American Conflicts Law:

Cases and Materials

Sixth Edition

2017-2018 Supplement

By

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PREFACE

This Supplement is intended to update teachers and students on the latest cases and literature pertinent to the course in Conflict of Laws. Since the publication of the Sixth Edition of the casebook in 2015, there have been no major developments in the general area of choice of law that would constitute a fundamental alteration in the direction of the "Conflicts Revolution" that constitutes the main subject matter of the casebook. However, the recent decision of the United States Supreme Court in *Obergefell v. Hodges*, 135 S. Ct. 2584, 2015 WL 2473451 (2015), holding that the Due Process and Equal Protection Clauses prohibit a state from refusing to allow same-sex marriages under its own law, will affect DOMA and full faith and credit issues discussed in Chapter 7 of the casebook. In addition, the Court's decision in *Franchise Tax Board v. Hyatt*, 578 U.S. ___, 136 S. Ct. 1277 (2016), 2016 WL 1562480, discussed in Chapter 3 of this supplement adds a new, and somewhat uncertain, dimension to the jurisprudence of the Full Faith and Credit Clause as a limitation on state choice-of-law authority.

Apart from developments in Conflict of Laws per se, the Supreme Court continued its development of due process restrictions on personal jurisdiction this past term in *BSNF Ry. Co. v. Tyrell*, 581 U.S. ___, 137 S. Ct. 1549 (2017) and *Bristol-Meyers Squibb Co. v. Superior Court of California*, 582 U.S. __, 137 S. Ct. 1773 (2017). These cases are examined in Chapter 10 of this supplement.

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Richard H. Seamon
June 2017

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Chapter 1

INTRODUCTION

C. A BRIEF HISTORY

4. The First Restatement: Beale and the Critics

[Insert at the end of Note 5 on page 10.]

Katherine Florey, *Big Conflicts Little Conflicts*, 47 ARIZ. ST. L.J. 683 (2015); Laura E. Little, *Conflict of Laws Structure and Vision: Updating a Venerable Discipline*, 31 GEORGIA ST. U. L. REV. 231 (2015).

[Replace Note 6 on page 10.]

The latest version of Professor Symeonides' review is, *Choice of Law in the American Courts in 2016: Thirtieth Annual Survey*, 65 AM. J. COMP. L. ___ (forthcoming 2017). His review reveals no changes among the states in conflicts methodology since the publication of the Sixth Edition of the casebook. *See id.* at ___ [31]. The survey for 2015 is, Symeon C. Symeonides, *Choice of Law in the American Courts in 2015: Twenty-Ninth Annual Survey*, 64 AM. J. COMP. L. 221 (2016). Professor Symeonides has also recently published a treatise on the subject: SYMEON C. SYMEONIDES, CHOICE OF LAW (2016).

[Insert at the end of Note 7 on page 11.]

At this printing, the latest work product of the ALI on the third restatement is found in RESTATEMENT (THIRD) OF CONFLICT OF LAWS (*Preliminary Draft No. 2*, August 12, 2016) [hereinafter *Preliminary Draft No. 2*]. That draft contains Chapter 1, §§ 1.01–1.04 (Introduction); Chapter 2, §§ 2.01–2.10 (Personal Geographical Links); Chapter 5 (Choice of Law), Topic 1 (Introduction) §§ 5.01–5.04, Topic 2 (Determination of Foreign Law), §§ 5.06–5.12; Chapter 6 (Torts), Topic 1 (General Rules) §§ 6.01–6.08; and Chapter 7 (Property), §§ 7.01–7.26. *See also* Donald Earl Childress, *International Conflict of Laws and the New Conflicts Restatement*, 27 DUKE J. COMP. & INT'L L. 361 (2017).

One matter that deserves comment at this point is the philosophy of the draft. As an examination of the materials in the principal casebook will demonstrate, the RESTATEMENT (SECOND) OF CONFLICT OF LAWS was not a true restatement of the law of conflicts, but an attempt to walk a line between rules and a more fluid analytical approach to the subject. In the current draft of the third restatement, the ALI has reprinted at pages x – xi an excerpt of the Revised Style Manual approved by the ALI Council in January 2015. This manual makes it clear that the reporters are not bound to follow "a preponderant balance of authority," assuming that one exists, but are to propose the "better rule and provide the rationale for choosing it." In addition, the new restatement is to anticipate the "direction in which the law is [trending] and [express] that development in a manner consistent with

previously established principles." *See Preliminary Draft No. 2*, *supra*, at x. This makes it clear that the third restatement will also not be a real "restatement," at least not in all areas. It also insures that the development of the restatement in many areas will be highly controversial, as there is bound to be significant controversy over the "better rule" of conflicts in some areas, as well as controversy over the direction in which law is "trending." When you encounter provisions of the proposed new restatement in future chapters of this supplement, you should ask whether the ALI is improving or worsening an already bad situation. *See also* Patrick J. Borchers, *An Essay on Predictability in Choice-of-Law Doctrine and Implications for a Third Conflicts Restatement*, 49 CREIGHTON L. REV. 495 (2016); Donald Earl Childress III, *International Conflict of Laws and the New Conflicts Restatement*, 27 DUKE J. COMP. & INT'L L. 361 (2017).

* * * * *

Chapter 2

CHOICE OF LAW: SOME GENERAL PROBLEMS

A. SELECTING A CHOICE-OF-LAW THEORY

2. Currie's Governmental Interest Analysis

[Insert at the end of Note 4 on page 34.]

See also Symposium, *Choice-of-Law Methodology: Fifty Years After Brainerd Currie*, 2015 U. ILL. L. REV. 1847 (articles by Professors Symeonides, Singer, Kay, Brilmayer, Weinberg, and Hay).

[Insert after Note 4 on page 34.]

5. In *In re APA Assessment Fee Litigation*, 766 F.3d 39 (D.C. Cir. 2014), the parties agreed in the district court that choice-of-law analysis was unnecessary because the unjust enrichment law of all the states was the same. Thus, D.C. law was applied. When the laws of all the potentially concerned states are the same, should the case be classified as a "false conflict" or as a "no conflict" case? Is there a difference between the two?

4. Leflar's Choice-Influencing Considerations

[Insert at the end of Note 5 on page 46.]

Sagi Peari, *Can Better Law Be Married with Corrective Justice or Evil Laws?*, 61 MCGILL L.J. 511 (2016); Sagi Peari, *Better Law as Better Outcome*, 63 AM. J. COMP. L. 155 (2015).

5. The "Most Significant Relationship" Approach

[Insert at the end of Note 4 on page 62.]

See also Elworthy v. First Tennessee Bank, 391 P.3d 1113 (Wyo. 2017) (action arising out of two related mortgage transactions, one on land in California and one on land in Wyoming; claims by plaintiff for breach of contract, interference with prospective economic advantage, declaratory judgment cancelling mortgage on Wyoming property, misrepresentation, and reformation and restitution; Wyoming Supreme Court applies separate RESTATEMENT (SECOND) analysis to each issue in case, concluding that Wyoming law applied to breach of contract claims and fraud claims and that because restitution and declaratory claims were derivative of the fraud claims, Wyoming law also applied to them).

[Insert at the end of Note 5 on page 62.]

See also Janvey v. Brown, 767 F.3d 430 (5th Cir. 2014) (Texas Supreme Court employs a false conflicts analysis rather than engaging in a full Second Restatement analysis).

[Insert after Subsection 7 at page 64.]

8. The Restatement Third

As indicated in Chapter 1, the American Law Institute has embarked on a project to frame a third restatement of Conflicts. The project is in its embryonic stages as of now, but several points can be made about the general direction of the project. First, the Reporters believe that sufficient data exists about modern choice-of-law practice to "restate" that practice in the form of rules. As a consequence, what was section 6 of the RESTATEMENT (SECOND) will no longer be a "grab-bag centerpiece," in the new restatement, but "an escape hatch, designed to be sparingly invoked, in the unusual case in which one of the rules of the Restatement Third disregards a manifestly more appropriate result." *See* ALI RESTATEMENT (THIRD) OF CONFLICT OF LAWS, *Preliminary Draft No. 1*, at xiv (Oct. 10, 2015) (Reporters' Memorandum). The shift in direction toward "restating" rules must, however, be taken in conjunction with the project's avowed purposed to create "better" rules for those that might currently be clear enough to be "restated," as previously noted at the end of Chapter 1 of this supplement. Currently the project is not sufficiently developed to determine how, exactly, all of this will work.

Preliminary Draft No. 1 was considered by the Advisers and Members Consultative Group in October of 2015. Thereafter, substantial changes in the draft were made, especially to the "habitual residence" sections, which had been designed to replace the traditional concept of domicile in choice of law. (The habitual residence sections and changes are discussed in Section G on Domicile, below. In *Preliminary Draft No. 2*, additional substantive material was added to the torts and property sections of the proposed table of contents.)

Preliminary Draft No 2 was discussed by the Reporters, Advisers, and Members Consultative Group in October of 2016. Following this, the Reporters submitted *Council Draft No. 1* for consideration in December of 2016. The council draft, however, contained only Chapter 1 (Introduction §§ 5.01–5.05), Chapter 2 (Domicile §§ 2.01–2.09), and Chapter 5 (Choice of Law) Topic 1 (Introduction §§ 5.01–5.05) and Topic 2 (Foreign Law §§ 5.06–5.08). The Council considered the draft in January 2017 and approved Chapter 1 and §§ 2.01–2.07 of the draft, reserving consideration of the later sections for future consideration because of considerations of time. The approved sections, together with modifications resulting from the Council's discussion, will be presented to a meeting of the full American Law Institute membership at some yet to be determined time in the future.

The following description is of the proposed table of contents as set out both in *Preliminary Drafts No. 1 & 2*. This is because *Preliminary Draft No. 1* contained a complete proposed table of contents, but *Preliminary Draft No. 2* omits some chapters of this table of contents from the draft while titling some chapters differently. Thus, the following is the most current information available

about what the new restatement will contain and how the chapters will be arranged: Excerpts from the Revised Style Manual of the ALI approved by the Council in January 2015; Reporters' Memorandum Restatement of the Law Third, Conflict of Laws Preliminary Draft No. 2, Table of Contents; Chapter 1 (Introduction); Chapter 2 (Personal Geographical Links [as submitted to the Council, retitled Domicile]); Chapter 3 (Judicial Jurisdiction [omitted from *Preliminary Draft No. 2*]); Chapter 4 (Recognition and Enforcement of Judgments [omitted from *Preliminary Draft No. 2*]); Chapter 5 (Choice of Law) (this chapter currently contains three topics, Topic 1 (Introduction), Topic 2 (Determination of Foreign Law), and Topic 3 (Procedure)); Chapter 6 (Torts); Chapter 7 (Property); Chapter 8 (Contracts); Chapter 9 (Complex Litigation); Chapter 10 (Trusts); Chapter 11 (Families); Chapter 12 (Agency and Partnerships); Chapter 13 (Business Corporations); Chapter 14 (Administration of Estates); and Chapter 15 (State-Federal Issues in the United States [including constitutional limitations on choice of law, extraterritorial legislation, preemption, state law in federal courts, and federal law in state courts]). The Reporters have consciously attempted to place foundational matters at the beginning of the new restatement. Have they succeeded? For example, don't constitutional limitations on choice of law provide an important context in which all choice-of-law rules operate? If so, should that topic not be considered and restated early in the draft?

Specific provisions of the current drafts will be considered as they become relevant later in this and other chapters.

B. CLASSIFYING RULES AS SUBSTANTIVE OR PROCEDURAL

1. Rules of Evidence

[Insert after Note 3 on page 72.]

4. *See Andrews v. Ridco*, 863 N.W.2d 540 (S.D. 2015) (holding that under § 139, the state of the most significant relationship to an issue of waiver of privilege with regard to numerous claim files in other cases was the state where the communications with regard to the files took place, not South Dakota, which had no relationship to the claim files other than that the lower court had ordered them produced as part of the discovery process in the immediate case).

4. Statutes of Limitations

[Insert after Note 2 on page 91 following *Gantes v. Kason Corp.* Excerpt.]

(a) In *McCarrell v. Hoffmann-La Roche, Inc.*, 153 A.3d 207 (N.J. 2017), New Jersey adopted § 142 of the RESTATEMENT (SECOND) for analyzing conflicts problems involving statutes of limitation, continuing a progression of adopting the Second Restatement in general. The case was a products liability action, and the court held that § 142(2) dictated the application of New Jersey's statute of limitations, which contained an equitable tolling rule, rather than Alabama's statute, which did not. The court held that New Jersey had a substantial interest in maintaining the claim to deter New Jersey manufacturers from manufacturing dangerous products and that no exceptional circumstances existed to overcome this interest. The court observed that unless it found New Jersey had no substantial interest in maintaining the claim, it would not reach the question under § 142(b) whether

another state (here Alabama) had a more significant relationship to the parties and the occurrence and would bar the claim. Thus, any time New Jersey has a substantial interest in maintaining the claim and there are no exceptional circumstances, that is the end of the inquiry and New Jersey's longer statute applies. After examining the application of § 142 in *DeLoach* and accompanying materials, review whether you think this approach is correct. Will there ever be a case in which the forum has a substantial interest, there are no exceptional circumstances, and another state is the state of the most significant relationship to the parties and the occurrence? If so, does § 142(2) give appropriate weight to the interests of the state of the most significant relationship?

[Insert at the end of Note 5 on page 93.]

See also Bartlett v. Commerce Ins. Co., 114 A.3d 724 (N.H. 2015) (New Jersey statute of limitations applied rather than New Hampshire forum statute; when New Hampshire is forum it first determined whether relevant law is substantive or procedural and if substantive, New Hampshire applies Leflar's five choice-influencing considerations to select applicable law; if procedural, New Hampshire law usually applied; New Hampshire holds statutes of limitations procedural any time either party is a resident of New Hampshire or the cause of action arose in the state).

[Insert at the end of Note 4(b) on pages 101–102 following *Sutherland v. Kennington Truck Serv. Ltd.* Excerpt]

Blake Marine Grp. v. CarVal Inv'rs, LLC, 829 F.3d 592 (8th Cir. 2016) (action brought by Alabama plaintiff versus a Minnesota defendant for interference with contract based on actions occurring in Minnesota but injury in Alabama; action untimely under Alabama law but timely under Minnesota law; using the "better law" approach, the court concluded that three of the five choice-influencing considerations were irrelevant while one was applicable but neutral, leaving only advancement of the forum's governmental interests; court concluded that the forum, Minnesota, did not have an interest in applying its law for the benefit of a noncitizen plaintiff, though Alabama had an interest in compensating an Alabama plaintiff even though that law did not provide for compensation; nevertheless, because Alabama had an interest, that made the Alabama limitations period applicable, barring the action; this analysis makes no sense, does it?). *See also Taylor v. First Resolution Inv. Corp.*, 72 N.E.3d 573 (Ohio 2016) (action by Delaware bank against Ohio consumer for failure to pay credit card debt; action timely under Ohio law, but not under Delaware law; Ohio borrowing statute applied to borrow limitations period of Delaware, because court concluded that cause of action accrued in Delaware where plaintiff made payments to defendant under credit card contract).

[Insert after Note 4(c) on page 102.]

(d) In *Boutelle v. Boutelle*, 337 P.3d 1148 (Wyo. 2014), the court stated that in applying Wyoming's borrowing statute to borrow the limitations period of another state, the other state's statute is not wrenched out of context, but is applied in the context of the other state's statutes and case law, but this does not mean that the other state's conflict of laws doctrine is applied to produce a renvoi-like situation.

[Insert after Note 5(c) on page 103 following *Sutherland v. Kennington Truck Serv. Ltd.* excerpt]

(d) *Taylor v. First Resolution Investment Corp.*, 72 N.E.3d 573 (Ohio 2016), was an action by a creditor to collect credit card debt from the defendant. The court held that the cause of action accrued in Delaware where the debt was to be paid for purposes of the Ohio borrowing statute. The court also held that it was not unconstitutional to apply the borrowing statute to the claim, which had accrued before the enactment of the statute. The end result was that the action was time barred.

[Insert at the end of Note 4(c) on page 111 following *Deloach v. Alfred* excerpt]

See also Burdett v. Remington Arms Co., L.L.C., 854 F.3d 733 (5th Cir. 2017) (although Texas applies the most significant relationship test of sections 6 & 145 of the RESTATEMENT (SECOND), the Texas borrowing statute is a codified rule of choice of law that governs the timeliness of actions and must be applied in a diversity case in Texas; borrowing statute borrows shorter limitations period of other state, New York law does not have a statute of repose, but Texas does, and the action is barred under the Texas statute of repose).

[Insert after Note 4(e) on page 111.]

Woodward v. Taylor, 366 P.3d 432 (Wash. 2016) was an extremely odd case from a Second Restatement jurisdiction. The case arose out of an automobile accident in Idaho. The action was brought in Washington, which had a three-year limitations period applicable to the claim, though the action was barred under the two-year Idaho statute. The trial court dismissed, holding Idaho's two year period applicable, and this was affirmed by the court of appeals. The Washington Supreme Court reversed, however. The court first analyzed the substantive tort law of both Washington and Idaho, concluding that there was no conflict between the substantive law of the two states. It then reasoned that the "significant contacts" analysis did not have to be reached when there was no substantive conflict and that Washington law would consequently be applied. It then referenced the Washington borrowing statute, which provided that if the claim was based on the law of another state, even partly, the limitations period of that state would apply. Because it had already concluded that Washington law would apply to the claim, it then reasoned that Washington's longer statute of limitations would also apply. Section 142 was never mentioned. This was just a decision attempting to avoid the effect of the Washington borrowing statute, wasn't it? *See also Wahl v. Gen. Elec. Co.*, 786 F.3d 491 (6th Cir. 2015) (under most significant relationship test of Ohio law, court applies tort sections and § 6 factors to select Tennessee substantive law in the form of one-year Tennessee statute of repose; § 142 not mentioned); *Steen v. Murray*, 770 F.3d 698 (8th Cir. 2014) (court applies Nebraska statute of limitations without reference to § 142, even though Nebraska follows the RESTATEMENT (SECOND)).

5. Other Issues

[Insert at the end of Note 5 on page 114.]

See also Phillips v. Carlton Energy Grp. LLC, 475 S.W.3d 265 (Tex. 2015) (under Second Restatement, local law of forum determines whether an issue shall be decided by judge or jury

(quoting § 129); argument that Nevada, which provided the controlling substantive law, has specified the procedure for adjudicating the issue and thus made it a substantive right is invalid; a state cannot make a decision by a court rather than a jury a substantive right enforceable in all jurisdictions; Nevada cannot supplant the constitutionally guaranteed right to a jury trial in Texas courts by a statute); *Tumlinson v. Advanced Micro Devices, Inc.*, 106 A.3d 983 (Del. 2013) (Delaware forum law rather than Texas law applied to procedural matters; admissibility of expert testimony is a procedural matter whose relevance and reliability should have been analyzed under Delaware law).

C. CHARACTERIZING THE ISSUES

[Insert the following discussion after the introductory paragraph on page 116.]

