H

United States Court of Appeals,
Ninth Circuit.
Fernando RUIZ, individually and on behalf of all others similarly situated, Plaintiff–Appellant,
v.
AFFINITY LOGISTICS CORPORATION, Defendant–Appellee.

No. 10–55581.
Argued and Submitted Dec. 8, 2011.
Filed Feb. 8, 2012.

**Background:** Furniture delivery driver filed putative class action against trucking company on behalf of former and current drivers, alleging drivers were misclassified as independent contractors rather than employees and entitled to wages, overtime pay, and benefits under Fair Labor Standards Act (FLSA) and California law. The United States District Court, for the Northern District of California, 2005 WL 5490240,Jeffrey S. White, J., granted defendant's motion to transfer venue. After bench trial, the United States District Court for the Southern District of California, Janis L. Sammartino, J., 697 F.Supp.2d 1199, entered judgment in company's favor. Driver appealed.

**Holding:** The Court of Appeals, Pregerson, Circuit Judge, held that California law, rather than Georgia law, applied.

Vacated and remanded.

West Headnotes

**[1] Federal Courts 170B 617**

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(D) Presentation and Reservation in Lower Court of Grounds of Review
170BVIII(D)1 Issues and Questions in Lower Court
170Bk617 k. Sufficiency of presentation of questions. Most Cited Cases

Although no bright line rule exists to determine whether a matter has been properly raised below, an issue will generally be deemed waived on appeal if the argument was not raised sufficiently for the trial court to rule on it.

**[2] Federal Courts 170B 753**

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)1 In General
170Bk753 k. Questions considered in general. Most Cited Cases

Because the issue of whether the district court properly applied California's choice of law framework was one of law and there was no deficiency in the record relating to it in action alleging failure to pay overtime wages and other claims, Court of Appeals would exercise its discretion to consider the issue.

**[3] Federal Courts 170B 611**

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(D) Presentation and Reservation in Lower Court of Grounds of Review
170BVIII(D)1 Issues and Questions in Lower Court
170Bk611 k. Necessity of presentation in general. Most Cited Cases

The rule of waiver is a discretionary one; Court of Appeals may consider issues not presented to the district court, although it is not required to do so.

**[4] Federal Courts 170B 611**

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(D) Presentation and Reservation in Lower Court of Grounds of Review
170BVIII(D)1 Issues and Questions in

Lower Court
170Bk611 k. Necessity of presentation in general. Most Cited Cases

Court of Appeals has discretion to make an exception to waiver under three circumstances: (1) in the exceptional case in which review is necessary to prevent a miscarriage of justice or to preserve the integrity of the judicial process, (2) when a new issue arises while appeal is pending because of a change in the law, and, (3) when the issue presented is purely one of law and either does not depend on the factual record developed below, or the pertinent record has been fully developed.

**[5] Federal Courts 170B 776**

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)1 In General
170Bk776 k. Trial de novo. Most Cited Cases

Whether the district court erred in its choice of law analysis is a question of law subject to de novo review.

**[6] Labor and Employment 231H 2221**

231H Labor and Employment
231HXIII Wages and Hours
231HXIII(B) Minimum Wages and Overtime Pay
231HXIII(B)1 In General
231Hk2221 k. What law governs. Most Cited Cases

Under California's choice of law framework, California, rather than Georgia, law applied in class action alleging, among other things, that employer failed to pay overtime wages, even though Georgia had a substantial relationship to the parties, where Georgia law on issue of whether truck drivers were employer's employees or independent contractors directly conflicted with California law, as well as with fundamental California policy seeking to protect workers, and California had a materially greater interest than Georgia in the outcome of the case.

**[7] Contracts 95 129(1)**

95 Contracts
95I Requisites and Validity
95I(F) Legality of Object and of Consideration
95k129 Obstructing or Perverting Administration of Justice
95k129(1) k. Agreements relating to actions and other proceedings in general. Most Cited Cases

California courts apply the parties' choice of law unless the analytical approach articulated in the Restatement dictates a different result.

**[8] Contracts 95 129(1)**

95 Contracts
95I Requisites and Validity
95I(F) Legality of Object and of Consideration
95k129 Obstructing or Perverting Administration of Justice
95k129(1) k. Agreements relating to actions and other proceedings in general. Most Cited Cases

As a threshold matter, under California's choice of law framework, a court must determine whether the chosen state has a substantial relationship to the parties or their transaction, or whether there is any other reasonable basis for the parties' choice of law.

