufacturing and advertising in California was insufficient to support application of California Unfair Competition and consumer protection law to plaintiff class including claims with no nexus with the state).

353. *See* *Diamond Multimedia Sys., Inc. v. Superior Court*, 968 P.2d 539 (Cal. 1999) (cited as authority for general presumption against extraterritorial application in *Sullivan v. Oracle Corp.*, 254 P.2d 237, 248 (2011)); *see also* *Norwest Mortgage Inc. v. Superior Court*, 72 Cal. App. 4th 214, 222 (Cal. App. 1999) (holding no claim arises under Unfair Competition Law where non-California residents injured by non-California resident by conduct outside California).

354. The court in *Azeltine v. Bank of America* held that a non-California resident failed to state a claim for a violation under the California Business and Professional Code for alleged misconduct outside California by the non-California defendant. No. CV 10-218-

Applying the presumption to new areas of law like securities regulation may have reached the wrong result.³⁵⁵ And, the judicial failure to extend labor protection to workers outside the state may ultimately undermine the statutory protection for in-state workers.³⁵⁶

Finally, the judicial application of the presumption reveals an enviable optimism in the ability to fix the location of relevant conduct outside California. Yet, clever counsel will argue that a telecommuter providing services from outside the state to a California employer is working “in” California³⁵⁷ or that a fraudulent scheme organized outside the state that leads to the dumping of goods in the state constitutes fraudulent conduct “in” California. The presumption against extraterritoriality commits courts to a future of deciding cases based on localizing one element in the dispute. Reported decisions are beginning to suggest that this may simply shift the opportunities for manipulating outcomes. The new challenges are on view in *Gentges v. Trend Micro Incorporated*.³⁵⁸ There, a California corporation produced computer software and marketed it through a website operated in its name. A class of out-of-state purchasers of its products alleged they were not provided

TUC-JGZ(HCE), 2011 WL 7272309, at *6 (D. Ariz. Dec. 16, 2011). While it was not clear the plaintiff alleged conduct that violated the California statute, it appears that the statute could not have applied regardless of its territorial scope. *Id.*; see also *Allstate Insurance Co. v. Hague*, 449 U.S. 302, 366 (1981) (due process requires a significant contact or significant aggregation of contacts creating state interests so application of state law is not arbitrary or fundamentally unfair).

355. The Ninth Circuit affirmed the dismissal of state-law claims for securities fraud where the non-California defendant allegedly manipulated the price of securities by certain bidding behavior outside the state. *Anschutz Corp. v. Merrill Lynch & Co.*, 690 F.3d 98, 115 (2d Cir. 2012). The plaintiff, a non-California business, purchased securities in California through a broker, and the court emphasized that the defendant engaged in no unlawful conduct in California. *Id.* at 111–12. While applying the prohibition against extraterritorial application may have reached a satisfactory result in litigation involving auction rate securities, it is by no means clear why there was no illegal conduct “in” the state (supposing the national sale of inflated securities was part of the scheme to defraud), and it is unclear why California law should not reach a simpler scheme to defraud aimed at a national market where persons are purchasing in the state. Indeed, the Second Circuit cited (and rejected) case law and academic authority that suggested California law might apply. *Id.* at 112 n.17.

356. *Campagna v. Language Line Services, Inc.*, No. 5:08-CV-02488-EJD, 2012 WL 15655229, at *2, *5, *9, *11 (N.D. Cal. May 2, 2012) (holding that California business providing interpretation services from California was not required to pay out-of-state employees for “necessary expenses” where it employed interpreters who worked from their homes across the country). The failure to require a California employer to pay comparable expenses to telecommuters in other states would provide a powerful incentive to replace California employees, thus frustrating the state goal of requiring fair compensation including necessary expenses.

357. See *id.* at *2.

358. No. C 11-5574 SBA, 2012 WL 2792442 (N.D. Cal. July 9, 2012).

information required by California's Unfair Competition Law and that this led to the automatic renewal of their purchases without their consent.³⁵⁹ Consumers completed their purchases by linking through the website to an online store.³⁶⁰ Throughout the transaction, the defendant's *www.trendmicro.com* name remained constant, but by linking to the online store, consumers were routed to a server located in Minnesota, operated by separate non-California corporations under contract with the California corporation's parent corporation.³⁶¹ Applying the presumption against extraterritoriality, the judge dismissed claims because none of the plaintiffs resided in California and "none of the conduct that form[ed] the basis of this action arose here."³⁶²

V. CONCLUSION

In the 1950s, California decisions helped spark the judicial "revolution" that rejected traditional territorial rules for resolving conflict of laws. By the 1970s, California courts had become the internationally preeminent proponents of the comparative impairment methodology for choice of law.

But, California judicial decisions since 2000 display a marked turn to territorial principles as the decisive consideration in resolving conflict of laws. In cases like *Tucci*, *Castro*, and *McCann*, the state's appellate courts ascribe to states where events occur the predominant interest in applying their own law—even when that law does not seek to regulate conduct.³⁶³ This effectively converts every conflicts case into a true conflict and tends in turn to resolve true conflicts by applying the law of the place where the events occurred. Federal courts and lower state courts following *McCann* have gone far towards returning to the territorial formalism of the *First Restatement*, applying the law of the place of the last event necessary for a cause of action without any meaningful evaluation of state interests.³⁶⁴ The territorial turn reached

359. *Id.* at *1.

360. *Id.*

361. *Id.* at *5.

362. *Id.* at *6.

363. This is abundantly clear in a case like *McCann* where the court chose the "business-friendly" law of a state where business was conducted so as to deny recovery even when the pro-business defense was enacted after the conduct in question and thus could not have encouraged it. *See supra* notes 186–93 and accompanying text.

364. Compare FIRST RESTATEMENT, *supra* note 1, §§ 377–78 (directing courts to apply law of "state where the last event necessary to make an actor liable for an alleged tort takes place . . ."), with cases cited and discussed, *supra* at notes 270, 280, 285, 289–306, 317, and 336.

its zenith in *Sullivan* where the Supreme Court of California resurrected a presumption from the era of the Gold Rush that state legislation does not reach beyond the borders of the state.³⁶⁵

Recent California conflicts cases raise more questions than they answer about the future course of choice of law in California. Because of the state's role as a leader in the field, California's territorial turn has significance far beyond the state. Judges, scholars, and practitioners who understand law as the prediction of what courts actually do³⁶⁶—as opposed to what they say they do—will ignore the trend towards territoriality at their peril.

365. See *Sullivan v. Oracle Corp.*, 254 P.2d 237 (2011); see also *supra* text accompanying note 223.

366. Oliver Wendell Holmes, *The Path of the Law*, in OLIVER WENDELL HOLMES, COLLECTED LEGAL PAPERS 167, 167 (1920) (“The object of our study, then, is prediction, the prediction of the incidence of the public force through the instrumentality of the courts.”) (address originally delivered in 1897).