The American Law Institute has included section 5.03 dealing generally with characterization in its initial provisions on choice of law in its first draft of a third restatement of conflict of laws. Section 5.03(1) provides that the classification of issues or claims and the interpretation of legal terms or concepts involve questions of characterization, and that courts must classify issues and claims in the "appropriate category" under the new restatement. *See* RESTATEMENT (THIRD) OF CONFLICT OF LAWS § 5.03(1), *cmt. a*, at 88 (AM. LAW INST., Preliminary Draft No. 1, Oct. 1, 2015). The section goes on to provide that the classification of issues or claims is generally performed under the forum's law (§ 5.03(2)), as are the classification and interpretation of conflict-of-laws concepts and terms (§ 5.03(3)). (The exception to § 5.03(2) is the new restatement's employment of renvoi under certain circumstances. This is discussed below in Section F.)

The classification and interpretation of internal-law concepts and terms are determined in accord with the law that governs the issue in question (§ 5.03(4)). (Earlier, the draft defines "internal law" of a state as "the body of law, exclusive of the rules of Conflict of Laws, which the courts of that state apply in the decision of controversies brought before them" (§ 1.04(1)). It defines the "law" or the "whole law" of a state as that state's internal law together with its rules of conflict of laws (§ 1.04(2)). In this respect, the draft differs from the RESTATEMENT (SECOND), which uses the term "local law," rather than "internal law" to refer to the same body of law.)

After examining the process of characterization in this section and later portions of the casebook, ask yourself whether the ALI treatment of the subject, as outlined above, helps you conceptually to understand the process better. Is it a restatement of existing practice, a creation of a "better" rule, or a clarification of existing practice?

[Insert at the end of Note 2 on page 126.]

See also Kipling v. State Farm Mut. Auto. Ins. Co., 774 F.3d 1306 (10th Cir. 2014) (in dispute between insured and carrier over benefits under four insurance policies issued in Minnesota, lower court erred in applying tort choice-of-law principles to select Colorado law as applicable, and should have analyzed case under contract choice-of-law principles of RESTATEMENT (SECOND)); *General Accident Ins. Co. v. Mortara*, 101 A.3d 942 (Conn. 2014) (dispute between insurance carrier and insured over company's obligation to pay underinsured motorist benefits requires a determination of

whether tort or contract choice-of-law rules govern the issue; under Connecticut's existing precedents, dispute is governed by contract choice-of-law rules of RESTATEMENT (SECOND)).

D. PROTECTING THE FORUM'S PUBLIC POLICY

[Insert after Note 3 on page 130 following *Wittkowski v. State*.]

However, in *Talbot v. WMK-Davis, LLC*, 380 P.3d 823 (Mont. 2016), the plaintiff, a citizen of Oklahoma, was injured in Montana and applied for workers' compensation benefits in Oklahoma. He also commenced a tort action in Montana. His employer sought to file a subrogation claim under Oklahoma law in the Montana action. Montana is a Second Restatement state. The Montana Supreme Court invoked section 90 of the RESTATEMENT (SECOND), which provides that no action can be maintained in the forum when it is contrary to the forum's strong public policy. The public policy of Montana forbade workers' compensation subrogation claims until the injured party had been made whole.

[Insert after Note 1 on page 132.]

(a) *Coon v. The Medical Center, Inc.*, 797 S.E.2d 828 (Ga 2017), is an extremely odd case. The action was for negligent infliction of emotional distress based on the mishandling of an infant's body by the defendant. The action of the defendant took place in Georgia, but the plaintiff learned of the action in Alabama where the plaintiff lived and the emotional distress thus took place. Georgia common law required a physical impact for recovery, but Alabama law did not. Ultimately, the trial court applied Georgia law on the ground that the public policy of Georgia would be violated by applying the Alabama rule. The Georgia Court of Appeals affirmed in a seven-judge decision, with six of the judges agreeing that the starting point was the rule of *lex loci delecti;* but all followed different choice-of-law approaches after that point. In effect, the Georgia Supreme Court followed the approach of one of these judges, Judge McMillian specially concurring. The approach? In the absence of a statute in another state where "the common law is in force," the Georgia courts will apply the common law *as expounded by the courts of Georgia* (emphasis added). This approach was based on the presumption that the common law is presumed to be the same in all American states! The court acknowledged that if the common-law rule as expounded by another state was perceived as superior to the Georgia understanding of it, Georgia might adopt the other state's interpretation as its own rule for Georgia as well as other cases, this was not so in the present case. Thus, the court applied the physical impact requirement and the plaintiff lost. The plaintiff argued that Georgia's approach was archaic and had outlived its usefulness, but the court rejected this, viewing the approach's antiquity as a factor that weighed in its favor and, in any event, viewed the argument as the same as criticisms of Georgia's adherence to the traditional conflicts system. Until it becomes clear to the court that a better rule exists, Georgia is not moving. After studying the constitutional limits on a state's ability to apply its own law in Chapter 3, you will see that Georgia had ample contacts with the events and parties in the suit to give it a constitutionally sufficient interest in applying its own law under one of the modern systems of conflicts analysis, or even to refuse to apply Alabama's law under the public policy exception to the traditional system. Nevertheless, suppose Georgia attempted to take this approach in a case in which it did not have any

constitutionally sufficient interest in applying its own law. It could not get away with that under such circumstances, could it?

[Insert at the end of Note 3(c) on page 133.]

See also West Virginia ex rel. *Am. Elec. Power Co., Inc. v. Swope*, ___ S.E.2d ___, 2017 WL 2626637 (Sup. Ct. App. W. Va. 2017) (West Virginia "in general" follows *lex loci delecti*; mere fact that the substantive law of another jurisdiction differs from the law of the forum or is less favorable does not mean that it is contrary to the public policy of the forum).

[Substitute the following new problem for existing Problem 2.17 in the casebook on page 134.]

Problem 2.17. *H* and *W-1* and *W-2* are persons in a polygamous union formed in Saudi Arabia where such marriages are legal. They immigrate to State *Y* where polygamous marriages are not permitted. *H* then dies intestate. In a probate proceeding in State *Y*, *W-1* and *W-2* claim *H's* estate under the law of State *Y*, which provides in cases of intestacy that a decedent's surviving spouse inherits all of the decedent's estate. *W-1* and *W-2's* claim is contested by *H's* brothers and sisters, who will inherit the estate if *H* was not validly married. Under the conflict-of-laws rules of State *Y*, a marriage valid where performed will be treated as valid in State *Y* unless it violates the strong public policy of State *Y*. *H's* brothers and sisters argue the marriage between *H* and *W-1* and *W-2* is invalid under the public policy exception to the marriage rule. In determining whether the public policy exception should be applied to treat the marriage as invalid, what kinds of factors should the courts in State *Y* consider? Does the difficulty of answering this question indicate what the problems are with the public policy exception generally?

E. USING DÉPEÇAGE

[Insert at the end of Note 5 on page 143.]

See also Symeon C. Symeonides, *Issue-by-Issue Analysis and Dépeçage in Choice of Law: Cause and Effect*, 45 U. TOL. L. REV. 751 (2014).

F. COPING WITH RENVOI

[Insert after the introductory paragraph in this section on page 143.]

In its project to create a third restatement of Conflict of Laws, the American Law Institute has proposed a limited use of the doctrine of renvoi. *See* RESTATEMENT (THIRD) OF CONFLICT OF LAWS § 5.04 (AM. LAW INST., Preliminary Draft No. 2, Aug. 12, 2016) [hereinafter *Preliminary Draft No. 2*]. Section 5.04(1) states that when directed by its own conflicts law to apply the law of another state, the forum applies the internal law of that state except as stated in § 5.04(2). Section 5.04(2) states that when the objective of the forum's conflicts rule is that the forum reach the same result on the very facts involved as would the courts of "another state," the forum will apply the conflicts rules of the other state, "subject to considerations of practicability and feasibility." In the latter regard, Comment j to the section states that it may be impractical to apply the conflicts rule of another state

when it is imprecise or unclear, or when the forum would be compelled to "ascertain and apply" the choice-of-law rules of two or more states. In addition, the comment states that if the conflicts rule of the other state refers to the conflicts rule of the forum, it may be impossible to achieve the objectives of § 5.04(2) and the forum will apply the other state's internal law. *See Preliminary Draft No. 2*, § 5.04*, cmt. j*, at 133.

G. ASCERTAINING A PERSON'S DOMICILE

[Insert at the end of Note 4(b) on page 168.]

See also Schill v. Cincinnati Ins. Co., 24 N.E.3d 1138 (Ohio 2014) (in action against insurance company by son for coverage under umbrella policy owned by parents, policy provided coverage for resident relatives who had the same "domicile" as parents; court held that evidence demonstrated that both parents were domiciled in Florida and son was domiciled in Ohio, so there was no coverage, despite the fact that the father spent a good deal of time each year in Ohio working and stayed at son's home while he was there; father carefully tailored his time in Ohio to avoid the operation of Ohio's income tax laws on him.); Susan Frelich Appleton, *Leaving Home? Domicile, Family, and Gender*, 47 U.C. DAVIS L. REV. 1453 (2014).

[Insert the following after the end of Note 4(b) on page 168:]

(c) The American Law Institute's current project to create a third restatement of conflicts initially proposed to substitute a concept of "habitual residence" for the existing doctrine of domicile in all areas where domicile is currently relevant in choice of law. *See* RESTATEMENT (THIRD) OF CONFLICT OF LAWS §§ 2.01–- 2.10 (*Preliminary Draft No. 1*, October 1, 2015). This approach proved to be controversial. At the October 22, 2015 meeting of the Reporters, Advisers, and Members Consultative Group, serious questions were raised about whether certain aspects of the habitual residence concept, such a de-emphasis of the intent requirement of the concept of domicile and the substitution of an "appreciable period of time" requirement to establish habitual residence would really streamline the process of determining a person's connection to a place for purposes of conflict-of-laws determinations. As a result, *Preliminary Draft No. 2* of the new restatement, while not altogether abandoning the habitual residence concept, reinstated the concept of domicile. *See generally* RESTATEMENT (THIRD) OF CONFLICT OF LAWS §§ 2.01–2.10 (*Preliminary Draft No. 2*, August 12, 2016) [hereinafter *Preliminary Draft No. 2*]. After discussion by the Reporters, Advisers, and Members Consultative Group in September 2016, revised provisions were embodied in *Council Draft No. 1* (November 11, 2016), and in January 2017, the Council approved §§ 2.01–2.07 of the draft. Along with Chapter 1, which the Council also approved, these sections will be presented to the full membership of the ALI at a future May meeting. The remaining sections (§§ 2.08–2.10) will be considered by the Council in the future. (At this writing, it is not known what changes will be made in the Council-approved sections based on the discussion at the January meeting). The following is a brief description of the sections in, *Preliminary Draft No. 2.*

Section 2.01 (Geographical Links), states generally that conflict-of-laws rules may accord significance to a geographical place because that place is the center of a natural or juridical person's identity for a particular purpose and that place can act as the central geographical link for resolving

conflict-of-laws problems. Section 2.02(1) states that a natural person's domicile is presumed to be the center of that person's life and to provide the central geographical link for resolving conflict-of-laws questions. Section 2.02(2) simply states that a statutory designation of a place for resolving conflict-of-laws matters must be respected. Section 2.02(3) states that when a natural person's domicile cannot be ascertained, that person's habitual residence will be used to determine the person's central geographical link. Finally, § 2.02(4) states that when a natural person's domicile or habitual residence cannot be ascertained, "the center of the person's life for the particular conflict-of-laws matter" provides the central geographical link.

Section 2.03(1) defines a natural person's domicile as the place where that person is physically present and intends to make that place the center of the person's life "for the time at least." Section 2.03(2) recites the traditional rule that for a particular conflict-of-laws issue, a person has only one domicile at a time.

Section 2.04 deals with habitual residence. Section 2.04(1) states that habitual residence of a natural person serves as the center of the person's life and rests on the person's domestic, social, economic, professional, familial, and civic activities; a finding of habitual residence does not require proof of intent that the person intends to make the place the center of the person's life. Furthermore, as with domicile, a person has only one habitual residence at one time for purposes of a conflict-of-laws determination.

Section 2.05(1) defines domicile of origin as the person's domicile of a person at birth, and § 2.05(2) provides that the person's domicile at birth is normally with the person's parents or custodial parent.

Section 2.06 deals with the domicile of minors and states that a minor has the domicile of the parent or parents with whom the minor lives unless custody of the minor is contested or the minor does not live with any parent.

Section 2.07 provides that a natural person possessing legal capacity can change the location that serves as the person's central geographical link.

Section 2.08 states that a natural person's domicile does not change because that person is in another place due to physical, emotional, or legal compulsion.

Section 2.09 deals with geographic connections for juridical persons, stating in § 2.09(1) that the place where such a person has its central geographical link depends, for conflict-of-laws purposes, on the particular matter to be resolved, but may be the principal place of business most relevant to the particular conflicts matter, the state of "formation" for registered organizations, or some other place (depending on the particular conflicts matter). Section 2.09(2) provides that the principal place of business of a juridical person is presumed to be its central geographical link, and is determined by reference to the particular matter for which the principal place of business determination must be made, but the subsection qualifies this rule by stating that the central geographical link may be some place other than the principal place of business for purposes of resolving a particular conflicts matter.

Section 2.10 states that in applying its conflicts rules, the forum will use its own law to determine the central geographical link of both natural and juridical persons.

H. PROVING FOREIGN LAW

[Insert after Note 2(d) on page 173.]

(e) A doctrine providing for waiver of a choice-of-law argument could produce a result similar to the forum default rule. When, if ever, should the concept of waiver be employed? *Cf. Masters Grp. Int'l, Inc. v. Comerica Bank*, 352 P.3d 1101 (Mont. 2015) (lower court erred in holding defendant's conflict-of-laws argument waived; opposing party had ample notice that defendant was relying on choice-of-law clause to provide for the application of Michigan law).

[Insert after Note 8 on page 176]:

9. In its project to create a third restatement of conflict of laws, the American Law Institute has proposed in its Topic 2 of Chapter 5 on Choice of Law to restate and clarify the rules on determination of foreign law. This decision is based on the correct view that determination of foreign law is fundamental and foundational in the choice-of-law process. In *Preliminary Draft No. 1*, these rules were found in §§ 5.06–5.13. After discussion at the October 2015 meeting of the Reporters, Advisers, and Members Consultative Group, these sections were revised and the revisions embodied in §§ 5.01–5.12; they were discussed at a meeting of the Reporters, Advisers, and Members Consultative Group in September of 2016. Sections 5.01–5.08 were then presented to the ALI Council in *Council Draft No. 1*, but have not yet been acted on by the Council. The following description is based on the sections as presented in *Preliminary Draft No. 2*.

(a) Section 5.06 provides that issues of foreign law are legal (as opposed to factual) issues. Section 5.07 provides that either party or the court can raise an issue of foreign law, but that, in either case, reasonable notice should be given, which shall be written notice in the case in which a party raises the issue. Section 5.08 provides that in determining an issue of foreign law, the court may consider any relevant material including testimony whether or not submitted by a party or admissible under the ordinary rules of evidence, and in § 5.08(2) provides that while the parties are primarily responsible for providing information about foreign law, the court can "obtain" its own information. Section 5.09 provides that if the court finds there is insufficient information on foreign law, it may request additional information from the parties or obtain its own information, but if there remains insufficient information, it will normally apply forum law.

(b) Section 5.10 provides that the court is responsible for determining foreign law and should ordinarily try to determine that law in the way that a court in the foreign state would interpret and apply it. Section 5.11 provides that a question of foreign law may be resolved on a motion for summary judgment. Finally, § 5.12 provides that a determination of foreign law is reviewable on appeal as a question of law.

(c) You should remember that the third restatement project is ongoing and that some of the descriptions above may be inaccurate, at least in detail, because the version submitted to the Council differ (based on discussion by the Reporters, Advisers, and Members Consultative Group) from the latest preliminary draft, or that the Council Draft is no longer completely accurate because of changes made after discussion among the Reporters and Council.

[Substitute the following problem for problem 2.21 in the casebook.]

Problem 2.21. *S-1, S-2,* and *S-3* are domiciled in State *X*. They applied for and received a marriage license in the city and county in which they live in State *X*, even though under State *X* statutory marriage restrictions, polygamous marriages are illegal. (The license was issued by a county clerk of the county in State *X* in which *S-1*, *S-2*, and *S-3* live. The clerk is sympathetic to more than two partners who wish to marry and has stated to the local press that he will issue marriage licenses to such partners because he believes that the equal protection clause of the State *X* constitution outlaws restrictions on polygamous marriages. He further stated that, as a public official, he is obligated to conform to constitutional restrictions and that this includes the obligation to make an independent judgment about the constitutionality of the laws he is called on to administer. Thus, in his view, he cannot adhere to the traditional restriction on marriage that allows only two people at a time to marry.) *S-1, S-2,* and *S-3* are subsequently married in State *X* by an appropriate official. They later move to State *Y*. Under the income tax law of State *Y*, married couples are taxed at a substantially lower rate than single couples. State *Y* does not recognize the validity of polygamous marriages. However, State *Y* has a statute providing that the state will recognize the validity of marriages validly performed under the law of another state. Assume that *S-1*, *S-2*, and *S-3* are denied the tax benefits afforded to married couples under the law of State *Y* on the grounds that they are not validly married. They commence an action against the State *Y* internal revenue commissioner in a State *Y* trial court for a declaratory judgment that their marriage is valid under the law of State *X* and must, therefore, be treated as valid under the State *Y* statute described above. What arguments can be made by the State *Y* internal revenue commissioner to defeat this action?

I. DEALING WITH EXTRATERRITORIAL CONDUCT IN CRIMINAL CASES

[Insert after the introductory paragraph on page 177.]

The American Law Institute's project to create a third restatement of Conflict of Laws does not attempt to provide rules for criminal conflicts, either substantive or procedural. Is this a mistake? After studying the materials in this subsection, ask yourself whether a restatement of criminal law conflict rules would serve a useful clarifying or other purpose.

[Insert at the end of Note 3 on page 184.]

For a case containing an excellent discussion and comparison of civil and criminal jurisdiction and issues of due process involved in prosecuting criminal activity that occurred largely, but not completely, outside the forum, see *State v. Rimmer*, 877 N.W.2d 652 (Iowa 2016). In *Rimmer*, most of the allegedly criminal activity occurred outside the state, but the court found criminal jurisdiction to exist constitutionally in Iowa on four of the five charges levelled against the defendants because they made false statements in phone calls with insurance investigators located in Iowa, despite the fact that the defendants did not know that they were talking to persons in Iowa.

[Insert after Note 4 on page 184.]