**[9] Labor and Employment 231H 55**

231H Labor and Employment
231HI In General
231Hk53 Evidence of Employment
231Hk55 k. Presumptions and burden of proof. Most Cited Cases

Under Georgia law, if a contract designates the relationship between the parties to be one of principal and independent contractor, this designation is presumed to be true unless other evidence is introduced to show that the employer exercised control as to the time, manner and method of performing the work sufficient to establish an employer-em-

ployee relationship.

**[10] Labor and Employment 231H 23**

231H Labor and Employment
231HI In General
231Hk22 Nature, Creation, and Existence of Employment Relation
231Hk23 k. In general. Most Cited Cases

**Labor and Employment 231H 55**

231H Labor and Employment
231HI In General
231Hk53 Evidence of Employment
231Hk55 k. Presumptions and burden of proof. Most Cited Cases

Under California law, once a plaintiff comes forward with evidence that he provided services for an employer, the employee has established a prima facie case that the relationship was one of employer/employee; once the employee establishes a prima facie case, the burden shifts to the employer, which may prove, if it can, that the presumed employee was an independent contractor.

**[11] Labor and Employment 231H 29**

231H Labor and Employment
231HI In General
231Hk28 Independent Contractors and Their Employees
231Hk29 k. In general. Most Cited Cases

Under California law, the employee-independent contractor issue cannot be decided absent consideration of the remedial statutory purpose behind the statute the worker seeks to enforce.

**[12] Contracts 95 144**

95 Contracts
95II Construction and Operation
95II(A) General Rules of Construction
95k144 k. What law governs. Most Cited Cases

To determine whether California has a materially greater interest than another state, in applying California's choice of law framework, Court of Appeals must analyze the following factors: (1) the place of contracting; (2) the place of negotiation of the contract; (3) the place of performance; (4) the location of the subject matter of the contract; and, (5) the domicile, residence, nationality, place of incorporation, and place of business of the parties.

**[13] Contracts 95 144**

95 Contracts
95II Construction and Operation
95II(A) General Rules of Construction
95k144 k. What law governs. Most Cited Cases

In determining which state has a materially greater interest under California's choice of law framework for contract matters, courts consider which state, in the circumstances presented, will suffer greater impairment of its policies if the other state's law is applied.

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Catherine K. Ruckelshaus, National Employment Law Project, New York, NY, for the amicus.

Cynthia L. Rice, California Rural Legal Assistance Foundation, Sacramento, CA, for the amicus.

Appeal from the United States District Court for the Southern District of California, Janis L. Sammartino, District Judge, Presiding. D.C. No. 3:05–cv–02125–JLS–CAB.

Before: HARRY PREGERSON and RICHARD A. PAEZ, Circuit Judges, and JAMES P. JONES, District Judge.[FN*]

FN* The Honorable James P. Jones, United States District Judge for the Western District of Virginia, sitting by designation.

## OPINION

PREGERSON, Circuit Judge:

Fernando Ruiz ("Ruiz") appeals the district court's judgment, after a bench trial, in his action against Affinity Logistics Corporation ("Affinity") for alleged violations of the Fair Labor Standards Act ("FLSA") and California laws. We have jurisdiction pursuant to 28 U.S.C. § 1291. We vacate and remand.

## BACKGROUND

Affinity Logistics Corporation ("Affinity") ***1321** FN1 is a company providing home delivery and transportation logistical support services to various home furnishing retailers, including Sears. To work as a driver for Affinity, individuals had to enter into the Independent Truckman's Agreement and Equipment Lease Agreement (collectively the "Agreements") with Affinity.

FN1. In June 2007, Affinity was acquired by 3PD, Inc.

The Agreements included clauses stating that (1) the parties were entering into an independent contractor relationship, and (2) Georgia law applied to any disputes. Specifically, the Agreements stated, among other things:

> • **Control and Exclusive Use**.... The parties intend to create an independent contractor relationship and not an employer-employee relationship.
>
> • **Independent Contractor** (a) Contractor, in the performance of this Agreement, will be acting in his own separate capacity and not as an agent, employee, partner, joint venture or associate of Affinity. It is expressly understood and agreed that Contractor is an independent contractor of Affinity in all manners and respects and that Contractor is not authorized to bind Affinity to any liability or obligation or to represent that it has any such authority.
>
> • **Governing Law.** This Agreement and any dispute thereunder shall be governed by the laws of the State of Georgia.

