American Conflicts Law:

Cases and Materials

Sixth Edition

2016-17 Supplement

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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*, 576 U.S. ___, 135 S. Ct. 2584 (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), 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.

With this Supplement, the authors of the casebook are joined by Professor Richard H. Seamon of the University of Idaho School of Law. The casebook authors welcome Professor Seamon's assistance and expertise. His participation in future supplements and editions of the casebook will surely enhance the quality of the publications.

Robert L. Felix
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June 2016

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INTRODUCTION

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

Laura E. Little, *Conflict of Laws Structure and Vision: Updating a Venerable Discipline*, 31 GEORGIA ST. U. L. REV. 231 (2015).

[Insert at the end of Note 6 on page 10.]

The latest version of Professor Symeonides review is, Symeon C. Symeonides, *Choice of Law in the American Courts in 2015: Twenty-Ninth Annual Survey*, 64 AM. J. COMP. L. 221 (2016). His review reflects no changes among the states in conflicts methodology since the publication of the Sixth Edition of the casebook. *See id.* at 290–92.

[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 (AM. LAW INST., Preliminary Draft No. 1, Oct. 1, 2015). The draft contains introductory sections 1.01 – 1.05, sections 2.01 -2.11 on habitual residence, which the reporters proposed to substitute for the existing concepts of domicile in the conflicts area, Chapter 5 on Choice of Law, containing introductory sections 5.01 – 5.05 (Topic 1), and Topic 2 on Determination of Foreign Law, sections 5.06 – 5.13. The reporters met with the Advisers and Members Consultative Group on October 22, 2015, where the draft was extensively discussed and criticized. Individual provisions of the draft will be discussed throughout this supplement where relevant.

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. 1, *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.

* * * * *

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, *Better Law as Better Outcome*, 63 AM. J. COMP. L. 155 (2015).

5. The "Most Significant Relationship" Approach

[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 § 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* RESTATEMENT (THIRD) OF CONFLICT OF LAWS, at xiv (AM. LAW INST., Preliminary Draft No. 1, Oct. 1, 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.

The Reporters have included a proposed table of contents in *Preliminary Draft No. 1* for the purpose of indicating their proposed coverage and to stimulate discussion about coverage. Chapters 1 (Introduction) and 2 (Habitual Residence) are considered foundational and contain several developed sections. Chapter 3 will deal with Judicial Jurisdiction, but is as yet undeveloped. Chapter 4 will deal with Recognition and Enforcement of Judgments, and will contain four topics, including an introduction, sister-state judgments, tribal judgments, and foreign country judgments. Chapter 5 begins the sections on Choice of Law and is proposed to embrace thirteen topics. Topics 1 and 2 contain black letter and are, respectively, an introduction and determination of foreign law, the latter being a new set of clarifying provisions that contain no counterpart in the RESTATEMENT (SECOND). Topic 3 will deal with procedure, Topic 4 with Torts, Topic 5 with Contracts, Topic 6 with Complex Litigation (a new area not in the previous restatement), Topic 7 with Property, including Movables, Immovables, and Intellectual Property, Topic 8 with Trusts, Topic 9 with Families, Topic 10 with Agency and Partnerships, Topic 11 with Business Corporations, Topic 12 with Administration of Estates, and Topic 13 with 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 rule operate? If so, should that topic not be considered and restated early in the draft?

Specific provisions of the current draft 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 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 after Note 4(c) on page 102.]

(f) 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 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 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); *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).

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

[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. 1, Oct. 1, 2015) [hereinafter *Preliminary Draft No. 1*]. 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. 1*, § 5.04, *cmt. j*, at 95. Significantly, Comment k also says that another state's conflicts rules, both statutory and common law, may provide valuable information about the territorial boundaries of the state's internal law, though the Reporters state that this will "generally speaking" not be the case. *See id.*at 95–96.

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.]