5. *See also State v. Rimmer*, 877 N.W. 2d 652 (Iowa 2016) (defendants who resided in Wisconsin and Illinois staged auto accident in Chicago to collect on false insurance claims; victim was Wisconsin insurer that paid claims through its Wisconsin bank account; accident investigated by two employees of insurer's Davenport, Iowa office who spoke with defendants by phone; defendants never set foot in Iowa or knew that employees were in Iowa during the phone calls, but made false statements to the investigators during the calls; held: the false statements during the calls caused a detrimental effect in Iowa, which constituted an element of four out of the five crimes charged and defendants' challenges to territorial jurisdiction fail as to those four crimes; defendants' reliance on civil restrictions on personal jurisdiction under the due process clause are not relevant to territorial jurisdiction issues in criminal cases; due process for purposes of criminal territorial jurisdiction is not violated as long as the defendants were on notice that they could be prosecuted somewhere).

* * * * *

Chapter 3

CHOICE OF LAW: SOME CONSTITUTIONAL PROBLEMS

A. THE FULL FAITH AND CREDIT AND DUE PROCESS CLAUSES

1. The Full Faith and Credit Clause

[Insert at the end of the introductory text on page 198.]

The American Law Institute, in its construction of a third restatement of Conflict of Laws, proposes to add a Topic 13 to its Chapter 5 on Choice of Law. *See* RESTATEMENT (THIRD) OF CONFLICT OF LAWS, at xxi (AM. LAW INST., Preliminary Draft No. 1, Oct. 1, 2015) (Proposed Table of Contents, Topic 13, State-Federal Issues in the United States, including Constitutional Limits on Choice of Law). As yet, this topic has no content. However, there are some places where the Reporters have made (as yet minor) comments on constitutional limits on choice of law. This supplement will identify those areas as appropriate below.

[Insert at the end of Note 3 on page 223, following *Nevada v. Hall* excerpt.]

See also Montano v. Frezza, 393 P.3d 700 (N.M. 2017) (Full Faith and Credit Clause does not require a state to apply another state's law in violation of its own public policy; here, Texas' grant of sovereign immunity to doctor does not violate New Mexico's public policy; therefore, New Mexico applies Texas' rule of sovereign immunity as a matter of "comity").

[Insert after Note 3 on page 223.]

a**.** On April 19, 2016, the Supreme Court decided *Franchise Tax Board of California v. Hyatt*, 578 U.S. ___, 136 S. Ct. 1277 (2016), which involved the resolution after trial of the *Hyatt* case described in Note 3 of the casebook. The plaintiff was awarded almost $500 million in damages and fees. On appeal, the Franchise Tax Board (FTB) argued that *Hall* should be overruled or that, in the alternative, the Full Faith and Credit Clause should be read to require that Nevada limit damages against the FTB to $50,000, the same amount that Nevada law would allow in a suit against its own officials. The Nevada Supreme Court limited the award granted to $1,000,000 and ordered a retrial of one of the awards, making it clear that Nevada's limit of $50,000 would not be applied to the retrial. It refused either to apply the California complete immunity rule or its $50,000 cap on damages that would apply to its own officials. The court reasoned that its own officials were subject to systems of legislative control, administrative oversight, and public accountability in Nevada, but that California officials operating in Nevada were not. Therefore, it was justifiable to apply a rule of no immunity against those officials to adequately protect its own citizens.

The Supreme Court granted certiorari, vacated the judgment of the Nevada Supreme Court and remanded. The Court was evenly divided on whether *Hall* should be overruled. Therefore, the judgment of the Nevada Supreme Court approving the exercise of jurisdiction over the Franchise

Tax Board was affirmed by an evenly divided Court. However, the Court held that Nevada had acted unconstitutionally under the Full Faith and Credit Clause in applying a special rule to California officials that would not be applied to their conduct either by California or by Nevada. The majority opined that by disregarding its own rules that would be applicable to the same kind of case, the Nevada Supreme Court demonstrated an unconstitutional hostility to the public acts of another state that violated the Full Faith and Credit Clause. The Court further reasoned that Nevada's "public accountability" explanation "amounts to little more than a conclusory statement disparaging California's own legislative, judicial, and administrative controls" and thus "cannot justify the application of a special and discriminatory rule." 578 U.S. at ___, 136 S. Ct. at 1282. The majority opinion made it clear that the Court was not returning to the "balancing of interests" approach that had been rejected in its earlier cases. Rather, this was a special case in which "in devising a special—and hostile—rule for California, Nevada has not 'sensitively applied principles of comity with a healthy regard for California's sovereign status.'" 578 U.S. at ___, 136 S. Ct. at 1283 (citing *Franchise Tax Board v. Hyatt*, 538 U.S 488, 499 (2003)).

Justice Alito concurred in the judgment only, while Chief Justice Roberts and Justice Thomas dissented. (Thus, the number of Justices concurring in Justice Breyer's majority opinion was five.) Throughout the majority opinion, the Court relied on a statement in *Carrol v. Lanza*, reprinted at page 215 of the casebook, to the effect that the states could not permissibly adopt a "policy of hostility" to the public acts of other states. The Chief Justice's dissenting opinion pointed out, however, that in explaining what adopting a policy of hostility means, *Carroll* had observed that a state might not refuse to apply another state's law when there were no sufficient policy considerations to warrant the refusal. (Presumably, the other state would also have to have sufficient contacts to justify the application of its law.) The Chief Justice opined that Nevada had given justifiable public policy reasons for apply the rule that it applied—to protect its own citizens and (for disregard of its $50,000 liability limitation) the fact that California officials act outside the system of Nevada legislative, administrative, and public accountability rules that apply to Nevada officials. 578 U.S. at ___, 136 S. Ct. at 1287–88. In addition, the dissent pointed out that the structure of the Full Faith and Credit Clause requires (as interpreted by the Court) that states *sometimes* apply the law of other states. If the majority's approach is correct, that would require Nevada to apply California law if there is really no adequate Nevada public policy justifying disregard of it. Yet that is not what the majority opinion required. Nevada does not have to apply California law, but may apply its own law, as long as it is the same law that it would apply to Nevada officials.

How easy will it be to apply the majority's "hostility" rationale to other cases? For example, suppose a state has a general public policy exception of the sort applied under the vested rights system examined in Chapter 1 of the casebook. A case of first impression arises in which the state applies that public policy exception to refuse to recognize a defense under the law of another state that would be applied to the conduct of a defendant from the other state who is named in a suit in the forum. The public policy exception is broadly worded and thus potentially applicable to the defense in question, but whether it should so apply has never been ruled on, because no case raising the issue has ever arisen, the defense not being applicable to official conduct within the forum. Does it matter whether the forum is applying the claim law of the other state or its own? Suppose it is applying the other state's claim law and that it has no claim law that would apply to the case?

If the plaintiff ultimately obtains a judgment against the Franchise Tax Board, however small, will it be able to execute the judgment in California against a defense of sovereign immunity raised by FTB in the California courts? Review this question after studying the materials in Chapter 9 of the casebook.

See generally Note, *Article IV—Full Faith and Credit—Sovereign Immunity*—Franchise Tax Board v. Hyatt, 130 HARV. L. REV. 317 (2016).

2. The Due Process Clause

[Insert at the end of the introductory paragraph in this subsection.]

See also Nathan S. Chapman & Michael McConnell, *Due Process as Separation of Powers*, 121 YALE L.J. 1672 (2015).

[Insert at the end of Note 3 on page 256]

See also Patrick J. Borchers, *Is the Supreme Court Really Going to Regulate Choice of Law Involving States?* 50 CREIGHTON L. REV. 7 (2016).

3. Convergence?

[Insert after Note 1(c) on page 242.]

(d) In the third Restatement of Conflicts, Reporter's Note on Comment b to § 1.02 (Subject Matter of Conflict of Laws), the reporters state that the Full Faith and Credit Clause forbids states to grant priority to their own law over the law of another state unless doing so promotes some legitimate interest. *See* RESTATEMENT (THIRD) OF CONFLICT OF LAWS 6 (AM. LAW INST., Preliminary Draft No. 2, Aug. 12, 2016) [hereinafter *Preliminary Draft No. 2*]. This view is obviously based on the majority agreement on the verbalization of the constitutional test in *Allstate*, as well as on the same agreement that the Due Process Clause and the Full Faith and Credit Clauses are governed by exactly the same test. Notwithstanding the disparate agreement on the verbalization of the test, is it really clear that there is majority agreement on (1) whether the Full Faith and Credit Clause requires the forum to have a legitimate interest in applying its own law or (2) whether the Due Process and Full Faith and Credit Clauses are governed by the same test? For example, if Justice Stevens' viewpoint about the clauses and the tests that govern them are taken to define the holding of the case (because it was his vote that was necessary for affirmance), would it not be clear that, as a matter of full faith and credit, the forum can apply its own law even if it has no interest, as long as it is not impairing the interest of another potentially concerned state? Under his view, isn't it clear that there would be no due process violation unless application of the forum's law would produce "unfair surprise" to the defendant (as he defines it)? Even if one focuses on an issue-by-issue definition of the holding, isn't it clear that the application of the significant contacts producing state interests test by the dissent is closer to Stevens' view than to the plurality's view of how the test should be applied?

(e) In *Preliminary Draft No. 2* of the third restatement, the Reporters also indicate that a state court would violate the Full Faith and Credit Clause if it blatantly misinterpreted another state's statute to apply to a set of facts outside the scope of the statute. *See Preliminary Draft No. 2*, Reporter's Note, *cmt. b* on § 5.02(1) at 124. The Reporters cite *Sun Oil Co. v. Wortman*, 486 U.S. 717, 731 (1988), for this proposition. However, neither *Sun Oil*, nor any of the authorities cited in the case, support the proposition. *Sun Oil* only indicated that a blatant misinterpretation of another state's law that would result in *inapplication* of that law when the other state would apply it to the case would violate the Clause. In fact, there appears to be no case in which the Court has ever held, or even strongly implied, that a blatant misinterpretation of another state's law that would result in its application to a case in which it would not otherwise apply would violate the Clause. Can you think of a real world situation involving the Reporters' statement that would violate the Clause under any of the views expressed in the *Allstate* case? *See also* Charles M. Thatcher, *Could a State Court's Selection of Another State's Substantive Law Exceed Constitutional Limitations on Choice of Law?*, 61 S.D. L. REV. 20 (2016).

[Insert after the citation to the Sohn article in Note 1(e) on page 254.]

See also sub-note (e) on the ALI's view of the constitutional obligation to interpret other states' laws properly; insert to Note 1 on page 242 above.

[Insert after Note 2(b) on page 255.]

Cf. Montana v. Barrett, 358 P.3d 921 (Mont. 2015) (Idaho convicted defendant of DUI, but, pursuant to a plea bargain, reduced the conviction to a second DUI rather than a third DUI; defendant was subsequently convicted in Montana of another DUI, which the Montana court counted as a fourth DUI for sentencing purposes under Montana law because of the prior Idaho conviction; defendant argued that this violated the Full Faith and Credit Clause, because the reduction of the conviction to a second DUI by the Idaho court defined the effect that Montana owed to the Idaho judgment; the Montana Supreme Court rejected this argument, holding that the obligation to give proper effect to the Idaho judgment (see Chapter 9) was not violated by counting the conviction differently for purposes of Montana law than Idaho would have counted it).

B. OTHER CONSTITUTIONAL CLAUSES

2. The Privileges and Immunities Clause

[Insert at the end of Note 4 on page 266 following *Supreme Court of New Hampshire v. Piper* Excerpt.]

See also Schoenefeld v. Schneiderman, 821 F.3d 273 (2d Cir. 2016) (New York statute requiring nonresident members of the bar to maintain a physical office for the transaction of legal business in the state did not violate the Privileges and Immunities Clause because it was not enacted for the protectionist purpose of burdening out-of-state attorneys, even though there was no similar requirement for in-state attorneys; the court indicated that under the Privileges and Immunities Clause as opposed to the Commerce Clause, it is protectionist purpose and not simply disparate effects that violates the Privileges and Immunities Clause).

* * * * *

[Insert at the end of Note 5 on page 266.]

See also Thomas H. Burrell, *Privileges and Immunities and the Journey from the Articles of Confederation to the United States Constitution: Courts on National Citizenship and Antidiscrimination*, 35 WHITTIER L. REV. 199 (2014).

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Chapter 4

CHOICE OF LAW: TORTS

A. THE TRADITIONAL RULES METHOD

[Insert at the end of Note 3 on page 275 following *Naughton v. Bankier* excerpt.]

See also Holt v. United States, 853 F.3d 1056 (9th Cir. 2017) (for purposes of the Federal Tort Claims Act "foreign country exception," injury occurs where the harm first impinges upon the body, even if it is later diagnosed elsewhere (applying traditional first Restatement system section 377)).

B. THE NEW YORK EXPERIENCE AND APPROACH

[Insert at the end of Note 5(b) on page 306.]

Compare Ginsberg v. Quest Diagnostics, Inc., 147 A.3d 434 (N.J. 2016), *with Edwards v. Erie Coach Lines Co.*, 952 N.E.2d 1033 (N.Y. 2011) (wrongful birth actions brought against both New Jersey and New York defendants). Both states recognized an action for wrongful birth, but differed in the damages that could be recovered. The New Jersey Supreme Court affirmed a determination by intermediate court of appeals that the Second Restatement does not require that the same law apply to all defendants and that a defendant-by-defendant analysis is appropriate "in a majority of the cases."

C. SECOND RESTATEMENT: THE MOST SIGNIFICANT RELATIONSHIP

[Insert at the end of Note 1 on page 321 following *Bates v. Superior Court* excerpt.]

See also Jacked Up, L.L.C. v. Sara Lee Corp., 854 F.3d 797 (5th Cir. 2017) (misappropriation of trade secrets claim governed by Ohio law under most significant relationship test; in such cases, place of injury (Texas) less important than place of conduct (Ohio); third factor in section 145 (place of business, etc.) weighed equally in favor of Texas and Ohio; fourth factor (place where relationship centered) not "particularly relevant" because parties did not have formal relationship; no section 6 analysis).

[Insert at the end of Note 6 on page 337.]

See also Michel v. NYP Holdings, Inc., 816 F.3d 686 (11th Cir. 2016) (state-court action for defamation and intentional infliction of emotional distress based on article published in New York by New York defendants; plaintiff a citizen of Florida; action removed to Federal Court; court of appeals lists § 145 factors, recognizes that they should be applied with regard to their relative importance in the case, but never performs § 6 analysis; New York law chosen); *Sarver v. Chartier*, 813 F.3d 893 (9th Cir. 2016) (action commenced in New Jersey for misappropriation of right of publicity and defamation and transferred to California under 28 U.S.C. § 1404(a); applying New

Jersey conflicts law, court holds that §§ 150 & 153 of RESTATEMENT (SECOND) create presumption in favor of law of plaintiff's domicile, which plaintiff contended was New Jersey; court not convinced that plaintiff had established domicile in New Jersey, but held that even if he had, the presumption was overcome by the factors in §§ 145 & 146, so that California's law, including its Anti-Slapp statute applied and case was properly dismissed under that statute by the district court); *Western Dermatology Consultants, Inc. v. Vitalworks, Inc.*, 143 A.3d 564 (Conn. 2016) (court holds that under Second Restatement tort analysis, New Mexico Unfair Trade Practices Act applied rather than Connecticut Act; court evaluated § 145 contacts in connection with § 6 factors, and concluded that the § 6 factors more strongly supported the application of New Mexico's law); *Martin v. Gray*, 385 P.3d 64 (Okla. 2016) (court held that a claim for bad faith failure to pay insurance benefits was independent of a contract claim and had to be separately evaluated under the Second Restatement's most significant contacts analysis); *FutureSelect Portfolio Mgmt., Inc. v. Tremont Grp. Holdings, Inc.*, 331 P.3d 29 (Wash. 2014) (in investment fraud case, court "formally adopts" § 148 of Second Restatement and applies its previously adopted approach under § 145; this involves a two-step analysis whereby the court first evaluates the contacts with each interested jurisdiction qualitatively and, second, evaluates the interests and public policies of the potentially concerned jurisdictions).

[Insert at the end of Note 7 on page 338.]

See also Bell Helicopter Textron, Inc. v. Arteaga, 113 A.3d 1045 (Del. 2015) (products liability action based on defective component part in helicopter that crashed in Mexico; held: place of injury was not fortuitous, with the result that rebuttable presumption arose that law of Mexico governed liability, damages, and remedies issues in the case; presumption not rebutted by other factors set forth in the Second Restatement; therefore, lower court's determination that Texas law applied reversed).

[Insert before Section D on page 338, will become section C.1.]

1. The Third Restatement of Conflict of Laws

In *Preliminary Draft No. 2* of the RESTATEMENT (THIRD) OF CONFLICT OF LAWS, the Reporters included Chapter 6, Topic 1, containing general rules of torts in §§ 6.01–6.08. In the Reporters' Memorandum to *Preliminary Draft No. 2*, the Reporters' state that their goal is to write "clear and sensible rules" that represent majority practice under modern approach and most codifications. To this end, they relied on the "widely accepted" distinction between conduct-regulating and loss allocating rules as a guide. They "assumed" as a general matter that states have a strong interest in applying conduct-regulating rules to conduct or injury within their borders, but "a negligible interest" in applying such rules to conduct outside their borders. They also assumed that states have a strong interest in applying loss-allocating rules in situations where application would benefit a domiciliary to the detriment of an out-of-state party or another domiciliary, but a weak interest in extending the benefits of loss-allocation rules to out-of-state parties with regard to events occurring within the out-of-state parties' states.

Section 6.01 defines and gives examples of loss allocation rules (tort rules whose primary purpose is to allocate loss among parties on the basis of considerations other than the wrongfulness

of conduct). Section 6.02 indicates that when the parties share a "central geographical link" to a state, that state's law will govern issues of loss allocation. Section 6.03(1) deals with situations in which the parties have central geographical links to different states and the conduct and injury occur in a single state, indicating that the latter state's law will govern an issue of loss allocation. However, under § 6.03(2), when the parties have central geographical links to different states and the conduct and injury occur in different states, the law of the state of conduct will govern loss allocation unless the injured person is affiliated with the state of injury, the occurrence of injury in that state was "objectively foreseeable," and the injured person requests the application of the law of the state of the injury.

Section 6.04 defines and gives examples of conduct-regulating rules (rules whose primary purpose is to impose liability for conduct deemed socially undesirable or to absolve parties from liability on the grounds that their conduct was not socially undesirable) and gives examples of such rules (e.g., standards of conduct or safety). Section 6.05 states that when the conduct and injury occur in the same state, that state's laws will govern issues of conduct regulation. Section 6.06 states that when conduct in one state causes injury in another, the law of the state of conduct will govern an issue of conduct regulation, but if the location of the injury was foreseeable, the injured party may select the law of the state of the injury.

Section 6.07 provides a "residual rule." For choice-of-law questions not explicitly provided for in the new restatement, an issue of tort will be governed by "the most appropriate law," which is determined by an assessment of the relevant policies of the forum and other interested states, the relative interests of those states in the particular issue, and the reasonable expectations of the parties.

Finally, § 6.08 provides that parties can choose the law to govern a tort after its occurrence by mutual agreement to the same extent that they could settle the claim, and that the parties may choose the law to govern a tort before it occurs to the same extent that they can choose the law to govern a contract issue that they could not have resolved by an explicit provision in their agreement, and that they may choose a law that eliminates tort liability to the same extent that they can agree to waive that liability.