(emphasis in original). The Agreements also repeatedly referred to the individual drivers as "contractors." Affinity hired Ruiz as a driver in 2003.

Ruiz and drivers similarly situated (collectively the "drivers") filed a class action against Affinity alleging violations of FLSA and California laws, including failure to pay overtime, failure to pay wages (including payment for vacation, holidays, sick days, and severance), improper charges for workers' compensation insurance, and the unfair business practice of wrongfully classifying California drivers. The district court initially granted partial summary judgment to Affinity on Ruiz's cause of action for violation of FLSA. Affinity then moved for summary judgment under Federal Rule of Civil Procedure 56(c) on the remainder of Ruiz's claims.

On June 5, 2008, the district court granted Affinity's motion for summary judgment on Ruiz's second cause of action for overtime pay under California law. The remainder of Ruiz's claims, however, turned on whether Ruiz should be classified as an independent contractor or as an Affinity employee.

Relying on the choice of law clause in the Agreements, the district court held that Georgia law applies to determine whether the drivers were employees of Affinity or independent contractors. The district court applied California's choice of law framework to reach this conclusion. Under California's choice of law framework, the district court noted that "California courts enforce choice-of-law clauses where ... the chosen state 'has a substantial relationship to the parties or the transaction.' " quoting *ABF Capital Corp. v. Osley,* 414 F.3d

1061, 1065 (9th Cir.2005). The district court then found that "[a] substantial relationship exists where one of the parties is domiciled or incorporated in the chosen state" and that Affinity is incorporated in Georgia and has its principal office in Marietta, Georgia. *ABF Capital Corp.*, 414 F.3d at 1065. Thus, the district court enforced the parties' choice of law clause and applied Georgia law to resolve the employee-independent contractor issue.

***1322** Applying Georgia law, the court concluded that there was "sufficient evidence from which a reasonable jury could conclude that [Ruiz] has overcome the presumption of 'independent contractor' status and established that he was [Affinity's] employee." Thus, the court denied Affinity's motion for summary judgment on those claims that turn on whether Ruiz should be classified as an independent contractor or as an Affinity employee. The matter was set for a bench trial on the remaining claims.

After a three-day bench trial, the district court concluded that under Georgia law there is a presumption of independent contractor status. *Ruiz v. Affinity Logistics Corp.*, 697 F.Supp.2d 1199, 1204 (S.D.Cal.2010). And to rebut this presumption Ruiz must establish that an employer-employee relationship existed. *Id.* The district court found that Ruiz was unable to establish an employer-employee relationship and thus failed to rebut Georgia's presumption of independent contractor status. *Id.* at 1220–21.

## DISCUSSION

### A. Waiver

[1] On appeal, Affinity claims that "Ruiz waived any objection to the choice of law for purposes of appeal [because] he failed to raise this issue in the District Court." "Although no bright line rule exists to determine whether a matter [h]as been properly raised below, an issue will generally be deemed waived on appeal if the argument was not raised sufficiently for the trial court to rule on it." *In re Mercury Interactive Corp. Sec. Litig.*, 618 F.3d 988, 992 (9th Cir.2010) (internal quotation marks and citations omitted). In this case, Ruiz's argument that California law, rather than Georgia law, applies was "raised sufficiently for the trial court to rule on it." *Id.* Accordingly, we will entertain Ruiz's argument that the district court erroneously applied Georgia law.