The American Law Institute's current project to create a third Restatement of Conflicts proposes 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. Habitual residence of a "natural person" is defined as "the place where the person has been living for an appreciable period of time and which has been serving as the center of that person's life." RESTATEMENT (THIRD) OF CONFLICT OF LAWS § 2.02(1) (AM. LAW INST., Preliminary Draft No. 1, Oct. 1, 2015) [hereinafter *Preliminary Draft No. 1*]. As with domicile, every person has one, and only one, habitual residence at all times. *Id.* § 2.02(2).

Similarly, once a person has a habitual residence, that residence continues until a new habitual residence has been acquired. *See id.* § 2.09; *see also* § 2.05 (Changing Habitual Residence). The draft states that a person's habitual residence can serve as a connecting factor for conflict-of-law determinations, and when the person's habitual residence changes, the habitual residence at the time of the events relevant to the conflict-of-law determination is "presumed" to control. *See id.* § 2.10. The forum determines habitual residence according to its own law when applying its conflict-of-laws rules. *See id.* § 2.03. The draft also contains a special section for determining the "place" where a "juridical person" has its "most significant relationship for conflict-of-laws purposes." *See id.* § 2.11. Other sections deal with habitual residence of origin (§ 2.04), habitual residence of minors (§ 2.06), habitual residence of married and unmarried persons (§ 2.07), and habitual residence of persons present in a place due to legal compulsion (§ 2.08).

It is important to understand that, unlike domicile, the habitual residence concept "does not explicitly require proof of intent" to make a place one's home permanently or indefinitely, but focuses on "past experience rather than future intention" and "on objective evidence about activities and physical location, thereby diminishing the importance of intent." *See Preliminary Draft No. 1*, § 2.01 *cmt. a*, at 15. By diminishing the importance of intent, the Reporters hope to streamline the task of determining the appropriate link between a person and a place for purposes of conflict-of-laws determinations. *See id.* This objective is to be aided by the "appreciable period of time" requirement in the definition of habitual residence in § 2.02(1). In evaluating whether the amount of time a person has spent in a place is "appreciable," the Reporters state that courts consider "related aspects of an individual's life such as employment near the residence and reasons for moving to the residence," as well as whether the residence has a fixed endpoint, though this last factor is not given controlling significance. *See id.* § 2.02 *cmt. c*, at 27. A person's plan to end residence in a place does not prevent the place from being the person's habitual residence, because "a key element of the habitual-residence concept is the absence of any need to evaluate whether an individual has the intent to remain a resident in a place indefinitely." *Id.*

At the October 22, 2015, meeting of the Reporters, Advisers, and Members Consultative Group, serious questions were raised about whether the de-emphasis of the intent requirement under 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. One problem is that the illustrations provided by the Reporters do not describe the legal issue that the habitual residence determination would relate to. *See id.* § 2.02 *cmt. d*, illus. 1, at 27–28 (describing an employment dispute that a habitual residence determination may be useful to without describing the legal issue in the dispute to which the determination would relate); § 2.09, *cmt.* illus., at 60 (describing the movement from place to place of a sick person whose movements are said not to result in a change of habitual residence, but without describing any legal issue to which the habitual residence determination would be relevant). This produces a singular lack of clarity about how the concept will operate in real cases. Whether future drafts of the habitual residence sections solve these difficulties remains to be seen.

Apply the ALI's habitual residence requirement (as it has been described above) to Problem 2.20 on page 108 of the casebook. Assume that the state where *H* was habitually resident will determine

which state's law of intestate distribution should be applied. Does it matter what the policies and purposes of laws of intestate distribution of the potentially concerned states are? Does it matter whether both *W* and *D* continue to live in State *X*, or that one or both of them move to State *Y* after *H's* death?

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 in Chapter 5 on Choice of Law, to restate and clarify the rules on determination of foreign law. This it does in its sections 5.06 – 5.13, which have no counterparts in the RESTATMENT (SECOND) OF CONFLICT OF LAWS. The decision of the Reporters to include these new sections is based on the correct view that determination of foreign law is fundamental and foundational in the choice-of-law process. *See* RESTATEMENT (THIRD) OF CONFLICT OF LAWS 103–04 (AM. LAW INST., Preliminary Draft No. 1, Oct. 1, 2015) (Introductory Note) [hereinafter *Preliminary Draft No. 1*].