QUESTIONS

What do you think of the RESTATEMENT (THIRD) scheme at this stage of its development? Is the distinction between conduct-regulating and loss-allocation rules sufficiently clear to warrant the Reporters' reliance on it in the construction of tort conflict rules? Note that at the October 2016 meeting, there was extensive discussion of this latter point, including a good bit of skepticism that the two kinds of rules can be clearly distinguished, at least at the margins, or that rules might be supported by both purposes. (There is, of course, the ever-present problem of determining what policies support particular rules.) Are the Reporters' wise to insert provisions (as in § 6.03(2)) allowing the injured party to select the applicable law after the occurrence of the tort? Is it wise, in § 6.08 to insert provisions encouraging choice of law in torts by mutual consent in contracts? Does this risk adding an unnecessarily complicated additional layer into the choice-of-law inquiry? (Reconsider this question after you have studied choice-of-law provisions in contracts in Chapter 5 of the casebook.)

D. LEFLAR'S CHOICE-INFLUENCING CONSIDERATIONS

[Insert after Note 3 on page 345 following *Ferren v. General Motors Corp.* excerpt]

4. In *Shelby County Health Care Corp. v. Southern Farm Bureau Casualty Insurance Co.*, 855 F.3d 836 (8th Cir. 2017), the claim was for impairment of a medical lien by a Tennessee hospital. The decedent had been injured in Arkansas and treated at the hospital in Tennessee, but his estate was being administered in Arkansas. The administrator of the estate obtained a settlement from the tortfeasor's insurer, allocating the entire settlement to recovery for wrongful death and none to compensatory damages for medical services and other expenses. After the probate proceeding was closed, the hospital sued the settling parties for impairment of its lien. On a second appeal after remand for determination whether Arkansas or Tennessee law governed the issue, the court of appeals held that under Arkansas's conflicts approach, Tennessee law should govern. The court first characterized the issue as one in tort rather than contract. It then opined that under Arkansas conflicts doctrine the court should first determine the state of the most significant relationship and then apply Leflar's choice-influencing considerations to determine the applicable law. After counting contacts, the court never explicitly concluded that one state or the other had the most significant relationship, but simply said it "considered" that question along with Leflar's considerations. (Nevertheless, the implication of the court's opinion was that Tennessee had the most significant relationship.) With regard to the choice-influencing considerations, it held that the predictability of results factor favored Tennessee because forcing parties like the hospital to predict the state in which a decedent's estate would be administered would result in unpredictable results and the application of Tennessee law would prevent forum shopping in lien impairment actions involving former patients who lived. The maintenance of interstate and international order also favored the application of Tennessee law because it would deprive the hospital of compensation for emergency care administered to injured Arkansans. The court did not mention the simplification of the judicial task consideration. It considered the fourth factor, advancement of the forum's governmental interest to be prevention of creditor's from attaching liens to wrongful death recoveries. However, while it said this arguably pointed to Arkansas law, this was only because Arkansas law allowed the administrator to allocate the entire recovery to wrongful death and none to recoveries that would benefit the creditors of the estate. In any event the court interpreted an Arkansas Court of Appeals decision as not having identified a strong policy in favor of the allocation procedure and then opined that it was not convinced that the forum's interest outweighed the other two factors, referring back to the interstate order factor as encouraging deference to other states' laws when they had a real interest in having their law applied. The court did not mention the better law factor. Thus, the court considered that Tennessee law, which allowed the claim, should be applied.

Evaluate the court's method of applying Leflar's system. What does addition of the most significant relationship inquiry add to the method, if anything? Did the fact that the court considered this as the first step analysis explain why it felt it necessary to categorize the case first as a tort case? Is it really hard to predict where a decedent's estate is going to be administered? Is it really true that Arkansas did not have a strong interest in its allocation procedure? Would that question have been clarified if the hospital had filed the lien in the Arkansas probate proceeding and litigated it in Arkansas state court?

[Insert the following new material in the current supplement:]

E. OTHER APPROACHES

2. Eclectic Solutions: Combining Choice-of-Law Approaches

[Insert at the end of Note 4(f) on page 363.]

Sims v. Kia Motors of Am., Inc., 893 F.3d 393 (5th Cir. 2016) (products liability action commenced in California and transferred under 28 U.S.C. § 1404(a) to Texas, where accident occurred and automobile purchased; applying California comparative impairment approach, court of appeals held that Texas had an interest in applying its law to attract businesses like Kia to Texas and that even if California had an interest in applying its law, Texas' interest would be more impaired by not applying its law because conduct-regulating rules were involved and the place of the wrong had the predominant interest in such cases).

F. SPECIAL PROBLEMS: MASS TORTS

2. Class Actions

[Insert at the end of the carryover paragraph on page 376.]

See also Bobbitt v. Milberg LLP, 801 F.3d 1066 (9th Cir. 2015) (in action for malpractice arising out of previous class action, court holds that under Arizona choice of law principles, specifically § 145 of Second Restatement, place of injury factor, factor regarding where conduct causing injury took place, and factor regarding center of relationship between parties favored application of Arizona law, while factor regarding domicile of parties was entitled to little weight; therefore, lower court decision refusing to certify malpractice action as class action was vacated and remanded); *Johnson v. Nextel Commc'ns, Inc.*, 780 F.3d 128 (2d Cir. 2015) (district court erred in certifying action for class treatment because proper choice of law analysis indicates that the law of each of the individual members of the class's home state will apply to their claims diminishing the predominance of common issues and superiority of class treatment factors for class treatment to the vanishing point); *Grandalski v. Quest Diagnostics, Inc.*, 767 F.3d 175 (3d Cir. 2014) (in nationwide putative class action against medical testing for overbilling, district court did not err in engaging in choice of law inquiry and concluding that the law of each of the individual plaintiff's home states would apply to their claims; patients had not carried their burden of showing that grouping of state laws was workable and need for specific evidence from each patient was not compatible with class predominance requirement).

3. Choice of Law: The ALI Proposal

[Insert after Note 3 on page 377.]

4. In its project to draft a Third Restatement of Conflict of Laws, the American Law Institute will include a Topic 6 in Chapter 5 on Choice of Law dealing with Complex Litigation. *See*

RESTATEMENT (THIRD) OF CONFLICT OF LAWS, at xxxxvi, xi (AM. LAW INST., Preliminary Draft No. 2, Aug. 12, 2016) (Projected Table of Contents). The project is at this date in its early stages, and it is, therefore, not possible to determine what this Topic will look like. Presumably, however, the drafters will attempt to make their proposals compatible with the ALI's complex litigation project. If so, is this likely to produce a desirable product?

* * * * *

Chapter 5

CHOICE OF LAW: CONTRACTS

B. SOME MODERN APPROACHES

1. When the Contract Does Not Contain a Choice-of-Law Clause

[Insert at the end of Note 1 on page 395.]

See also Hoosier v. Interinsurance Exchange of the Auto. Club, 451 S.W.3d 206 (Ark. 2014) (holding Texas law rather than California law applied to underinsured motorist provision, by virtue of the fact that at the time of the accident the place of performance was Texas, the insureds lived in Texas, and the location of the subject matter of the contract was Texas; evaluating these factors according to their relative importance to the case (but without explaining why they were relatively more important than other factors), Texas had the most significant relationship to the issue).

[Insert at the end of Note 1 on page 402.]

See also Leritz v. Farmers Ins. Co., 385 P.3d 991 (Okla. 2016) (providing laws to apply to insurance contracts by state statute); *Tidyman's Mgmt. Servs. Inc. v. Davis*, 330 P.3d 1139 (Mont. 2014) (under Montana statute, Montana law applied to case because Montana was place of performance of contract; this is congruent with § 6 of the Second Restatement).

[Insert at the end of Note 2 on page 402.]

See also Certain Underwriters at Lloyds, London v. Chemtura Corp., 160 A.3d 457 (Del. 2017) (insured sues for declaratory judgment that insurer required to reimburse costs of cleaning up environmental contamination in Arkansas and Ohio; Supreme Court of Delaware held that presumption under Second Restatement § 193 that principal location of insured risk controls did not apply to complex multistate insurance agreement and most significant relationship test pointed to New York, which was principal place of business of insured at beginning of coverage, was state of most significant relationship).

[Insert after Note 3 on page 410 following *Plante v. Columbia Paints* Excerpt.]

4. In *American Fire & Casualty Co. v. Hegel*, 847 F.3d 956 (8th Cir. 2017), an employer brought suit against an employee's estate, seeking a declaratory judgment that it had no obligation to provide underinsured motorist coverage under its business auto insurance policy after the employee had been killed during the course of his employment in an automobile accident. At issue was whether the law of Kentucky, which provided no such obligation, or the law of North Dakota, which did, applied. Applying Leflar's choice-influencing considerations, the court of appeals held that Kentucky law should be applied. The court found that predictability of results pointed in favor of the application of Kentucky law, because the insurance contract had been formed in Kentucky between

the employer and a Kentucky agent. The rest of the factors were initially described as not relevant, but at the end of the discussion the court observed: "Accordingly, two factors favor the application of Kentucky law and no factor favors the application of North Dakota law." The second factor the court may have been counting in favor of Kentucky was the forum's governmental interest; however, the court's analysis of that factor concluded that North Dakota had no governmental interest because the case involved an out-of-state insurance company and an out-of-state resident. (Is that a plausible analysis?) On the simplification of the judicial task point, the court noted that *Plante* was distinguishable from the case before it because North Dakota had a statute requiring underinsured motorist coverage, making it unnecessary for the court to have to formulate the appropriate legal standard. The court also noted that the difficulty of applying North Dakota law is "a moot issue" because federal courts routinely apply the laws of the various states. Was this last observation a shot at the North Dakota Supreme Court's silly analysis of this factor in *Plante*? Finally, the court noted that even under North Dakota law, the deceased employee would not have been entitled to recover underinsured motorist benefits because the driver of the other automobile was not underinsured. Did this observation make the entire conflicts analysis unnecessary?

2. When the Contract Contains a Choice-of-Law Clause

[Insert at the end of Note 4(a) on page 430.]

See also Crawford Prof'l Drugs, Inc. v. CVS Caremark Corp., 748 F.3d 249 (5th Cir. 2014) (under § 187, plaintiff failed to demonstrate that Arizona had no substantial relationship to the parties or transaction; assuming arguendo that Mississippi has a materially greater interest than Arizona in the determination of the particular issue and that Mississippi would be the state of the applicable law in the absence of the choice of law clause, the application of Arizona law would not violate a fundamental policy of Mississippi; though each state has a different law, they would not necessarily reach different results on the enforceability of the arbitration clause at issue); *Progressive Gulf Ins. Co. v. Faehnrich*, 327 P.3d 1061 (Nev. 2014) (Nevada public policy does not invalidate the choice of Mississippi law in an insurance contract even though family exclusion clause in contract would deny recovery; more fundamentally, Nevada's public policy has changed and now permits family exclusion clauses); *Exxon Mobile Corp. v. Drennen*, 452 S.W.3d 139 (Tex. 2014) (choice of law clause selecting New York law to govern executive bonus-compensation system that allowed forfeiture of bonus awards for "detrimental activity" was valid; Texas was the state of the most significant relationship and also had a materially greater interest than New York, but application of New York law would not violate a fundamental policy of Texas because the provision in question was not a covenant not to compete; reserved for another day is whether such provisions are unreasonable restraints of trade under Texas law and unenforceable for that reason); *cf. Bode & Grenier, LLP v. Knight*, 808 F.3d 852 (D.C. Cir. 2015) (one contract document did not refer to or incorporate choice of law clause in another contract document; therefore, it was not governed by the choice of law clause); *Masters Grp. Int'l, Inc. v. Comerica Bank*, 352 P.3d 1101 (Mont. 2014) (while refusing to adopt a "bright-line" rule with respect to all choice of law provisions, court holds that tort issues in case are governed by the law selected by the provision as well as contract provisions, resulting in the application of Michigan law to tort claims "arising out of contract").

[Insert at the end of Note 6 on page 432.]

See also St. Jude Med. S.C., Inc. v. Biosense Webster, Inc., 818 F.3d 785 (8th Cir. 2016) (choice-of-law clause in non-competition agreement upheld under law of Minnesota, which is a "better law" jurisdiction, but court's analysis simply stated that Minnesota's approach was to uphold choice-of-law provisions as long as the parties acted in good faith and without intent to evade the law); *Federated Capital Corp. v. Libby*, 384 P.3d 221 (Utah 2016) (choice-of-law clause and forum selection clause in contract pointed to Utah; action in Utah held barred by limitations because of Utah borrowing statute, which selected Pennsylvania's shorter limitations period as applicable; argument that forum selection clause made Utah longer limitations period applicable without regard to borrowing statute rejected). *Cf. George K. Baum & Co. v. Twin City Fire Ins. Co.*, 760 F.3d 795 (8th Cir. 2014) (a contract can indicate which state's law the parties intended to apply without an explicit choice of law clause).

C. SOME SPECIAL PROBLEMS

2. The Uniform Commercial Code

[Insert at the end of Note 2(b) on page 447.]

See also Mo Zhang, *Rethinking Contractual Choice of Law: An Analysis of Relation Syndrome*, 44 STETSON L. REV. 831 (2015).

[Insert at the end of Note 5 on page 448.]

See also W. Laurence Craig, *Some Trends and Developments in the Laws and Practice of International Commercial Arbitration*, 50 TEX. INT'L L.J. 699 (2016).

* * * * *

Chapter 6

CHOICE OF LAW: PROPERTY, TRUSTS, AND ESTATES

[Insert prior to Section A on page 450.]

In RESTATEMENT (THIRD) OF CONFLICT OF LAWS (*Preliminary Draft No. 2*, Aug. 12, 2016), the Reporters included a Chapter 7, §§ 7.01 – 7.26, dealing with property. At the October 2016 meeting of the Reporters, Advisers, and Members Consultative Group, the discussion of this chapter was somewhat truncated because of lack of time. Based on that truncated discussion, however, it seems likely that portions of the Chapter will undergo substantial revision. For example, in the real property sections, the Reporters included numerous black-letter rules that pointed to the situs of the real property as controlling, but these rules were qualified by an escape clause that stated "unless, under the exceptional circumstances of a particular case, a different state's law is manifestly more appropriate," In the discussion, it was pointed out that in some sections, it was inconceivable that any law but the situs should control the issue, and the escape clause posed a danger that the courts would interpret the section as an invitation to depart from situs law improperly. In other sections, the initial designation of situs law as controlling was itself criticized on the grounds that there were numerous situations in which the situs had no conceivable interest in having its law applied, as where a non-resident testator leaves realty to non-resident beneficiaries contrary to situs law and there are no potential inheritors of the property or creditors located in the situs state. Because it seems that this chapter will undergo significant revision in the future, therefore, there is no detailed description of the individual sections in this supplement. The following is a listing of the individual sections with the subject-matter of the section described. The curious may refer to the draft for more detail on the current version.

Section 7.01 (real property defined); § 7.02 (personal property defined); § 7.03 (fixtures defined); § 7.04 (characterization of property as real or personal determined by law of situs state); § 7.05 (equitable conversion of real into personal property determined by law of situs); § 7.06 (permissible types of interests in realty determined by situs law); § 7.07 (whether rule against perpetuities violated decided by situs law); § 7.08 (restrictions on alienation of realty determined by law of state where realty located); § 7.09 (claim for waste affecting realty governed by situs law); § 7.10 (leasehold interests in realty governed by situs law unless situs allows issue to be governed by contract); § 7.11 (security interests in realty governed by situs law unless situs law allows issue to be governed by contract); § 7.12 (trusts of realty); § 7.13 (marital property); § 7.14 (contracts to transfer interests in realty); § 7.15 (transfer of realty by deed); § 7.16 (recording of real property documents); § 7.17 (fraud in connection with a transfer by deed); § 7.18 (transfer of interests in real property by will); § 7.18 (transfer of realty by intestate succession); § 7.20 (transfer of real property by power of appointment by trust); § 7.21 (transfer of realty by escheat); § 7.22 (transfer interest in real property by adverse possession); § 7.23 (easements, covenants, and other servitudes pertaining to real property); § 7.24 (private nuisance affecting realty); § 7.25 (trespass); § 7.26 (state regulation of real property).

Chapter 7

FAMILY LAW

A. MARRIAGE AND ITS TERMINATION

1. Marriage

[Substitute the following text for Note 3(a) – (e) and (f) on pages 513 – 516.]

After the principal text had gone to press, the United States Supreme Court decided *Obergefell v. Hodges*, 576 U.S. ___, 135 S. Ct. 2584 (2015). In *Obergefell*, the Court held that state limitations on same-sex marriage were unconstitutional under the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Obviously, if the Due Process and Equal Protection Clauses prohibit a state from refusing to allow same-sex marriages under its own law, those clauses also prohibit the states from refusing to recognize marriages performed in other states simply on the grounds that they are between persons of the same sex. In fact, the Court, while not ruling directly on DOMA or the Full Faith and Credit issues discussed in the casebook, did hold "that there is no lawful basis for a State to refuse to recognize a lawful same-sex marriage performed in another State on the ground of its same-sex character." *Id.* at 2608.

At this time, it is not clear what effect *Obergefell* will have on other nontraditional forms of marriage, such as polygamous or polyamorous marriages, incestuous marriages, and marriage between persons below a certain age. The Court's opinion indicated that marriage was a fundamental right protected by the Constitution, that there was no difference between same-sex and opposite-sex couples with regard to the right, and that laws prohibiting same-sex marriages stigmatized same-sex couples in an unconstitutional fashion. The new problems below explore some of these issues.

[Substitute the following problems for Problems 7-1 – 7-3 in the casebook.]

Problem 7-1. State *X* forbids polygamous marriages. *S-1*, *S-2*, and *S-3* are domiciled in State *X* and wish to enter into a polygamous marriage with one another. They travel to State *Y*, which has recently legalized polygamous marriages and validly enter into a polygamous marriage under the law of State *Y*. They then return to State *X* and resume their life in that state. Subsequently, *S-1* dies intestate while the parties are still domiciled in State *X*. *S-2* and *S-3* claim all of *S-1's* property as the surviving spouses of *S-1*. Their claim is challenged in the probate proceeding in State *X* by *S-1's* surviving brothers and sisters, who would inherit *S-1's* estate if *S-1* is not validly married. In response, *S-2* and *S-3* assert that State *X* must treat the State *Y* marriage as valid and recognize it under the Full Faith and Credit Clause of the Constitution. Consider first *Obergefell*, discussed in the text above. Should the right to marry more than one person be considered "fundamental" in the same fashion as same-sex marriages, thus bringing the marriage described in this problem within the reach of the decision? How can you tell? Assume that *Obergefell* does not encompass polygamous

marriages, so that the states can allow or disallow such marriages as they please. Under such circumstances, given the Full Faith and Credit Clause, could State *X* deny effect to the marriage validly performed under the law of State *Y* on the grounds that polygamous marriages violate its strong public policy? (Remember that DOMA is not applicable to this case.) Could it do so if it adds explicitly that the parties were attempting to avoid otherwise legitimate restrictions on their ability to marry by going to State *Y* to evade the State *X* restrictions on polygamous marriages?

