

# Leveraging Choice of Law Provisions

## situation

State laws vary widely in certain areas of civil law. As a result, in situations where there is a choice of law available, counsel have the strategic option to select one state's provisions over another's in developing business contracts or pursuing civil cases.

## in-house counsel challenge

Counsel often default to the set of state laws with which they may be most familiar—most frequently, those of the state in which their company is headquartered. However, a different state's laws may be available and provide broader protections or more favorable legal standards when applied to the given situation. Counsel must determine the most favorable state laws applicable to the particular situation and take appropriate steps to apply them.

## approach adopted

Determine which set of state laws available to you would be most favorable to the situation at hand keeping in mind the key goal of the long-term benefits that can be derived from one specific choice over another.

State laws vary widely in numerous specific areas. The area of law surrounding non-compete covenants provides a case in point. For instance, if a company is acquiring a business headquartered in another state, non-compete agreements are vital to keeping the individuals affiliated with the to-be-acquired company out of competition as long as possible. Choice of law could make an enormous difference here: Florida, for example, is extremely generous in terms of the types of non-compete agreements it upholds as reasonable, while California is far more restrictive. In the event of litigation over such agreements, these factors will become crucial to the outcome. A strong, well-thought-out strategy can win the day.

## measuring success

There are two possible successful outcomes in this area. The first and best is that your company's contract is completed and enforced as desired with no subsequent litigation. The second is that if litigation does arise, your company will receive the increased protection you envisioned based on your choice of law—for example, if the more advantageous non-compete law is made to apply.

## implementation steps

1. Evaluate your primary and long-term goals, in prioritized order, for the outcome of the contract.
2. Evaluate the possible choices different sets of state laws offer that can apply and determine which are most advantageous to your company.
3. Take specific, concrete actions in the development of the contract to ensure that your choice of law will apply should litigation ultimately take place. Examples include physically completing the negotiations in the state of choice, signing the contract in that state and temporarily headquartering the new, merged company (if it is a merger or acquisition situation) in that state.

## future issues to consider

*The broadest future issue is the potential for ongoing changes in state laws in various areas. It is critical to keep abreast of changes in any state.*



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