(a) The draft provides that the determination of foreign law is a question of law (§ 506) and that a court's determination of foreign law is reviewable as a question of law (§ 5.13). It also provides that a party who wishes to raise an issue of foreign law must give reasonable written notice, though the court may itself raise an issue of foreign law on its own motion (§ 5.07). In the latter regard, the reporters make it clear that the court is not required to raise an issue of foreign law on its own, but that if it does, it should give reasonable notice to the parties. *Preliminary Draft No. 1*, § 5.07 *cmt. i*, at 130. The draft does not, however, provide standards stating when courts should raise issues of foreign law on their own initiative. However, § 5.11 provides that if there is "insufficient information" to determine foreign law, the court ordinarily applies forum law. In this last regard, however, discussion at the October 22, 2015, meeting of the Reporters, Advisers, and Members Consultative Group indicated that the Reporters may revise the draft to specify some situations in which failure to establish foreign law should result in failure of a party's case.

(b) Section 5.08 provides that the court is responsible for determining foreign law, while the parties are responsible for providing information about foreign law. Section 5.09 provides that "ordinarily" foreign law is determined in light of how it is understood and applied in the foreign jurisdiction. Section 5.10 states that in determining foreign law, a court may consider any relevant material or source, including testimony, "whether or not submitted by a party or admissible under the rules of evidence." Section 5.12 provides that a dispute about foreign law may be resolved on a motion for summary judgment, just as issues of forum law are often determined.

(c) In evaluating the ALI provisions, do you see them as simply restating common practice in the courts, establishing new "better" rules, or clarifying existing practice? Should the Reporters provide more specific guidance on certain matters, such as when the courts should and should not raise issues of foreign law on their own initiative?

[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 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 after Note 3 on page 223.]

3A. 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.

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).

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. 1, Oct. 1, 2015) [hereinafter *Preliminary Draft No. 1*]. 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. *See also id.* § 5.05, *cmt. c*, at 98 (due process requires that a state have a significant contact or aggregation of contacts creating state interests such that choice of its law is neither arbitrary nor fundamentally unfair). 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 two places in *Preliminary Draft No. 1* 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. 1*, Reporter's Note, *cmt. b* on § 5.02(1) at 87; *id.* Reporters Note, *cmt. f*, page 101. 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?

[Insert after the citation to the Sohn article 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 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

C. SECOND RESTATEMENT: THE MOST SIGNIFICANT RELATIONSHIP

[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); *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).

F. SPECIAL PROBLEMS: MASS TORTS

2. Class Actions

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

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 xx xxi (AM. LAW INST., Preliminary Draft No. 1, Oct. 1, 2015) (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?

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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 because Texas, by virtue of the fact that at the time of the accident the place of performance was Texas, the insureds lived in Texas, 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 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).

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.]

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).

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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

[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.

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.

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.

[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

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 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).

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 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); *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); *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 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

a. Basic Policies

[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).

b. Exceptions and Potential Exceptions to the Basic Policies

(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?

(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).

D. ENFORECEMENT 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 4(c) on age 820.]

Later 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 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).

[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

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

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 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)); *Pruczinski v. Ashby*, ___ P.3d ___, 2016 WL 2586687 (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).

[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 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, ___ A.3d ___, 2016 WL 1569077 (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.]

See also 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); *First Cmty. Bank, N.A. v. First Tennessee Bank, N.A.*, ___ S.W.3d ___, 2015 WL 9025241 (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); 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).

(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 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 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.*, ___ S.W.3d ___, 2015 WL 9025241 (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).

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).

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).

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

See also 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); *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); *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).

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

See also Simona Grossi, Forum Non Conveniens *as a Jurisdictional Doctrine*, 75 U. PITT. L. REV. 1 (2013).

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, ___ P.3d ___, 2016 WL 2586687 (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).

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. Volkman v. Hanover Invs., Inc.*, 126 A.3d 308 (Md. Ct. Spec. App. 2015) (forum should have dismissed parallel declaratory judgment action); *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).

[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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