Problem 7-2. On the facts of Problem 7-1, assume that there are only two parties to the marriage, *S-1* and *S-2*, but that the parties are first cousins. State *X*, where the parties are domiciled, forbids marriages between first cousins, but State *Y*, where the marriage was performed, allows such marriages. Now does the Full Faith and Credit Clause require State *X* to recognize the State *Y* marriage as against a strong public policy objection? Suppose *S-1* and *S-2* were brother and sister? Suppose they were first cousins, but were of the same sex?

Problem 7-3. Assume that *S-1*, *S-2*, and *S-3* are domiciled in State *X*, which permits polygamous marriages and the parties enter into such a marriage. Subsequently, *D*, a citizen of State *Y*, enters State *X*, and, while present there, becomes involved in an altercation with *S-1* and kills *S-1*. *S-2* and *S-3* qualify as co-administrators of *S-1's* estate and bring a wrongful death action against *D* in State *X*, validly serving *D* in State *Y* under the State *X* long-arm statute, which extends as far as the United States Constitution permits. (You may assume that the assertion of long-arm jurisdiction over *D* is constitutionally valid.) *D* does not appear in the State *X* action, and a default judgment for substantial damages is rendered against *D*. Subsequently, *S-1* and *S-2* bring an action in State *Y* to enforce the judgment against *D*. *D* defends on the grounds that the strong public policy of State *Y* prohibits enforcement of a judgment in favor of persons involved in a polygamous marriage. (Note that DOMA has no application here.) Thus, the judgment is governed by the general implementing statute to the Full Faith and Credit Clause, 28 U.S.C. § 1738 and the exceptions to that statute. The statute and its exceptions are examined in Chapter 9. Reexamine this problem after studying the materials in that chapter. Then assume that State *X* is a foreign country and State *Y* is a state of the United States, with all other facts remaining the same. What should the result be then and why?

2. Divorce

[Insert at the end of 5(a) on page 528.]

For a discussion of a lower Alabama state court case granting a divorce in disregard of the restrictions of a Louisiana covenant marriage, see Symeon C. Symeonides, *Choice of Law in the American Courts in 2015: Twenty-Ninth Annual Survey*, 64 AM. J. COMP. L. 221, 294–96 (2016).

[Substitute the following problem for Problem 7-5 on page 529.]

Problem 7-5. *S-1* and *S-2* are first cousins domiciled in State *X*, which permits marriages between first cousins. They enter into a valid marriage in State *X*. Subsequently, *S-1* moves to State *Y*, which does not recognize the validity of marriages between first cousins and has specifically prohibited recognition of any such marriages performed in other states, and establishes a new domicile there. *S-1* sues *S-2* for a divorce in a State *Y* court of proper subject-matter jurisdiction, serving *S-2* under the State *Y* long arm statute, which extends the jurisdiction of the State *Y* courts as far as the U.S. Constitution permits. Assuming that *S-2* appears in the State *Y* action, what arguments can *S-2* make that the State *Y* court should not grant the divorce to *S-1*? What arguments can *S-1* make to the contrary?

3. Annulment

[Insert after Note 3 on page 532.]

4. In *In re Geraghty*, 150 A.3d. 386 (N.H. 2016), the parties were married in New York in 1981, moved successively to Massachusetts and New Jersey, and finally moved to New Hampshire by 2002. In 2013, the wife filed a petition for divorce, and in 2015 the husband filed a petition for annulment, arguing that New York law should be applied and contending that the marriage was void from the inception because of fraud, the wife having allegedly concealed that she had engaged in prostitution, taken illegal drugs, and had certain medical procedures prior to the marriage. The trial court entered a judgment of divorce, holding in part that New Hampshire law should govern the annulment issue and did not provide for annulment under the circumstances. The New Hampshire Supreme Court applied Professor Leflar's choice-influencing considerations, holding that predictability of results favored application of New York law, maintenance of reasonable orderliness among the states was neutral (because both states had a substantial connection to the facts of the case), simplification of the judicial task was not important (because New Hampshire could easily apply New York annulment law), advancement of the forum's governmental interest favored application of New Hampshire law (because of New Hampshire's strong interest in maintaining order in its system of regulating marriage and marital dissolutions), and that the preference for applying the sounder rule of law applied to New Hampshire's stricter rule of annulment. Thus, the court affirmed the trial court's application of New Hampshire's annulment law. Note that after evaluating all of the five choice-influencing considerations, the court simply stated: "Accordingly, our analysis of the five choice-influencing considerations leads us to conclude that the trial court correctly applied New Hampshire law to the respondent's petition for annulment of the marriage." It did not indicate which of the applicable considerations, if any, was stronger than the others. Was the result simply due to the fact that, in the court's view, two of the considerations pointed to New Hampshire law and only one to New York law? If so, is this the way you understand that Leflar's considerations should be applied? Did the court analyze the choice-influencing considerations the way you understand is proper under Leflar's system?

[Substitute the following problems for Problems 7.6 and 7.7 on page 532.]

Problem 7.6. *S-1* and *S-2* are first cousins who are domiciliaries of State *X*, which, as a matter of its strong public policy, prohibits marriages between first cousins or recognition of such marriages performed in other states where they would be valid. *S-1* and *S-2* travel to State *Y*, where marriages between first cousins are legal, and are validly married there under the law of State *Y*. They then return to State *X* to live. Subsequently, *S-1* abandons *S-2* and commences an action to annul the marriage in a court of State *X*. Assuming that State *X* follows the approach of the RESTATEMENT (SECOND) OF CONFLICT OF LAWS, described in Note 1 of the casebook, should it annul the marriage? Would it matter if the parties were same-sex first cousins, with all the remaining facts the same.

Problem 7.7. Assume the same facts as Problem 7.6, except that after *S-1* abandons *S-2*, *S-1* moves to State *Z* and establishes a new domicile there. State *Z*, like State *X*, also considers marriages between first cousins as contrary to its strong public policy and follows the approach of the Second Restatement. Would State *Z* have jurisdiction to annul the marriage?

B. SUPPORT: DECREES/ORDERS

1. "Divisible Divorce"

[Substitute the following problems for Problems 7.8 and 7.9 on page 538.]

Problem 7.8. *S-1*, *S-2*, and *S-3* are domiciled in State *X* and married to each other under the law of that state, which permits polygamous marriages. *S-1* abandons *S-2* and *S-3* and moves to State *Y*, which also recognizes the validity of polygamous marriages. When *S-1* abandons *S-2* and *S-3*, the latter parties move to State *Z*, which by its constitution, prohibits polygamous marriages or the recognition of polygamous marriages performed in other states. *S-1* obtains an ex parte divorce in State *Y* based on *S-1's* newly acquired domicile there. While *S-1* was temporarily in State *Z*, *S-2* and *S-3* have *S-1* served with process in an action to recover alimony under the law of State *X*, the state of the parties' previous domicile. (Assume that State *X* would provide that the right of *S-2* and *S-3* to obtain alimony survived the State *Y* ex parte divorce decree.) *S-2* and *S*-3 contends that the Full Faith and Credit Clause requires that State *Z* apply the law of State *X* and award alimony under that law. *S-1* contends that the Full Faith and Credit Clause contains no such requirement and that State *Z* can refuse to recognize the validity of the polygamous marriage between the parties and deny alimony under its strong public policy. What should the result be and why?

Problem 7.9. On the facts of Problem 7.8, could *S-2* and *S-3* successfully sue in State *X* for alimony after they have changed domiciles to State *Z*? Review this problem after studying the materials in Chapter 10.

Insert the following new headings and material in the existing supplement:

B. SUPPORT: DECREES/ORDERS

2. Support—Generally

c. Uniform Interstate Family Support Act

[Insert at the end of Note 3 on page 545.]

See also Studer v. Studer, 131 A.3d 240 (Conn. 2016) ("initial order" issued in Florida and provided for the duration of the support obligation; order registered in Connecticut, where order modified twice to adjust amount of support; third modification sought to extend duration of support beyond period specified in initial order; court held that under the UIFSA, law of Florida where initial order issued controlled whether modification permitted).

[Insert after Note 3 on page 552.]

(a) In *In re Paternity of M.H.*, 383 P.3d 1031 (Wash. 2016), the question was whether § 604(b) of the UIFSA, which provides for application of the procedural law of the responding state shall govern enforcement procedure and remedies or § 604(c) providing for the application of the longer statute of limitations of either the issuing or responding state applied to an Indiana judgment being enforced in Washington. Washington had a statute providing that a judgment for "accrued child support" would continue in force for ten years after the eighteenth birthday of the child, who was now 29. Thus, the judgment would no longer be in force under Washington law, but would still be in effect under Indiana law, which had a 20 year statute of limitations that had not yet run. The Washington Supreme Court held that § 604(c) applied, thus making Indiana law applicable and the judgment enforceable.

C. CUSTODY

1. The Uniform Child Custody Jurisdiction Enforcement Act

[Insert after Note 4 on page 558.]

5. In *Friedetzky v. Hsia*, 117 A.3d 660 (Md. Ct. Sp. App. 2015), a mother commenced a single-parent custody petition for her child. The putative father filed an answer requesting paternity testing of the child and initiated discovery to acquire information relevant to paternity and child support. The mother amended her complaint to include claims for paternity, child support, and attorney fees. The father then moved to dismiss for lack of personal jurisdiction. The trial court granted the father's motion, but the Maryland Court of Special Appeals held that by requesting paternity testing in his answer and requesting discovery, the father had waived his limited immunity under the UCCJEA that allows a nonresident to appear on an issue of interstate custody without submitting to the jurisdiction of the court in other matters.

3. International Child Abduction

[Insert at the end of Note 4 on page 574.]

See also Didon v. Castillo, 838F.3d 313 (3d Cir. 2016) (children resided on island of Saint Martin, which is divided into two countries, French Saint Martin, which recognizes the Hague Convention, and Dutch Sint Martin, which does not; court of appeals reversed district court's holding that the Convention permitted children to have two places of habitual residence at a single time and holding that the children were habitually resident in Dutch Sint Martin, which made the Convention inapplicable).

[Insert at the end of Note 6 on page 575]

Sam F. Halabi, *The Hague Convention on the Civil Aspects of International Child Abduction and the Latent Domestic Relations Exception to Federal Question Jurisdiction*, 41 N.C. J. INT'L L. 691 (2015-16).

4. Adoption

[Insert after Note 2 on page 577.]

2.A(i) In *V.L. v. E.L.*, 577 U.S. ___, 136 S. Ct. 1017 (2016), the Supreme Court confirmed that the same rules apply to adoption judgments of other states that apply generally to other kinds of judgments—*i.e.*, that jurisdictionally valid adoption judgments of states must be given effect in other states. The case involved two women living in Alabama who were in a relationship from 1995 to 2011. One of the women conceived by artificial insemination. The parties wanted the non-conceiving partner to adopt the child, but this could not be done in Alabama. They rented a house in Georgia and instituted an adoption proceeding in a court there with proper subject-matter jurisdiction over adoption proceedings. Although Georgia law did not allow adoption unless the natural mother relinquished in writing all rights to the child, this was not done; but the mother of the child did consent to the adoption, and a judgment of adoption was entered by the Georgia court. Later, the partners broke up, and the natural mother denied the adopting partner custody and visitation rights. The latter partner instituted an action in Alabama state court to register the Georgia judgment and secure custody and visitation privileges. The Alabama Supreme Court ultimately determined that the provision in Georgia law prohibiting adoption unless the natural mother relinquished all rights to the child was a subject-matter jurisdiction restriction that made the Georgia judgment unenforceable in Alabama. In a per curiam opinion, the Supreme Court reversed. The Court found no basis in Georgia law for concluding that the provision in question was a subject-matter jurisdiction limitation as opposed to a provision governing the merits of adoption. The Court made it clear that under these circumstances the Full Faith and Credit Clause required the Alabama courts to give effect to the Georgia judgment.

(ii) Under the suppositions of the case, the result was clearly correct, as you will see when you study Chapter 9 on Judgments. However, as you will also see in that chapter, the rules governing the obligations of the states to give effect to the judgments of other states do not proceed directly from the Constitution, but from the general implementing statute, 28 U.S.C. § 1738, which also governs

adoption judgments. In *V.L.*, the Supreme Court never mentioned the implementing statute, but only the Full Faith and Credit Clause itself. It is commonplace for the Court to proceed this way, sometimes relying on the statute and sometimes relying on the Constitution, without explaining why it is doing one thing rather than another. After studying Chapter 10, ask yourself whether the Court should not try to explain how it sees the relationship between the statute and the first sentence of the Full Faith and Credit Clause.

(iii) The preceding paragraph stated that "under the suppositions of the case" the result was correct. As you will see in Chapter 10, there are more "exceptions" to the obligations of the states to give effect to judgments of other states than subject-matter jurisdiction. It pretty clearly appears for the lower court decisions that the parties to the Georgia proceeding had established a bogus address in Georgia so that they could invoke the authority of the Georgia courts in the adoption proceeding. In addition, that proceeding was not an adversarial proceeding. After studying Chapter 10, ask yourself whether there were any better grounds than subject-matter jurisdiction for arguing that Alabama did not have to give effect to the Georgia judgment.

[Add the following new material to the insert after Note 2 on page 577:]

2B.(i) In *Burnett v. Maddocks*, 881 N.W.2d 185 (Neb. 2016), Burnett brought an action to quiet title to a parcel of Nebraska land which he contended he had inherited as the "eldest son" of the life estate holder of the land under a will of the life estate's great uncle. His claim was based on a Colorado decree of adult adoption making him the life estate holder's heir for purposes of intestate distribution of the property. However, under Colorado law, the adult adoption decree did not create a parent-child relationship between the adopter and adoptee except to make the adoptee eligible for intestate distribution. Under Nebraska law, an adult adoptee is treated as the adopter's child for all purposes. The Nebraska Supreme Court held that the Full Faith and Credit Clause required Nebraska to give the same effect to the Colorado decree as it would receive in Colorado, but because it did not create a parent-child relationship, the adoptee could not qualify as the "eldest son" of the adopter for purposes of the great-uncle's will.

(ii) In *In re Adoption of Jaelyn B.*, 883 N.W.2d 22 (Neb. 2016), a putative father executed an affidavit of paternity in Ohio. Subsequently, the mother moved to Nebraska and turned custody of the child over to a putative adoptive parent, who instituted an adoption proceeding in which a DNA test established that the putative father was not, in fact, the real father. The trial court denied the putative father's motion to intervene on the grounds that his consent was not necessary to the adoption. The Nebraska Supreme Court held that the Full Faith and Credit Clause required Nebraska to give effect to the adoption decrees of other states, and a Nebraska statute extended the full faith and credit requirement to voluntary acknowledgements executed under the laws of other states. This meant that the putative father was the legal father under Ohio law, which had to be given full faith and credit by Nebraska, making the lower court's action erroneous. *See also Jesse B. v. Tylee H.*, 883 N.W.2d 1 (Neb. 2016) (same case).

[Insert at the end of Note 3 on page 578.]

See also David Rohlfing, Note, *Full Faith and Credit and Section 1983*, 75 U. PITT. L. REV. 121 (2013).

[Insert after Note 7 on age 580.]

8. In *Nevares v. M.L.S.*, 345 P.3d 719 (Utah 2015), a putative father commenced in Utah a paternity proceeding in Utah regarding a child conceived in Colorado, after the mother put the child up for adoption. The trial court applied Utah law and held that the father had failed to preserve his rights to object to the adoption under that law. The district court granted summary judgment for the mother, but the Utah Supreme Court reversed. The court held that the father had not failed to avail himself of opportunities under Colorado law to establish his parental rights, which would have disentitled him to object to the Utah adoption if it had been the case. The court then considered the applicability of a provision of Utah law that would bar the father from contesting the adoption if the child had been conceived in Colorado by conduct that would constitute a sexual offense under certain portions of Utah law. The court held that this provision was inapplicable and would present serious due process issues if applicable. On the latter point, the court stated that the father could not reasonably anticipate the application of Utah law to penalize him on the basis of sexual activity in Colorado.

[Substitute the following problem for Problem 7.14.]

Problem 7.14. *S-1* and *S-2* are unmarried domestic partners domiciled in State *X*. While domiciled in State *X*, *S-1* and *S-2* each adopt child *C* in a proper court proceeding in State *X*. The adoption is valid under State *X* law, which permits the adoption of a child by two unmarried adults. *S-1* and *S-2* later move to State *Y*, which prohibits by statute the adoption of child by more than one unmarried adult. Subsequently, *S-1* and *S-2* die simultaneously in an automobile accident. Tragically, they die intestate. In a probate proceeding to distribute the estate of *S-1*, *S-1's* brother claims the entirety of the estate. Under the intestate law of State *Y*, if *C* is the validly adopted child of *S-1* and *S-2*, *C* would inherit the entirety of *S-1's* estate. However, if the adoption is invalid, *S-1's* brother would inherit the estate. Who should win and why?

D. MARITAL PROPERTY

1. Common Law and Community Property Regimes

[Insert after Note 2 on page 590.]

2(a). In *Kirilenko v. Kirilenko*, 505 S.W.3d 766 (Ky. 2016), the wife filed a petition for divorce and the trial court entered a judgment dissolving the marriage, ruling that the husband's disability benefits from the Connecticut retirement system were marital property subject to equitable distribution. The intermediate court of appeals held that Connecticut law governed the equitable distribution issue, but the Kentucky Supreme Court reversed, holding that Kentucky law governed the issue as the state of the marital domicile. The court recognized that Kentucky follows the Second Restatement in contracts and torts, but refused to do so in this kind of case. The court was influenced by the fact that application of any law other than the law of the marital domicile would pose "immense practical problems," in that equitable distribution law is "by any standard complex and difficult to apply" and "[j]udges in many states have had difficulty construing their own law correctly, let alone understanding the law of other jurisdictions." In addition, the court observed that application of foreign law to individual assets acquired out of state would also lead to unjust results, as property division systems cannot be viewed in isolation and are an integral part of each state's domestic law, which presents complex tradeoffs between property division and other issues.

2. Party Autonomy in Marital Property Arrangements

a. Unilateral Party Autonomy

[Insert at the end of Note 1 on page 592.]

See also Ministers & Missionaries Benefit Bd. v. Snow, 814 F.3d 130 (2d Cir. 2016) (answer to certified question by New York Court of Appeals; choice-of-law clause in retirement and death benefit plan controlled and compelled application of New York law rather than law of the place of the decedent's domicile as provided under a New York statute); *see Ministers & Missionaries Benefit Bd. v. Snow*, 45 N.E.3d 917 (N.Y. 2015).

b. Bilateral Party Choice

[Insert after Note 4 on page 594.]

