

Shopping for Preference in California

By Edward R. Hugo and Bina Ghanaat

Beaches, mountains, weather, wineries, world class cuisine, and unparalleled diversity. California has everything, including a number of laws that favor asbestos plaintiffs. See, e.g., California Code of Civil Procedure § 2025.295(b)(2) (in mesothelioma and silicosis cases where a licensed physician attests in a declaration that there is substantial medical doubt of the survival of the deponent beyond six months, defendants collectively are limited to a total of 14 hours even if there are 100+ defendants and even though deponent's counsel has unlimited time to examine their client on both direct and re-direct examination, including trial preservation testimony); *id.* § 377.34(b) (“ . . . in an action or proceeding by a decedent's personal representative or successor in interest on the decedent's cause of action, the damages recoverable may include damages for pain, suffering, or disfigurement if the action or proceeding was granted a preference pursuant to Section 36 before January 1, 2022, or was filed on or after January 1, 2022, and before January 1, 2026.”) One law worth shopping for is Code of Civil Procedure 36, California's trial preference statute, which requires courts to set a civil action “for trial not more than 120 days” from the granting of the motion and limits any continuance to “no more than 15 days and no more than one continuance.” To qualify, a plaintiff must be over the age of 70 or provide “clear and convincing medical documentation that concludes that one of the parties suffers from an illness or condition raising substantial medical doubt of survival of that party beyond six months,” or “that the interests of justice will be served by granting this preference.” This has led to an ever-increasing number of out-of-state plaintiffs choosing to file claims in The Golden State. As some defendants have noted, “[t]here is a growing consensus that California has become ‘the courthouse to the world,’ as out-of-state plaintiffs – lured by a perception that there are favorable laws and generous juries – travel here to invoke the state's jurisdiction.” Memorandum in Support of The Colgate-Palmolive Company's Motion to Stay for *Forum Non Conveniens* in *Elaine Adelia Hickey Herman, et al. v. 3M Company, et al.*, Los Angeles Superior Court, Case No. 22STCV32540, at pp. 1:1-4. Forum shopping is problematic under any circumstances, but it is especially problematic now as California courts struggle to work through backlogs created by the COVID-19 pandemic. For more than 30 years, California law has been clear: when resolving *aforum non conveniens* motion pursuant to Code of Civil Procedure section 430.10, “the fact that an alternative jurisdiction's law is less favorable to the litigant than the law of the forum *should not be afforded any weight* . . . provided, however, that *some remedy* is afforded.” (*Stangvik v Shiley, Inc.* (1991) 54 Cal. 3d 744 at 745 (emphasis added).) This is because if “weight is given to the circumstances that the law in the forum state is more favorable to the plaintiff than the one in the alternative jurisdiction,” litigation in the forum state “would increase and further congest already crowded courts.” *Id.* (internal citations omitted). No case since *Stangvik* has altered its holding.

Despite *Stangvik's* holding, plaintiffs who shop for trial preference in California contend that they are entitled to cut the litigation line in front of actual California residents even though (1) they are not current residents of California, (2) they have lived outside of California for the majority of their lives, (3) none of their medical providers are located in California, (4) many of the relevant witnesses are located outside of California, (5) the vast majority of defendants are not residents of, and do not have principal places of business, in California, and (6) plaintiffs' suit is not barred by the statute of limitations in the proposed alternate forum. *Elaine Adelia Hickey Herman, et al. v. 3M Company, et al.*, Los Angeles Superior Court, Case No. 22STCV32540. The problem with the argument "the fact that plaintiffs [in California] can get a really early trial date trumps all else" is that it "open[s] the doors in California for anybody who can sue a defendant in California regardless of whether all other defendants have connections to California." Transcript of hearing re *forum non conveniens* motion in *Elaine Adelia Hickey Herman, et al. v. 3M Company, et al.*, Los Angeles Superior Court, Case No. 22STCV32540 at p. 6 (April 5, 2023).

More troublingly, as recently recognized by the Superior Court of California for the County of Los Angeles in a ruling that was upheld on appeal, such an argument: (See the order denying Plaintiffs' petition for writ of mandate in *Elaine Adelia Hickey Herman, et al. v. 3M Company, et al.*, Los Angeles Superior Court, Case No. 22STCV32540 (Court of Appeal of the State of California, Second Appellate District, Division One, No. B328352).

... seems to then create all kinds of tactics if Plaintiffs know that that's - - if that trumps everything, then Plaintiffs can file in California even if the case really - it makes sense for it to be someplace else and then just say, 'Well, now that we filed in California and we have spent six months or so dealing with all the preliminary stuff and getting discovery, now we can't go to the other state because the plaintiff is about to die.'

And if this is the trump card and - then it has to stay here even if it really makes sense for it to be someplace else, then that allows Plaintiffs to always require it to stay in California. And I didn't see any law that says that that's a factor to consider.

*So, then, why don't all Plaintiffs just file in California, you know, everybody brings their motions and everybody is doing discovery and it takes a while for the motions to make their way through the system and now it's six months later and now we're finally getting to a time - or decisions on these motions and Plaintiff stands up and says, 'Well, Plaintiff is going to die soon, therefore, we can't go to another state,' I mean, would just - it becomes a tactic that does away with all the various factors of balancing that's supposed to be done. Transcript of hearing re *forum non conveniens* motion in *Elaine Adelia Hickey Herman, et al. v. 3M Company, et al.*, Los Angeles Superior Court, Case No. 22STCV32540 at p. 15 (April 5, 2023).*

Given this tactic, it is incumbent upon defendants to ascertain the viability of a *forum non conveniens* motion as soon as possible and, critically, prior to plaintiffs filing a motion for preference. Before a plaintiff's deposition is noticed, defendants should seek detailed

information by way of written discovery regarding the dates and locations of plaintiff's residence, the locations of witnesses, the locations of medical providers, and where and when plaintiff alleges exposure to asbestos. Defendants should also determine who amongst them is incorporated in (or has a principal place of business in) California and whether that defendant will consent to jurisdiction outside of California. Only in this way can defendants seek to stem the ever-growing tide of out-of-state litigants seeking to take advantage of California's plaintiff-friendly laws.



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