[2][3][4] Moreover, "the rule of waiver is a discretionary one." *Ackerman v. Western Elec. Co.*, 860 F.2d 1514, 1517 (9th Cir.1988) (citing *Singleton v. Wulff*, 428 U.S. 106, 121, 96 S.Ct. 2868, 49 L.Ed.2d 826 (1976)). "We may consider issues not presented to the district court, although we are not required to do so." *In re Mercury Interactive Corp. Sec. Litig.*, 618 F.3d at 992 (citation omitted). This court has stated that it has discretion to make an exception to waiver under three circumstances: (1) "in the'exceptional' case in which review is necessary to prevent a miscarriage of justice or to preserve the integrity of the judicial process," (2) "when a new issue arises while appeal is pending because of a change in the law," and, (3) "when the issue presented is purely one of law and either does not depend on the factual record developed below, or the pertinent record has been fully developed." *Bolker v. C.I.R.*, 760 F.2d 1039, 1042 (9th Cir.1985). In this case, because the issue of whether the district court properly applied California's choice of law framework is one of law and there is no deficiency in the record relating to it, we exercise our discretion to consider that issue. *Ackerman*, 860 F.2d at 1517 (citing *In re Howell*, 731 F.2d 624, 627 (9th Cir.1984), *cert. denied*, 469 U.S. 933, 105 S.Ct. 330, 83 L.Ed.2d 266 (1984)).

### B. Choice of Law

[5] Ruiz contends that the district court after applying California's choice of law framework erred when it concluded that Georgia law applies. We agree. Whether the district court erred when it concluded that Georgia law, not California law, applies is a question of law subject to de novo review. ***1323***Schoenberg v. Exportadora de Sal, S.A. de C.V.*, 930 F.2d 777, 782 (9th Cir.1991) (citation omitted).

[6][7][8] California's choice of law framework is set forth in Restatement § 187(2) and in *Nedlloyd Lines B.V. v. Superior Court*, 3 Cal.4th 459, 11 Cal.Rptr.2d 330, 834 P.2d 1148, 1152 (1992). "California courts apply the parties' choice of law unless the analytical approach articulated in § 187(2) of the Restatement (Second) of Conflict of Laws ("187(2)") dictates a different result." *Hoffman v. Citibank (S.D.), N.A.*, 546 F.3d 1078, 1082 (9th Cir.2008) (citation omitted). As a threshold matter, a court must determine "whether the chosen state has a substantial relationship to the parties or their transaction, or ... whether there is any other reasonable basis for the parties' choice of law." *Nedlloyd*, 11 Cal.Rptr.2d 330, 834 P.2d at 1152 (citing Rest., § 187(2)). The district court properly found that because Affinity is incorporated in Georgia and has its principal office in Georgia, the chosen state (Georgia) has a substantial relationship to the parties. *See ABF Capital Corp.*, 414 F.3d at 1065 ("A substantial relationship exists where one of the parties is domiciled or incorporated in the chosen state."). The district court then concluded that Georgia law applied.

But the district court's inquiry should not have ended there. Two additional steps remained in California's choice of law framework. The district court should have then considered (1) whether applying Georgia's law "is contrary to a *fundamental* policy of California," and then (2) "whether California has a materially greater interest than [Georgia] in resolution of the issue." *Id.* at 1066 (quoting *Nedlloyd*, 11 Cal.Rptr.2d 330, 834 P.2d at 1152) (emphasis in original). Here, the district court in deciding to apply Georgia law, overlooked these additional two steps of California's choice of law framework. Accordingly, we proceed to consider the two additional steps of the inquiry.

[9][10] Properly applying California's choice of law framework requires us to conclude that California law applies in determining whether the drivers are employees or independent contractors. First, Georgia law "is contrary to a *fundamental* policy of California." *Nedlloyd*, 11 Cal.Rptr.2d 330, 834 P.2d at 1152 (emphasis in original). Under Georgia law, if a contract designates the relationship between the parties to be one of principal and independent contractor, this designation is presumed to be true "unless other evidence is introduced to show that the employer exercised control as to the time, manner and method of performing the work sufficient to establish an employer-employee relationship." *Fortune v. Principal Fin. Grp., Inc.*, 219 Ga.App. 367, 465 S.E.2d 698, 700 (1995). On the other hand, "under California law, once a plaintiff comes forward with evidence that he provided services for an employer, the employee has established a prima facie case that the relationship was one of employer/employee." *Narayan v. EGL, Inc.*, 616 F.3d 895, 900 (9th Cir.2010) (citing *Robinson v. George*, 16 Cal.2d 238, 243–44, 105 P.2d 914 (1940)). "Once the employee establishes a prima facie case, the burden shifts to the employer, which may prove, if it can, that the presumed employee was an independent contractor." *Id.* (citation omitted). Thus, the starting point from which the drivers begin their lawsuit is vastly different depending on whether California or Georgia law applies. In essence, the drivers are at a disadvantage under Georgia law because they must overcome the presumption that they are independent contractors. By contrast, under California law, the presumption is that the drivers are employees and the burden is upon Affinity to demonstrate that the drivers are independent contractors.***1324** As such, Georgia law directly conflicts with California law.[FN2]