5. In *Hussemann v. Hussemann*, 847 N.W.2d 219 (Iowa 2014), two Florida citizens signed a postnuptial agreement two months after they were married in Florida. The agreement contained a choice of law clause making Florida law applicable and a provision under which each of the parties waived a right to an elective share of the other party's estate. The couple subsequently moved to Iowa, after which one of the spouses died. Notwithstanding the waiver of the elective share provision of the contract, the surviving spouse claimed an elective share of the decedent's estate. The waiver would be effective under Florida law, but not under Iowa law. Applying § 187 of the Second Restatement, the Iowa Supreme Court held that Florida did not lack a substantial relationship

to the parties or the transaction. In addition, the court held that it did not need to decide whether Florida law would apply in the absence of the choice of law clause, because Iowa did not have a materially greater interest in the dispute than Florida. Thus, the waiver was effective. Was it relevant that the parties had entered into the Florida agreement in 1991, but moved to Iowa in 2005, with the death of one of the spouses occurring in 2012? Should the passage of time in which the parties were domiciled in Iowa have enhanced Iowa's interest relative to that of Florida?

* * * * *

Chapter 8

VERTICAL CHOICE OF LAW

B. THE *ERIE* DOCTRINE

[Insert at the end of Note 5 on page 625.]

See also Schmigel v. Uchal, 800 F.3d 113 (3d Cir. 2015) (Pennsylvania certificate of merit statute does not directly conflict with a Federal Rule of Civil Procedure and is substantive law under *Erie* that must be applied by a federal court in a diversity action); *but cf. In re County of Orange*, 784 F.3d 520 (9th Cir. 2015) (no Federal Rule of Civil Procedure governs pre-dispute jury trial waivers; therefore, court applies "relatively unguided" Rules of Decision Act analysis; court finds issue is not outcome determinative and thus is procedural under *Erie*, which would allow application of federal rule allowing waiver; however, court also finds California's rule to be substantive because it is a rule of state contract interpretation that favors the state constitutional policy favoring jury trial; thus, it is intimately bound up with the state substantive policy favoring jury trials and the federal "voluntary and knowing" waiver rule is a constitutional minimum whose application is not required when the state rule is more protective of constitutional rights than the federal rule; court thus adopts state law as the federal rule).

[Insert after Problem 8.6 on page 632.]

NOTE

In conjunction with Problems 8.3–8.5, concerning certificate of merits statutes, consider *Bard Water District v. James Davey & Associates, Inc.*, 671 F. App'x 506 (9th Cir. 2016), which held the California certificate of merit statute procedural for *Erie* purposes with no analysis. The court did cite one district court decision holding the statute procedural because it was not outcome determinative and one district court decision stating that the statute was procedural because it does not contain substantive elements of a professional negligence claim, does not limit recovery in any way, and is "somewhat similar" to other procedural statutes. This analysis is completely inadequate, is it not? Don't unthoughtful decisions like this produce unnecessary confusion about how either a Rules of Decision Act or Rules Enabling Act issue should be analyzed? It is not an excuse, is it, that the opinion is unpublished?

[Insert at the end of Note 5(b) on page 637.]

See generally Chavez v. Dole Food Co., 836 F.3d 205(3d Cir. 2016) (containing an extensive discussion of the meaning and ambiguities of *Semtek*, including whether a second court can disregard a diversity judgment when the judgment-rendering state's res judicata law is procedural).

[Insert at the end of Note 10 on page 678.]

See also Donald L. Doernberg, *Horton the Elephant Interprets the Federal Rules of Civil Procedure: How the Federal Courts Sometimes Do and Always Should Understand Them*, 42 HOFSTRA L. REV. 799 (2014); Allan Erbsen, Erie*'s Four Functions: Reframing Choice of Law in Federal Courts*, 89 NOTRE DAME L. REV. 579 (2013); Alan M. Trammel, *Toil and Trouble: How the* Erie *Doctrine Became Structurally Incoherent (and How Congress Can Fix It)*, 82 FORDHAM L. REV. 3249 (2014); Patrick Wooley, *The Role of State Law in Determining the Construction and Validity of Federal Rules of Civil Procedure*, REV. LITIG. 207 (2016).

C. HORIZONTAL CHOICE OF LAW UNDER *ERIE*

[Insert after Note 6 on page 681.]

7. What counts as a state conflict of laws rule under *Klaxon* that must be applied by federal courts in diversity? *Howard v. Ferrellgas Partners, LLP*, 748 F.3d 975 (10th Cir. 2014), presented a contracts choice of law problem. Everyone agreed that Kansas conflicts rules applied and also agreed that under those rules the substantive law of the place where the last act necessary to form the contract occurred (the vested rights system rule). However, the court observed that it was not clear where the place of the last act was, and under Kansas approach to conflicts there was a "default presumption" that Kansas law controlled unless a "clear showing" was made that another state's law should apply. Thus, the court held that it was not error to apply Kansas substantive law given the lack of clarity about the place of the last act. Is this the kind of rule that the federal courts must follow under *Klaxon*? If the Kansas choice of law rule was clear and applicable, and if the only problem was lack of factual clarity, shouldn't the court have insisted that the factual matter be clarified instead of using the default presumption? If no one in a diversity case raises a choice of law issue and the state courts would apply their own law by default under the circumstances, could a federal court raise the conflicts issue on its own motion and insist that the parties address it?

[Insert at the end of Note 7 on page 698.]

See also Dobbs v. DePuy Orthopedics, Inc., 842 F.3d 1045 (7th Cir. 2016) (case filed in Ohio district because it was part of multidistrict litigation and later transferred to Northern District of Illinois, where venue would have been proper if there had been no multidistrict litigation treated as filed in Illinois for purposes of *Van Dusen-Ferens* rule and Illinois conflicts law applied to result in applicability of Illinois law to attorney's claim for contingency fee); *Wahl v. Gen. Elec. Co.*, 786 F.3d 491 (6th Cir. 2015) (plaintiff in Tennessee developed disease allegedly as a result of one of defendant's drugs; the Panel on Multidistrict Litigation consolidated all pretrial litigation involving the drug in the Northern District of Ohio and, instead of plaintiff filing in Tennessee and having the case transferred to Ohio, issue an order allowing the plaintiff to file directly in Oho; subsequently, the case was transferred back to the Middle District of Tennessee, which applied Tennessee choice-of-law rules and dismissed the action under Tennessee's statute of repose; court of appeals affirmed, holding that the Northern District of Tennessee was not to be considered a transferor district under the circumstances, and that Tennessee choice-of-law rules were the proper rules to apply; those rules pointed to the Tennessee statute of repose as applicable); *In re Dow Corning Corp.*, 778 F.3d 545

(6th Cir. 2015) (breast plant implant suit filed in North Carolina federal court and transferred to Michigan federal court because manufacturer filed for bankruptcy there; court dismissed action under Michigan statute of limitations; court of appeals holds that there was no reason that *Van Dusen-Ferens* should not be applied in this situation and that North Carolina choice-of-law rules should have been applied, which would result in North Carolina statute of limitations being applied); *Steen v. Murray*, 770 F.3d 698 (8th Cir. 2014) (suit commenced in U.S. District Court in Iowa transferred for improper venue to District of Nebraska; Nebraska U.S. District Court refused to retransfer and dismissed case under Nebraska statute of limitations; court of appeals affirmed, holding refusal to retransfer because all the wrongful acts in the case had occurred in Nebraska; court also held that Nebraska choice-of-law decisions had to be consulted to determine whether Nebraska would apply its own statute of limitations; the court held that it would; despite the fact that Nebraska follows the Second Restatement, the court referred only to old Nebraska choice-of-law decisions and never referred to original or revised § 142).

D. ASCERTAINING STATE LAW

[Insert at the end of the carryover paragraph on page 702.]

See also Pitzer College v. Indian Harbor Insurance Co., 845 F.3d 993 (9th Cir. 2017) (questions certified to California Supreme Court about (1) whether California's "common-law notice-prejudice" rule is a fundamental public policy (and whether common law rules other than unconscionability that are not embodied in a statute, regulation, or constitution, be fundamental public policies for choice-of-law purposes) and (2) if the notice prejudice rule is a fundamental public policy for purposes of choice-of-law analysis, can a consent provision in a first-arty claim insurance policy be interpreted as a notice provision such that the notice-prejudice rule applies?)

[Insert at the end of the text on page 703]

See also J. Stephen Tagert, Note, *To* Erie *or Not to* Erie*: Do Federal Courts Follow State Statutory Interpretation Methodologies?*, 66 DUKE L.J. 211 (2016).

[Insert after text on page 703.]

QUESTION

If a federal district court in a state predicts the content of the law of that state in the absence of any state court authority, and if a state court in another state is considering a choice of law question that requires it to determine whether there is a conflict between its law and the law of the state where the federal authority exists, is the federal authority binding on the state court considering the state choice of law question? *See Bridgeview Health Care Ctr., Ltd. v. State Farm Fire & Cas. Co.*, 10 N.E.3d 902 (Ill. 2014) (federal court prediction is not state law and cannot, standing alone, create a conflict between forum law and the law of another state, but it may be considered).

E. FEDERAL COMMON LAW AFTER *ERIE*

[Insert at the end of Note 3 on page 708.]

See also Roger P. Alford, *Human Rights After* Kiobel*: Choice of Law and the Rise of Transnational Tort Litigation*, 63 EMORY L.J. 1089 (2014); Anthony Blackburn, Comment, *Striking a Balance to Reform the Alien Tort Statute: A Recommendation for Congress*, 53 SANTA CLARA L. REV. 1051 (2013); Usurla Tracy Doyle, *The Evidence of Things Not Seen: Divining Balancing Factors From* Kiobel*'s "Touch and Concern" Test*, 66 HASTINGS L.J. 443 (2015); Kaki J. Johnson, Casenote, Kiobel v. Royal Dutch Petroleum Co.*: The Alien Tort Statute's Presumption Against Extraterritoriality*, 60 LOY. L. REV. 171 (2014); Ernest A. Young, *Universal Jurisdiction, the Alien Tort Statute, and Transnational Public-Law Litigation After* Kiobel, 64 DUKE L.J. 1023 (2015).

[Insert at the end 6(e) on page 709.]

See also Pearson v. Sec'y Dep't of Corr., 775 F.3d 598 (3d Cir. 2015) (state statute of limitations applicable in § 1983 action; state tolling rule would prevent state statute from running if the commencement of the action was stayed by a "statutory prohibition"; court of appeals interprets federal Prison Litigation Reform Act's exhaustion of remedies requirement applicable to § 1983 actions as a statutory prohibition within the meaning of state tolling statute).

[Insert at the end of Note 6(g) on page 710.]

Omar K. Madhany, Comment, *Towards a Unified Theory of "Reverse*-Erie,*"* 162 U. PA. L. REV. 1261 (2014).

[Insert at the end of Note 9 on page 710.]

See also Mark D. Rosen, *Choice-of-Law as Non-Constitutional Federal Law*, 99 MINN. L. REV. 1017 (2015).

* * * * *

Chapter 9

JUDGMENTS

B. ENFORCEMENT OF STATE JUDGMENTS

2. Basic Policies and Exceptions

[Insert after the last paragraph on page 716.]

For an illustration of the continuing confusion about the source of the rule requiring reference to the law of the judgment-rendering state for the effect of a state judgment, see *Graham v. R.J. Reynolds Tobacco Co.*, 857 F.3d 1169 (11th Cir. 2017) (in individual action, federal court gives "full faith and credit" to state court's determination of issues of negligence and strict liability in prior class action); *State* ex rel. *Eric Greitens v. Am. Tobacco Co.*, 509 S.W.3d 726 (Mo. 2017) (stating that the effect of a state judgment is determined by the law of the judgment-rendering state and citing the RESTATEMENT (SECOND) § 95, but not citing or referring to the implementing statute or the concept of full faith and credit); *In re Adoption of Jaelyn B.*, 883 N.W.2d 22 (Neb. 2016) (Full Faith and Credit Clause requires states to give same effect to adoption decrees of other states as decrees would have in state where decree rendered); *Jessee B. v. Tylee H.*, 883 N.W.2d 1 (Neb. 2016) (same); *Burnett v. Maddocks*, 881 N.W.2d 185 (Neb. 2016) (same).

a. Basic Policies

[Insert at the end of Note 1 on page 719.]

See also State ex rel. *Eric Greitens v. Am. Tobacco Co.*, 509 S.W.3d 726 (Mo. 2017) (issue preclusion effect of multistate arbitration award determined under same effect rule by reference to preclusion law of states where decisions rendered, Maryland and Pennsylvania).

[Insert at the end of Note 3 on page 720.]

See Faith Temple v. DiPietro, 130 A.3d 368 (Me. 2015) (Uniform Enforcement of Foreign Judgments Act does not preclude judgment creditor from bringing common-law action for debt on a judgment).

[Insert at the end of Note 4 on page 720.]

See also Unleaded Software, Inc. v. TNF Gear, Inc., ___ A.3d ___, 2016 WL 4446549 (Vt. Aug. 19, 2016) (judgment debtor had adequate notice of post-trial proceedings for attorney fees communicated electronically to debtor's attorney to allow enforcement of Colorado judgment in Vermont).

[Insert at the end of Note 3 on page 725.]

See also Kevin M. Clermont, *Limiting the Last-in-Time Rule for Judgments*, 36 REV. LITIG. 1 (2017).

b. Exceptions and Potential Exceptions to the Basic Policies

[Insert the new (2) and following material:]

(2) Lack of Personal Jurisdiction

[Insert at the end of Note 1 on page 751.]

See also Linde Health Care Staffing, Inc. v. Claiborne Cty. Hosp., 198 So. 3d 318 (Miss. 2016) (Missouri judgment based on arbitration award in Missouri; Mississippi Supreme Court held judgment not enforceable because Missouri had no jurisdiction over hospital, which did not appear in arbitration proceeding; hospital did not appear because it was not party to contract that was being arbitrated and did not conduct business in Missouri.).

(4) Fraud

[Insert after Note 5 on page 777.]

6. In *V.L. v. E.L.*, 577 U.S. ___, 136 S. Ct. 1017 (2016), described in Chapter 7 of this supplement in the section on Adoption, the Supreme Court held that Alabama had erred in refusing to give effect to a Georgia adoption judgment on the grounds that the Georgia judgment-rendering court lacked subject-matter jurisdiction under Georgia law. However, it was there pointed out that the parties to the adoption proceeding had established a bogus residence in Georgia in order to invoke the authority of the Georgia court and the proceeding was not adversary in nature. Would circumstances of this sort fall within the fraud exception? If not, should the fraud exception be broadened to include this sort of behavior? If not, should a new exception be created under some other label to include the behavior?

(5) Statutes of Limitations

[Insert at the end of Note 3 on page 781.]

See also Patrick v. Hess, 212 So. 3d 1039 (Fla. 2017) (Arizona federal judgment registered in Florida but not renewed in Arizona prior to expiration of Arizona five-year statute of limitations, making it unenforceable in Arizona; held that foreign judgment domesticated in Florida under Florida's version of Uniform Enforcement of Foreign Judgments Act subject to Florida twenty-year statute of limitations applicable to actions on judgments of record of courts of record in Florida, not Arizona law or Florida five-year limitations period for enforcing foreign judgment).

[Insert at the end of Note 5 on page 782.]

See also H & E Equip. Servs., Inc. v. Cassani Elec., Inc., ___ A.3d ___, 2017 WL 1318338 (Vt. Apr. 7, 2017) (Vermont's statute of limitations on actions on judgments applies not only to original judgments but to renewed judgments.).

(7) Administrative Adjudications

[Insert at the end of Note 3 on page 798.]

See also Metro. Edison Co. v. Pennsylvania Pub. Util. Comm'n, 767 F.3d 335 (3d Cir. 2015) (judicially reviewed state administrative decision was not "legislative" in character and thus had a preclusive effect under Pennsylvania preclusion rules); *Council v. Vill. of Dolton*, 764 F.3d 747 (7th Cir. 2014) (judicially reviewed state administrative proceeding had no preclusive effect because governing statute stated agency's decisions would not have preclusive effect).

[Insert at the end of Note 8 on page 801.]

See also Demetres v. East West Constr., Inc., 776 F.3d 271 (4th Cir. 2015) (injured worker who collected benefits under North Carolina law brought diversity action in Virginia against subcontractor who allegedly caused injuries in Virginia; held: Virginia law applied under *Klaxon* doctrine, and required application of law of state of injury, Virginia, to determine whether suit precluded; Virginia's more restrictive law precluded suit, even though North Carolina law permitted it); *Mize v. Commonwealth Mining, LLC*, 2017 WL 1348516 (Sup. Ct. App. W. Va. Apr. 7, 2017) (not reported) (West Virginia had no subject-matter jurisdiction to adjudicate worker's compensation claim because employee, though employed by West Virginia employer, worked in Kentucky where injury and death occurred and claim governed by Kentucky workers compensation law).

C. ENFORCEMENT OF FEDERAL JUDGMENTS

[Insert after the end of the carryover paragraph on page 813.]

Chavez v. Dole Food Co., 836 F.3d 205 (3d Cir. 2016), is a case containing a complicated procedural history. One issue in the case concerned the effect of a dismissal in a Louisiana federal diversity action on limitations grounds in a subsequent federal action in New Jersey. Importantly, the court of appeals recognized the following point:

> We begin by noting that there is an important ambiguity in *Semtek* itself. *Semtek* alludes only briefly to the fact that a state might apply two rules simultaneously: first, that a timeliness dismissal precludes re-litigation of the same claims within the state; and second, that a timeliness dismissal does not bar litigation in of the same claims a court *outside* that state. To frame the problem in the context of the appeal, the fact that timeliness dismissals are claim-preclusive *within* Louisiana may not necessarily mean that such dismissal extinguish claims in other states with longer limitations periods.

836 F.3d at 226 (emphasis in original). After examining Louisiana law, the court concluded that it would not, in fact, make a judgment of dismissal on limitations grounds claim-preclusive in New Jersey. Note that the problem in this kind of case is finding direct authority on the question of claim preclusion of a limitations dismissal in another state. If a second action were brought in either a Louisiana state or federal court after such a dismissal, the defendant should raise the question of limitations and contend that the question should be considered precluded from re-litigation by the doctrine of issue preclusion. No court in Louisiana will presumably ever have to consider the effect of a limitations dismissal in a suit brought in another state, assuming that there is no certification procedure that would allow the court in the other state to obtain a direct answer. Thus, the judgment-enforcing state will always have to deduce the answer from the judgment-rendering states general law of claim preclusion. *See also Haik v. Salt Lake City Corp.*, 393 P.3d 285 (Utah 2017) (previous Utah federal judgment based on same claim asserted in this state action was precluded; even though plaintiff did not raise every element in the prior action that is raised in state action, he might have done so; federal law controls the effect of a federal judgment, but Utah's rules of claim preclusion are virtually identical to federal rules of claim preclusion anyway, so it makes no difference which are applied; claim precluded).

D. ENFORCEMENT OF FOREIGN NATION JUDGMENTS

[Insert at the end of Note 2 on page 816.]

See also John F. Coyle, *Rethinking Judgments Reciprocity*, 92 N.C. L. REV. 1109 (2014) (concluding that a policy of U.S. judgments reciprocity would not result in foreign states that refuse to enforce U.S. judgments altering their laws to make it easier to enforce U.S. judgments there).

[Insert after Note 2 on page 816.]

3. *See also Derr v. Swarek*, 766 F3d 430 (5th Cir. 2014) (foreign nation judgments not included within mandate of Full Faith and Credit Clause; such judgments enforced as a matter of comity; court looks to Mississippi law to determine obligation to enforce foreign nation judgment); *D'Amico Dry Ltd. v. Primera Maritime (Hellas) Ltd.*, 756 F.3d 151 (2d Cir. 2014) (actions to enforce foreign nation judgments fall within federal admiralty jurisdiction, even if not rendered by specialized foreign admiralty court, as long as underlying claim leading to judgment was maritime in nature; United States law, rather than foreign law, determines whether foreign judgment is maritime).

[Insert at the end of Note 1 on page 818.]

See also Ahmad Hamad Al Gosaibi & Bros. Co. v. Standard Chartered Bank, 98 A.3d 998 (D.C. 2014) (New York judgment that simply recognized a Bahrain judgment is not entitled to full faith and credit in the District of Columbia, because when a state merely recognizes a foreign nation judgment, it lacks the kind of interest that would normally require its domestic judgments to be given full faith and credit in other states; if the rule were otherwise, parties could obtain recognition of a foreign nation judgment in a U.S. state that had the most lax recognition standards and then obtain enforcement of that judgment in any other U.S. state).

[Insert at the end of Note 3 on page 819.]

See also Iraq Middle Market Dev. Found. v. Harmoosh, 848 F.3d 235 (4th Cir. 2017) (as a matter of first impression, court of appeals predicts arbitration clause exception to recognition of foreign judgment under the Maryland Uniform Foreign Money Judgment Recognition Act does not apply when a party has waived its right to arbitrate the dispute by litigating it to a conclusion in a foreign court; however, the fact issue as to whether the judgment debtor waived the right to arbitrate precluded the grant of summary judgment by the district court).

[Insert at the end of Note 4(b) on page 820.]

Tanya J. Monestier, *Whose Law of Personal Jurisdiction? The Choice of Law Problem in the Recognition of Foreign Judgments*, 96 B.U. L. REV. 1729 (2016).

[Insert at the end of Note 4(c) on age 820.]

RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES—TREATIES (*Preliminary Draft No. 5*, Aug. 17, 2016) (Status of Treaties in United States Law); RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES—JURISDICTION (*Preliminary Draft No. 4*, Aug. 17, 2016) (General Concept of Jurisdiction; Prescription; Exercise of Prescriptive Jurisdiction by the United States, Adjudication, Jurisdiction to Adjudicate in Criminal Cases, Enforcement, Jurisdiction to Enforce in General, Recognition and Enforcement of Foreign Judgments in the United States); RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES—SOVEREIGN IMMUNITY (*Preliminary Draft No. 3*, Aug. 17, 2016) (Immunity of States From Jurisdiction; Immunity of Foreign States From Jurisdiction to Adjudicate). Earlier drafts of the Fourth Restatement are, RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES—TREATIES (AM. LAW INST., Council Draft No. 1, Dec. 17, 2015); RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES—JURISDICTION (AM. LAW INST., Council Draft No. 2, Dec. 11, 2015); RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES—TREATIES (AM. LAW INST., Preliminary Draft No. 3, Nov. 3, 2014) (containing Chapter 2 on the status of treaties in United States law and the black letter of Preliminary Draft No. 3); RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES—JURISDICTION (AM. LAW INST., Preliminary Draft No. 2, Nov. 5, 2014) (containing Chapter 5 on immunity of states from jurisdiction, Subchapter A on immunity of foreign states from jurisdiction to adjudicate and the black letter of Preliminary Draft No. 2); RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW

OF THE UNITED STATES—JURISDICTION (Am. Law Inst., Preliminary Draft No. 2, Oct. 20, 2014) (containing Chapter 1 on the limits on U.S. prescriptive jurisdiction, Chapter 2 on the effect of foreign exercises of prescriptive jurisdiction, the black letter of Preliminary Draft No. 2, and other relevant black letter text).

[Insert at the end of Note 13(b) on page 825.]

See also de Fontbrune v. Wofsy, 838 F.3d 992 (9th Cir. 2016) (French award for copyright infringement was not a penal judgment; French court awarded civil remedies and an injunction under the relevant code provisions, but did not make an award under the court's power to impose criminal penalties for copyright violations).

[Insert at the end of Note 14(i) on page 827.]

John B. Bellinger III & R. Reeves Anderson, *Tort Tourism: The Case for a Federal Law on Foreign Judgment Recognition*, 54 VA. J. INT'L L. 501 (2014).

[Insert at the end of Note 16(b) on page 828.]

See also Comm'ns Import Export S.A. v. Republic of the Congo, 757 F.3d 321 (D.C. Cir. 2014) (Foreign Arbitral Awards Conventions Act's (New York Convention) three year period to confirm a foreign arbitral award did not preempt District of Columbia's Uniform Foreign-Country Money Judgments Recognition Act's longer limitations period for enforcing a foreign court judgment enforcing the award).

[Add the following citation to the end of Note 16(f) on page 829:]

See also RESTATEMENT OF THE LAW THE U.S. LAW OF INTERNATIONAL COMMERCIAL ARBITRATION (*Preliminary Draft No. 8*, Jan. 12, 2016) (General Provisions, Definitions, International Investment Arbitration).

[Insert at the end of Note 16(e) on page 829.]

See also W. Laurence Craig, *Some Trends and Developments in the Laws and Practice of International Commercial Arbitration*, 50 TEX. INT'L L.J. 699 (2016).

[Insert at the end of Note 16(f) on page 829.]

The latest draft of the project on international commercial arbitration is, RESTATEMENT (THIRD) OF THE U.S. LAW OF INTERNATIONAL COMMERCIAL ARBITRATION (AM. LAW INST., Preliminary Draft No. 8, Jan. 12, 2016).

* * * * *

Chapter 10

PERSONAL JURISDICTION

A. SERVICE OF PROCESS AND NOTICE

2. Long-Arm Process

[Insert at the end of the carryover paragraph on page 833.]

See also Water Splash, Inc. v. Menon, 581 U.S. ___, 137 S. Ct. 1504 (2017) (Hague Service Convention does not prohibit service by mail, but does not specifically authorize such service; mail service is permissible as long as it is authorized by the forum state and the receiving state has not objected to mail service).

3. Due Process Requirement of Adequate Notice

[Insert at the end of Note on page 836.]

See also Barot v. Embassy of the Republic of Zambia, 785 F.3d 26 (D.C. Cir. 2015) (dismissal of complaint for failure to properly effectuate service under Foreign Sovereign Immunities Act was an abuse of discretion under circumstances in which it appeared service could be made properly by plaintiff proceeding in forma pauperis); *Freedom Watch, Inc. v. Org. of the Petroleum Exporting Countries (OPEC)*, 766 F.3d 74 (D.C. Cir. 2014) (service on OPEC by delivery to OPEC's headquarters in Austria and by sending a copy of the documents by Austrian mail to OPEC's headquarters did not satisfy Rule 4(f)).

B. FOURTEENTH AMENDMENT RESTRICTIONS ON STATE-COURT JURISDICTION

a. Pennoyer v. Neff

[Insert after the carryover of the quote at 838.]

For a recent defense of *Pennoyer* against numerous criticisms that it was wrong when decided, see Stephen E. Sachs, Pennoyer *Was Right*, 95 TEX. L. REV. 1249 (2017).

1. Traditional Territorial Restrictions

b. Evolution of the Territorial Rules

[Insert at the end of the first paragraph in this subsection.]

See also Jacob Kreutzer, *Incorporating Personal Jurisdiction*, 119 PENN ST. L. REV. 211 (2014) (describing *Pennoyer* as having failed to identify how personal jurisdiction doctrine should change to emphasize the individual right quality of the doctrine after being incorporated into the Due Process Clause of the Fourteenth Amendment).

2. Development of Modern Restrictions on State-Court Jurisdiction

[Insert after the citation to the *Fraley* decision in the carryover paragraph on page 847.]

See also Pruczinski v. Ashby, 374 P.3d 102 (Wash. 2016) (Idaho state trooper pursued suspected drunk driver from Idaho into Washington; during stop of driver, trooper allegedly committed several torts; held: trooper committed tortious acts within state within Washington long-arm statute, but to satisfy due process, jurisdiction must be based on intentional conduct of defendant; here, both parties were citizens of Idaho and defendant did not know he was in Washington at the time of the traffic stop; nevertheless, connections with both Washington and Idaho are sufficient for either state to assert jurisdiction; case remanded for trial court to determine whether to decline jurisdiction on grounds of comity); *Nordness v. Faucheux*, 170 So. 3d 454 (Miss. 2015) (action by ex-wife against ex-husband's paramour for alienation of affections, intentional and negligent infliction of emotional distress, invasion of privacy, and punitive damages arising from ex-husband's extramarital affair with defendant in several non-forum states, but not in the forum; court held that Mississippi's long-arm provision providing for jurisdiction over nonresident who commits a tort in whole or part in Mississippi was broad enough to cover the case, because affair broke up marriage in Mississippi; however, the minimum contacts test was violated because the defendant did nothing in Mississippi and did not know the ex-husband was from Mississippi, thus eliminating the purposeful contacts necessary to sustain an exercise of specific jurisdiction (see text below)).

[Insert at the end of carryover paragraph on page 847.]

See also Sproul v. Rob & Charlies, Inc., 304 P.3d 18 (N.M. 2012) (personal jurisdiction issue involves two-step inquiry; first, is New Mexico long-arm statute applicable and, second, is due process satisfied; because New Mexico statute extends as far as due process permits, inquiry "collapses" into the latter inquiry!).

a. Status of Traditional Territorial Rules After *International Shoe*

[Insert at the end of Note 3 on page 855.]

See also Pac. W. Bank v. Eighth Judicial Court of Nevada, 383 P.3d 252 (Nev. 2016) (funds contained in debtor's out-of-state accounts were a debt that was garnishable).

[Insert after Note three on page 855.]

4. In *Hazout v. Tsang Mun Ting*, 134 A.3d 274 (Del. 2016), a Delaware statute provided that nonresident officer who accepted and held office in the corporation consented to suit in Delaware in cases in which the corporation sued (or someone sued on its behalf) or was sued in the state and the officer was a necessary or proper party and in suits in which the officer was sued for violation of a duty in the capacity as officer. The Delaware Supreme Court held that in a suit against the corporation and an officer, among others, for unjust enrichment, fraud, and fraudulent transfer based on actions in Canada, this statute properly subjected the officer to suit in Delaware and was consistent with the officer's "constitutional expectations of due process" because by accepting a position as a director and officer of a Delaware corporation the officer purposefully availed himself of certain duties and protections of Delaware law. The court observed that under the circumstances of the case, the officer could not "fairly say" that he did not foresee that he would be subject to suit in Delaware based on his out-of-state conduct. What part in the foreseeability of suit did the Delaware statute itself play and could the officer have been subject to suit under a more general statute purporting to subject him to jurisdiction in any suit in which it would not be inconsistent with the U.S. Constitution to do so?

b. General and Specific Jurisdiction

(1) General Jurisdiction

[Insert at the end of Note 9 on page 881.]

See also Genuine Parts Co. v. Cepec, 137 A.3d 123 (Del. 2016) (compliance with corporate registration statute allowing service of process on foreign corporation doing business within state does not constitute consent to general jurisdiction over corporation within the state).

[Insert at the end of Note 1 on page 908.]

Brown v. Lockheed Martin Corp., 814 F.3d 619 (2d Cir. 2016) (action by personal representative of deceased Air Force mechanic to recover for asbestos exposure, none of which occurred in the forum state; held: foreign corporation's leasing of space in four locations in the forum and employment of between 30 and 70 workers in the state may have been systematic and continuous activity, but fell far short of the high level of activity necessary to make the corporation essentially at home in the state; registration to do business under forum state statute did not constitute consent to suit in the state); *Hinrichs v. Gen. Motors of Canada, Ltd.*, ___ So. 3d ___, 2016 WL 3461177 (Ala. 2016) (plaintiff was a German citizen in Alabama for flight training; while riding as a passenger in a G.M. vehicle manufactured in Canada sold to an independent entity, Motors Liquidation Corporation (MLC), in Canada, and imported to the U.S. by MLC and sold in Pennsylvania, he was involved in an accident with a drunk driver; he commenced a products liability action in Alabama; the Alabama Supreme Court held that neither general nor specific jurisdiction was appropriate in Alabama; the Alabama Supreme Court held that general jurisdiction was inappropriate because G.M. Canada's contacts with Alabama were not such, under the *Goodyear-Diamler* standard as to make it "at home"

there; the court also held specific jurisdiction to be inappropriate, relying especially on the *McIntyre* (casebook page 927) and *Walden* (casebook page 944) cases, the court emphasized that it "has not found any case in which a trial court has exercised specific jurisdiction over a foreign manufacturer arising from its sale of an allegedly defective vehicle in a foreign jurisdiction to a separate entity in the foreign jurisdiction unless the vehicle was ultimately sold in the forum state" and "no caselaw that upholds specific jurisdiction where the stream of commerce for the product does not end in the forum state"); *Magill v. Ford Motor Co.*, 379 P.3d 1033 (Colo. 2016) (action against Ford by a resident of Colorado based on an accident in Colorado; although Ford did business in Colorado and had offices there, the court concluded that it was not "at home" in Colorado under the *Goodyear-Diamler* standard; the court remanded the case for the trial court to consider whether specific jurisdiction was appropriate); *First Cmty. Bank, N.A. v. First Tennessee Bank, N.A.*, 489 S.W.3d 369 (Tenn. 2015) (under Supreme Court's decisions in *Goodyear* and *Daimler*, it is not sufficient to sustain an exercise of general jurisdiction that defendants do business in state; none of defendants did more than one per cent of their fifty-state business in Tennessee and only defendant to have office in state had employees in state that constituted no more that 0.3% of its employees there; therefore, contacts do not establish that the defendants are essentially at home in Tennessee).

[Insert at the end of Note 4 on page 908.]

See also Am. Fidelity Assurance Co. v. Bank of N.Y. Mellon, 810 F.3d 1234 (10th Cir. 2016) (after *Goodyear* but before *Daimler*, action commenced against nonresident defendant; defendant did not object to assertion of general jurisdiction over it until after *Daimler* decided; defendant argued that defense should not be considered waived because *Daimler* changed the law on general jurisdiction and made the objection available whereas it had not been prior to the decision; court disagreed, holding that *Daimler* simply reaffirmed the *Goodyear* standard, so that objection was available to defendant under latter case); Judy M. Cornett & Michael H. Hoffheimer, *Good-Bye Significant Contacts: General Personal Jurisdiction After* Daimler AG v. Bauman,76 OHIO ST. L.J. 101 (2015) (arguing that *Daimler* is a significant departure from settled practice); Hays C. Doan, Note, *A Call for Clarity Resulting from* Daimler AG v Bauman *Jurisdictional Veil Piercing in the Context of Parent and Subsidiary Corporations and the Irrelevance of Fraud or Injustice*, 38 U. ARK. LITTLE ROCK L. REV. 245 (2016); Linda S. Mullenix, *Personal Jurisdiction Stops Here: Cabining the Extraterritorial Reach of American Courts*, 45 U. TOL. L. REV. 705 (2014) (commenting on *Daimler* among other recent Supreme Court decisions).

[Add the following citation to the insert for Note 4 on page 908 in the current supplement:]

Ariel Winawer, *Too Far From Home: Why* Diamler*'s "At Home" Standard Does Not Apply to Personal Jurisdiction Challenges in Anti-Terrorism Act Cases*, 66 EMORY L.J. 161 (2016).

[Insert the following new text after Problem 10.8 on page 909.]

In *BSNF Railway Co. v. Tyrrell*, 581 U.S. ___, 137 S. Ct. 1549 (2017), plaintiffs commenced FELA actions in Montana state court against BSNF, seeking recovery for injuries inflicted outside Montana. BSNF was incorporated in Delaware and had its principal place of business in Texas. BSNF did business in Montana, having about 6% of its total track mileage there, employing less than

5% of its workers there, generating less than 10% of its revenue there, and having only one of its 24 automotive facilities there (4%). BSNF moved to dismiss the action, arguing that it was not "at home" there as required by *Daimler*. Its motion was granted in one of the two cases before the trial court and denied in the other. The Montana Supreme Court consolidated the two cases and held that the Montana courts could exercise general personal jurisdiction over both cases.

The court first relied on 42 U.S.C. § 56, which provides that

> an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several states.

The court concluded that this section authorizes state courts to exercise personal jurisdiction over railroads doing business in the state. In addition, the court concluded that by providing that personal jurisdiction may be exercised over all persons "found" within the state, Montana law also authorized general personal jurisdiction over the railroad because of its many miles of track and large number of employees within the state.

The Supreme Court granted certiorari and reversed. The court first held that § 56 dealt only with venue and subject-matter jurisdiction, not personal jurisdiction. Turning to the exercise of personal jurisdiction under Montana law, the Court observed that because neither plaintiff "alleges any injury from work in or related to Montana, only the propriety of general jurisdiction is at issue." The Court then interpreted *Goodyear* and D*aimler* to make Montana's assertion of personal jurisdiction over the two actions unconstitutional under the Due Process Clause of the Fourteenth Amendment. The Court first observed that it did not matter that Montana was exercising jurisdiction over federal (FELA) claims under state law, because the "due process constraint described in *Daimler* . . . applies to all state-curt assertions of general jurisdiction over nonresident defendants . . . ." Second, the Court concluded that BSNF's contacts with Montana were inadequate to satisfy the systematic and continuous contacts test. Despite the "magnitude" of the corporation's activities in Montana, the Court stated that the due process inquiry does not focus entirely on the magnitude of activities within the state. Rather, it calls for appraisal of the corporation's activities in their entirety, because a corporation that operates in many places can scarcely be deemed "at home" in all of them. Finally, the plaintiffs contended that BSNF had consented to jurisdiction in Montana, but because the Montana Supreme Court had not considered that question, the Supreme Court also refused to consider it.

Justice Sotomayor dissented from that part of the Court's opinion dealing with general jurisdiction asserted under Montana law. Essentially, she continued her objection to the Court's approach to general jurisdiction in *Daimler*. However, she also objected to the Court's failure to remand the case to the Montana Supreme Court for reevaluation under proper legal standards, interpreting that failure to obliterate the Court's observation in *Daimler* that there might be "exceptional cases" in which general jurisdiction would be appropriate in a forum that was neither the corporate defendant's place of incorporation or principal place of business.

NOTES AND QUESTONS

1. Note that the interpretation of § 56 as not being a federal long-arm statute avoided some interesting questions. Chapter 10B.2.c examines the Fifth Amendment limits on federal assertions of long-arm jurisdiction. Does Congress have the constitutional power to confer long-arm jurisdiction on state courts when they are hearing claims under federal law? If so, is the assertion of jurisdiction by those courts under a federal long-arm statute governed by Fifth or Fourteenth Amendment standards, assuming that there is any longer a difference?