FN2. Affinity asserts that any error in applying Georgia law was harmless because the district court applied the common law factors that California considers and concluded that Ruiz was an independent contractor. Such an assertion, however, disregards the district court's repeated references to the Georgia presumption of independent contractor status and its general reliance on Georgia law to resolve the employee-independent contractor issue. *See Ruiz*, 697

> F.Supp.2d at 1204 ("Under Georgia law, if the contract designates the relationship between the parties to be one of principal and independent contractor, this designation is presumed to be true...."); *Id.* at 1217 ("The court finds that the Georgia test regarding [Affinity's] control over the [drivers'] time, manner, and method of work indicates an independent contractor relationship, *especially in light of the presumption arising from the language in the [Independent Truckman's Agreement]* ") (emphasis added); *Id.* at 1220 ("Under Georgia law and the language of the [Agreements], a presumption of independent contractor arises"). Accordingly, applying Georgia, rather than California law, is not harmless error.

[11] Additionally, Georgia law directly conflicts with a fundamental California policy that seeks to protect its workers. The California Supreme Court has developed a multi-factor test for determining employment status. *S.G. Borello & Sons, Inc. v. Dep't of Indus. Rel.*, 48 Cal.3d 341, 256 Cal.Rptr. 543, 769 P.2d 399, 404–07 (1989). The California Supreme Court recognized that this test "must be applied with *deference to the purposes of the protective legislation* " that the worker seeks to enforce. *Id.*, 256 Cal.Rptr. 543, 769 P.2d at 406 (emphasis added). "[T]he employee-independent contractor issue cannot be decided absent consideration of the remedial statutory purpose" behind the statute the worker seeks to enforce. *Id.*, 256 Cal.Rptr. 543, 769 P.2d at 405. Thus, under Georgia law, while the drivers are presumptively independent contractors, under California law, the court must consider protective legislation designed to aid employees to determine the employee-independent contractor issue. Therefore, application of Georgia law in this case would contravene the fundamental California public policy in favor of ensuring worker protections.

[12] Second, California also has a materially greater interest than Georgia in the outcome of this case. To determine whether California has a materially greater interest than Georgia, we must analyze the following factors: (1) the place of contracting; (2) the place of negotiation of the contract; (3) the place of performance; (4) the location of the subject matter of the contract; and, (5) the domicile, residence, nationality, place of incorporation, and place of business of the parties. *1–800–Got Junk? LLC v. Superior Court*, 189 Cal.App.4th 500, 116 Cal.Rptr.3d 923, 932 n. 10 (2010) (citing Rest., § 188). Here, the drivers entered into the contract with Affinity in California. The drivers completed the work for Affinity in California. The subject matter of the contract deals with completing deliveries in California. Finally, the domicile of the drivers is California. The only connection with Georgia is that Georgia is where Affinity is incorporated. Accordingly, California has a materially greater interest than Georgia in determining whether the drivers are independent contractors or employees of Affinity.

[13] Moreover, Affinity has not produced any evidence to suggest that Georgia has a material interest in the resolution of this case. In determining which state has a materially greater interest, California courts "consider which state, in the circumstances presented, will suffer greater impairment of its policies if the other state's law is applied." ***1325** *Brack v. Omni Loan Co., Ltd.*, 164 Cal.App.4th 1312, 80 Cal.Rptr.3d 275, 287 (2008) (citation omitted). Affinity has not explained how Georgia will suffer if California law is used to determine whether the drivers are employees or independent contractors. *See Bridge Fund Capital Corp. v. Fastbucks Franchise Corp.*, 622 F.3d 996, 1004 (9th Cir.2010).

For these reasons, we hold that the parties' choice of Georgia law is unenforceable in California. We also hold that under California's choice of law framework, the law of California applies. Accordingly, on remand the district court shall apply California law to determine whether the drivers are

employees or independent contractors.

This panel retains jurisdiction over any future appeals.

**VACATED and REMANDED.**

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