2. Note also the Court's refusal to confront the plaintiff's argument that BSNF had consented to jurisdiction in Montana. Given the Court's approach in *Goodyear*, *Daimler*, and *BSNF*, its it conceivable that the Court would hold the Fourteenth Amendment satisfied by a state statute exacting consent to general jurisdiction over a corporation based on the fact that it did business in the state?

3. Does the Court's approach mean that specific jurisdiction will be the only available basis for asserting jurisdiction over a corporate defendant not incorporated and not having its principal place of business in the state?

4. For further discussion of Daimler and general jurisdiction, see Edward D. Cavanagh, *General Jurisdiction 2.0: The Updating and Uprooting of the Corporate Presence Doctrine*, 68 ME. L. REV. 287 (2016); Seungwon Chung, Note, *The Shoe Doesn't Fit: General Jurisdiction Should Follow Corporate Structure*, 100 MINN. L. REV. 1599 (2016); Walter W. Heiser, *General Jurisdiction in the Place of Incorporation: An Artificial "Home" for an Artificial Person*, 53 HOUS. L. REV. 631 (2016).

(2) Specific Jurisdiction

[Insert at the end of Note 4(a) on page 918.]

See Acorda Therapeutics, Inc. v. Mylan Pharm., Inc., 817 F.3d 755 (Fed. Cir. 2016) (action in U.S. District Court for the District of Delaware for injunction to prevent defendant from marketing generic drugs in Delaware and elsewhere; court of appeals holds that district court could validly exercise specific jurisdiction over action; the defendant's action in applying to the FDA for permission to engage in future activities in Delaware and elsewhere was "suit related" and was tied in purpose and planned effect to the future marketing of drugs in Delaware and elsewhere; concurring Judge O'Malley agrees, but believes court should have reached the issue of general jurisdiction, which he considered easier than specific jurisdiction under Delaware's registration statute).

[Insert after Note 4(b) on page 919.]

(c) The Supreme Court this term had an opportunity to clarify the "related to" concept in specific jurisdiction. The result indicates that the Court may have effectively eliminated the concept as a test for whether an assertion of jurisdiction is general or specific. In *Bristol-Meyers Squibb Co. v. Superior Court of California*, 582 U.S. ___, 137 S. Ct. 1773, 2017 WL 2621322 (2017), plaintiffs included some California residents but mostly nonresidents of the state. Their claims asserted injuries caused by a drug manufactured by defendant. The nonresident plaintiffs did not assert that they had obtained the drug from the defendant in California, had been injured by the drug there, or

been treated there. The defendant was incorporated in Delaware and headquartered in New York, with extensive activities in New York and New Jersey. The defendant also had extensive activities in California. The California Superior Court found that general jurisdiction existed over the nonresident plaintiffs' claims against the defendant in California based on its activities there. The California Court of Appeal found that general jurisdiction was improper under the *Daimler* test examined above in the casebook, but found that specific jurisdiction was proper. The California Supreme Court affirmed the specific jurisdiction conclusion, emphasizing in part that the nonresidents' claims were similar to the California residents' claims and because the defendant engaged in other activities in the state.

The U.S. Supreme Court granted certiorari and reversed. The Court stated that it was insufficient that the claims of the nonresidents were similar or identical to the claims of the California residents. Rather, it was necessary that there be a connection between the forum and the specific claims at issue. Importantly, the Court distinguished the case of *Keeton v. Hustler Magazine, Inc.*, examined in Note 2 at page 925 of the casebook. The court stated that in *Keeton*, the false statements of fact made by the defendant harmed both the nonresident subject of the falsehood within the state and the readers of the statement who were residents of the state. That distinguished the nonresident plaintiffs' claims in *Squibb*, because their claims involved no harm in California and no harm to California residents.

In *Squibb*, the Court's decision was 8 to 1, with only Justice Sotomayor dissenting. One point made by Justice Sotomayor was that the nonresident plaintiffs' claims "related to" the defendant's forum conduct because it was "materially identical" to the actions of the company in California. Another point Justice Sotomayor made was that the defendant had not challenged that its contacts with California were purposeful, or that the assertion of jurisdiction over it was unreasonable.

[Insert after Note 5 on page 919.]

6. After the *Squibb* decision, is there any room left to conclude that when the defendant conducts identical conduct in and outside the forum state, but the harm to the plaintiff occurs wholly outside the forum, the plaintiff can successfully assert specific jurisdiction over the defendant in the forum?

7. After *Squibb*, what is left of the suggestion in *Burger King* that the reasonableness test can enhance the case for specific jurisdiction in an otherwise marginal case? Is it sufficient to preserve that suggestion that in *Squibb*, the court said that specific jurisdiction was absent altogether under the test that it applied, making it unnecessary to inquire into purposeful contacts and reasonableness?

8. Is the Court taking its eye off the fundamentals of due process in the recent general and specific jurisdiction cases in order to pursue a policy of limiting forum shopping? That is, the purpose of the due process clause in its procedural operation is to assure the defendant an adequate opportunity to be heard in defense before its property (damages) can be taken from it. Beyond that fundamental policy, the clause arguably should not limit the power of a plaintiff to bring suit anywhere. If the defendant's activities give rise to a foreseeable risk of suit in the state that the defendant should and can protect itself against with insurance, higher prices, etc., why should the Court conclude that it is being deprived of due process because the plaintiff is engaging in forum shopping?

9. Justice Sotomayor also suggested in her opinion that the Court was still carrying the torch for federalism by importing territorial restrictions into the due process inquiry as it did in *World Wide*

Volkswagen (discussed in Note 2 on page 917 of the casebook), *McIntyre* (reprinted on page 927 of the casebook), and, of course, *Pennoyer* (discussed at page 836 of the casebook). This is a fair implication of the Court's overall approach to personal jurisdiction limits under the Due Process Clause. If this is so, is the Court's approach justified or should it consider a general reformulation of its due process jurisprudence?

10. *See also* State *ex rel.* Norfolk So. Ry. Co. v. Dolan, 512 S.W.3d 41 (Mo. 2017) (Missouri did not have specific or general jurisdiction over FELA action arising out of events in another state; no general jurisdiction because *Daimler* standard not met by Norfolk's activities in Missouri; no specific jurisdiction just because Norfolk conducted the same kind of activities in Missouri as in the state where the claim arose; compliance with statute that required appointment by Norfolk of agent to receive process does not provide an independent basis for general jurisdiction; no need to determine whether state could constitutionally require corporation to submit to general jurisdiction as a condition of doing business in state); Figueroa v. BNSF Ry. Co., 390 P.3d 1019 (Or. 2017) (Oregon legislature did not intend for statute requiring foreign corporation to appoint agent to receive service of process as condition of doing business in Oregon to result in implied consent to general jurisdiction).

[Insert at the end of Note 3 on page 926.]

Alan M. Trammel & Derek E. Bambauer, *Personal Jurisdiction and the "Interwebs,"* 100 CORNELL L. REV. 1129 (2015).

[Insert at the end of Note 1 on page 942.]

See also George Rutherglen, *Personal Jurisdiction and Political Authority*, 32 J.L. & POL. 1 (2016).

[Insert at the end of Note 7 on page 943.]

See also Cody Jacobs, *A Fork in the Stream: The Unjustified Failure of the Concurrence in* J. McIntyre Machinery Ltd. v. Nicastro *to Clarify the Stream of Commerce Doctrine*, 12 DEPAUL BUS. & COM. L.J. 171 (2014); Eric Shepard, *The Battle for the Soul of* International Shoe*: Why the Author of* International Shoe *Would Condemn the* Nicastro *Plurality for Hijacking His Legacy of Judicial Restraint*, 32 QUINNIPIAC L. REV. 353 (2014).

[Insert at the end of Note 1 on page 951.]

See also Catholic Diocese of Greenbay, Inc. v. John Doe, 349 P.3d 518 (Nev. 2015) (assertion of specific jurisdiction over Wisconsin diocese in Nevada; although diocese engaged in certain monitoring activities over priest after transfer to Nevada, it did not assign him daily tasks that he could not refuse consistent with his employment in Nevada; doctrine of incardination, which results in a certain loyalty to the ordaining diocese (here Wisconsin) did not establish agency relationship between priest and diocese; purposeful contacts therefore not present); *First Cmty. Bank, N.A. v. First Tennessee Bank, N.A.*, 489 S.W.3d 369 (Tenn. 2015) (rating agencies ratings of investments that were purchased in Tennessee did not establish purposeful contacts with Tennessee for purposes

of specific jurisdiction); *FutureSelect Portfolio Mgmt., Inc. v. Tremont Grp. Holdings, Inc.*, 331 P.3d 29 (Wash. 2014) (sustaining an exercise of jurisdiction over the defendant based on its doing of business with the plaintiffs through an agent in Washington).

[Insert at the end of Note 3(b) on page 952.]

See also Simona Grossi, *Personal Jurisdiction: A Doctrinal Labyrinth with No Exit*, 47 AKRON L. REV. 617 (2014); Peter L. Markowitz & Lindsay C. Nash, *Constitutional Venue*, 66 FLA. L. REV. 1153 (2014).

[Add the following cite to the insert for Note 3(b) on page 952:]

Adam Balinski, *Wonky* Walden: *The Dizzying New Personal Jurisdiction Rule*, 2016 B.Y.U. L. REV. 683 (2016).

C. GROUNDS FOR DECLINING JURISDICTION

1. Forum-Selection Clauses

[Insert after Note 4(c) on page 965.]

(d) *See also Stone & Webster, Inc. v. Georgia Power Co.*, 779 F.3d 614 (D.C. Cir. 2015) (permissive forum selection clause did not prohibit evaluation of filing in another forum according to standards governing which parallel federal declaratory judgment action should be allowed to proceed); *Nickerson v. Network Solutions, LLC*, 339 P.3d 526 (Colo. 2014) (on motion to set aside a default judgment, forum selection clause does not deprive court of jurisdiction to enter judgment); *Energy Claims Ltd. v. Catalyst Inv. Grp. Ltd.*, 325 P.3d 70 (Utah 2014) (forum selection clause in contract was entitled to same deference in forum non conveniens analysis (see below) as would be given a plaintiff who filed suit in its home jurisdiction; forum selection clause; when party alleges forum selection clause obtained by fraud, it must plead the circumstances constituting fraud with particularity and the trial court is authorized to conduct a hearing in its discretion on the allegations of fraud before deciding whether to enforce clause). *Cf. Roberts v. TriQuint Semiconductor, Inc.*, 364 P.3d 328 (Ore. 2015) (Delaware Corporation's forum selection by law did not violate directors fiduciary duty and was not unreasonable or unfair under either Delaware or Oregon law).

[Insert at the end of Note 5 on page 966.]

See also San Diego Gas & Elec. Co. v. Gilbert, 329 P.3d 1264 (Mont. 2014) (when contract contains both choice-of-law clause and forum selection clause, court first determines validity of choice-of-law clause; choice-of-law clause selecting California law is valid; forum selection clause selecting California forum is valid and mandatory).

[Add the following material to the Insert for Note 5 on page 966 after the citation to the Montana case:]

For an extensive discussion of which law governs the interpretation and enforcement of a forum selection clause, see Symeon C. Symeonides, *Choice of Law in the American Courts in 2016: Thirtieth Annual Survey*, 65 AM. J. COMP. L. ___ [53–61] (forthcoming 2017).

2. Forum Non Conveniens

[Insert at the end of Note 1 on page 970.]

See Espinoza v. Evergreen Helicopters, Inc., 337 P.3d 169 (Ore. 2016) (case of first impression; doctrine of forum non conveniens is part of common law of Oregon).

[Add the following citation to the insert for Note 1 on page 970 in the current supplement:]

West Virginia ex rel. *Khoury v. Cuomo*, 783 S.E.2d 849 (W.Va. 2016) (West Virginia forum non conveniens statute).

[Insert at the end of Note 5 on page 974.]

See also Hefferan v. Ethicon Endo-Surgery, Inc., 828 F.3d 488 (6th Cir. 2016) (lesser presumption in favor of plaintiff's choice of forum when plaintiff lives abroad); *Halo Creative & Design Ltd. v. Comptoir Des Indes, Inc.*, 816 F.3d 1366 (Fed Cir. 2016) (action in which both plaintiff and defendant were businesses based in Hong Kong and Canada, but claim was for infringement of American patents, trademarks, and copyrights in the United States; court held that Canada was not an adequate alternative forum because it had not been demonstrated that Canada would provide remedies for intellectual property claims occurring abroad); *Archangel Diamond Corp. Liquidating Trust v. OAO Lukoil*, 812 F.3d 799 (10th Cir. 2016) (two requirements for forum non conveniens dismissal are an adequate alternative forum and a choice-of-law analysis confirming that foreign law is applicable, because if issue is controlled by American law dismissal is not proper; here dismissal was proper in a case in which domestic law governed part of case and foreign country law governed part of case); *In re Oceanografia, S.A. de C.V.*, 494 S.W.3d 728 (Tex. 2016) (suit arising out of sinking of Mexican ship in Mexican waters, with all plaintiffs and defendants being Mexican citizens except for two defendants that were businesses not based in Texas; court held that Mexico was an adequate alternative forum); *American Electric Power Co. v. Nibert*, 784 S.E.2d 713 (W. Va. 2016) (refusal of lower court to dismiss on grounds of forum non conveniens in favor of alternative forum in Ohio was not an abuse of discretion under West Virginia codification of forum non conveniens doctrine); *Garcia v. AA Roofing Co., LLC*, 125 A.3d 1111 (D.C. 2015) (district court erred in dismissing on forum non conveniens grounds; question is not whether the District of Columbia is the ideal forum in which to bring a suit, but whether it is a seriously inconvenient forum).

[Insert at the end of Note 7 on page 974.]

See also Tarik R. Hansen & Christopher A. Whytock, *The Judgment Enforceability Factor in Forum Non Conveniens Analysis*, 101 IOWA L. REV. 923 (2016); Simona Grossi, Forum Non Conveniens *as a Jurisdictional Doctrine*, 75 U. PITT. L. REV. 1 (2013).

[Add the following citation to the Insert for Note 7 on page 974:]

Pamela K. Bookman, *The Unsung Virtues of Global Forum Shopping*, 92 NOTRE DAME L. REV. 579 (2016).

5. Local Actions

[Insert at the end of Note 2(b) on page 990.]

See also Ralph v. Dep't of Nat'l Res., 343 P.3d 342 (Wash. 2014) (statute embodying local action rule reinterpreted to be venue statute rather than subject matter jurisdiction limitation; therefore, when an action is commenced in a county in which the land is located, proper result is not dismissal for lack of jurisdiction, but a change of venue to a county where the land is located).

6. Comity?

[Insert at the end of Note 5 on page 993.]

Pruczunski v. Ashby, 374 P.3d 102 (Wash. 2016) (Idaho trooper pursued Idaho motorist suspected of driving drunk from Idaho into Washington; Washington long-arm statute and due process satisfied by assertion of personal jurisdiction in Washington in tort action against trooper; however, case remanded for determination by trial court whether to decline jurisdiction in favor of Idaho on basis of comity).

[Add the following citation to the Insert for Note 5 on page 993:]

See also In re Vitamin C Antitrust Litig., 837 F.3d 175 (2d Cir. 2016) (international comity doctrine required abstention in antitrust case in which true conflict existed between Chinese and United States' laws and factors in addition to the true conflict also pointed toward abstention).

[Substitute the following problem for Problem 10.20 in the casebook.]

Problem 10.20. Reconsider the materials in Chapter 7(A)(1), concerning prohibited marriages. Assume that *S-1* and *S-2*, two seventeen-year olds, live in State *X*, where marriage between persons under the age of eighteen is outlawed by statute. Nevertheless, *S-1* and *S-2* convince a municipal official in the city in which they live in State *X* to issue them a marriage license and also convince a public official in that city to marry them. Both officials give as their reason that they believe the State *X* statutory restriction on such marriages is unconstitutional under the Equal Protection Clause of the State *X* Constitution. After the marriage, *S-1* and *S-2* move to State *Y* and become domiciled there,

where *S-2* dies intestate. *S-1* seeks to qualify as the administrator of *S-2's* estate as *S-2's* surviving spouse and also claims the right to inherit the entire estate under the laws of intestate distribution in State *Y*. *S-1's* right to qualify as administrator and inherit the proceeds of the estate are challenged by *S-2's* relatives who would have rights of administration and inheritance under State *Y* law if *S-1* and *S-2* were not validly married. The grounds of the challenge are that the marriage was invalid under the statutory restriction in State *X*. *S-2* argues that the marriage was valid because the Equal Protection Clause of the State *X* Constitution invalidates the restriction in that state on such marriages. If State *Y* follows a doctrine of comity similar to that in *Harmar*, should it refuse to interpret the State *X* Constitution? Is there any additional information that you would like to have about the social context in State *X* before deciding this question?

D. INJUNCTIONS AGAINST EXTRASTATE ACTIONS

[Insert at the end of Note 4 on page 1002.]

See also In re Amerijet Int'l, Inc., 785 F.3d 967 (5th Cir. 2015) (in removed action, district court did not err in enjoining Florida action because Texas action was clearly the first filed; only federal authorities relied on). *Cf. Hapag-Lloyd Aktiengesellschaft v. U.S. Oil Trading LLC*, 814 F.3d 146 (2d Cir. 2016) (interpleader action in which district court enjoined parties from proceedings in other actions including a foreign action; held, although 28 U.S.C. § 2361, which authorizes injunctions in statutory interpleader actions under 28 U.S.C. § 1335 does not have extraterritorial operation, federal courts have inherent power to enjoin foreign proceedings; remanded for district court to apply proper statute for determining when foreign antisuit injunction should be granted); *Volkman v. Hanover Invs., Inc.*, 126 A.3d 308 (Md. Ct. Spec. App. 2015) (forum should have dismissed parallel declaratory judgment action).

[Add the following citation to the Insert for Note 4 on page 1002:]

Chavez v. Dole Food Co., 836 F.3d 205, 225 (3d Cir. 2016) (in vast majority of cases, a court exercising its discretion under the first-filed rule should stay or transfer a second-filed suit rather than dismiss it; district court abused its discretion by dismissing the action with prejudice under the first filed rule and also erred in denying a motion to transfer the action to another district court in New Jersey).

[Insert at the end of Note 5 on page 1002.]

See also Maslowski v. Prospect Funding Partners LLC, 890 N.W.2d 756 (Minn. 2017) (action to enjoin New York proceeding and obtain declaratory judgment that agreement with litigation company was unenforceable; forum selection clause selecting New York as forum under agreement, in conjunction with choice-of-law clause selecting New York substantive law as governing agreement, were unenforceable as an attempt to avoid Minnesota's public policy against champerty agreements; New York action concerned similar issues and would be disposed of by Minnesota action; district court did not abuse its discretion in not deferring to New York proceeding under first

filed rule, because courts of Minnesota and New York do not have concurrent jurisdiction; and comity and equity did not require deference to New York proceeding).

[Insert at the end of Note 6 on page 1003.]

See also Samantha Koeninger & Richard Bales, *When a U.S. Domestic Court Can Enjoin a Foreign Court Proceeding*, 22 CARDOZO J. INT'L & COMP. L. 473 (2014).

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