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The Current State and Trajectory of U.S. Conflict of Laws

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Outline

- ⊙ Sources of law for conflict of laws
Today only **choice of law** and **recognition and enforcement**
- ⊙ Overview of choice of law approaches in the U.S.

- ⊙ Current issues
 - Class actions
 - Anti-Sharia state laws
 - SPEECH Act
 - DOMA (federal Defense of Marriage Act)

Sources of law for conflict of laws

- ◉ Choice of law: the same rules for state-state conflicts as for state/federal-foreign country conflicts
- ◉ Recognition and enforcement of foreign judgments: different rules for sister-state judgments and foreign-country judgments

Sources of law for conflict of laws

- ⦿ U.S. Constitution, Article IV, Section 1 (Full Faith & Credit Clause)

“Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof.”

- ⦿ U.S. Constitution, 14th Amendment (Due Process Clause)

“No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

Sources of law for recognition and enforcement

- ◎ Sister-state judgments:
 - Full Faith & Credit Clause
 - Registration approach: Uniform Enforcement of Foreign Judgments Act (1964)
 - Separate action approach (e.g., California for non-monetary judgments)

- ◎ Foreign-country judgments
 - Comity – Hilton v. Guyot, 159 U.S. 113 (1895)
 - Uniform Foreign-Country Money Judgments Recognition Act (2005) (monetary judgments only)

Uniform Enforcement of Foreign Judgments Act (1964)

- judgments of U.S. federal or sister-state courts
- Full Faith & Credit
- “A judgment [...] filed [in the office of the Clerk of a court of this state] has the same effect and is subject to the same procedures, defenses and proceedings for reopening, vacating, or staying as a judgment of a [court] of this state and may be enforced or satisfied in like manner.”

(Section 2)

Uniform Foreign-Country Money Judgments Recognition Act (2005)

- judgments of courts other than U.S. federal or sister-state courts
- only judgments for sums of money
- exceptions for judgments for taxes, penalty, divorce, support or maintenance
- grounds for non-recognition:
 - 1) mandatory:
 - lack of due process
 - lack of personal or subject-matter jurisdiction
 - 2) discretionary:
 - absence of timely notice
 - fraud preventing opportunity to defend
 - cause of action repugnant to public policy
 - conflict with another final and conclusive judgment
 - etc.

Sources of law for **choice of law**

- ⊙ Common-law based rules; state law
- ⊙ Restatement (first) of conflict of laws (1934)
- ⊙ Restatement (second) of conflict of laws (1971)
- ⊙ Individual state approaches
 - Government interest analysis (Currie)
 - Better law approach (Leflar)
 - Mixed approach

car manufacturer,
car dealer



driver



	ARIZONA	NEVADA
STRICT LIABILITY	Comparative fault defenses to strict liability claims are allowed where product misuse is asserted.	No comparative fault defenses where product misuse is asserted.
NEGLIGENCE	Recovery proportional to percentages of fault.	Recovery only if the injured person's fault 50% or less.

Choice of Law Approaches: First Restatement (1934)

- ◉ E.g., Alabama, Georgia, Virginia
- ◉ Vested rights theory
- ◉ Torts: “the place of wrong,”
- ◉ Contracts: “place of contracting,” “place of performance”
- ◉ Escape devices:
 - Characterization
 - Substance v. procedure
 - Renvoi
 - Public policy

Choice of Law Approaches: Interest Analysis

- ◉ California, D.C. (torts only)
- ◉ Brainerd Currie (late 1950s)
- ◉ True conflicts: both states have an interest
 - Currie: law of the forum
 - California: theory of comparative impairment (Baxter, 1963) – “the law of the state whose interest would be more impaired if its law were not applied”
- ◉ False conflicts: only one state has an interest
 - Use the law of the state with the interest
- ◉ Unprovided-for cases
 - No state with an interest – forum law

Choice of Law Approaches: Second Restatement (1971)

- ◉ E.g., Illinois, Texas, Washington
- ◉ The “most significant relationship” approach

Choice of Law Approaches: Second Restatement (1971)

§ 6. Choice-Of-Law Principles

(1) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.

(2) When there is no such directive, the factors relevant to the choice of the applicable rule of law include

- (a) the needs of the interstate and international systems,
- (b) the relevant policies of the forum,
- (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
- (d) the protection of justified expectations,
- (e) the basic policies underlying the particular field of law,
- (f) certainty, predictability and uniformity of result, and
- (g) ease in the determination and application of the law to be applied.

Choice of Law Approaches: Second Restatement (1971)

§ 145. The General Principle

(1) The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties under the principles stated in § 6.

(2) Contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:

- (a) the place where the injury occurred,
- (b) the place where the conduct causing the injury occurred,
- (c) the domicil, residence, nationality, place of incorporation and place of business of the parties, and
- (d) the place where the relationship, if any, between the parties is centered.

These contacts are to be evaluated according to their relative importance with respect to the particular issue.

Choice of Law Approaches: The Better Law Approach

- ◉ E.g., New Hampshire (since 1966, torts only), Minnesota, Wisconsin
- ◉ R.A. Leflar (mid-1960s)
- ◉ Five considerations:
 - 1) Predictability
 - 2) Maintenance of interstate and international order
 - 3) Simplification of judicial task
 - 4) Advancement of forum's governmental interests
 - 5) Application of the better rule of law

Choice of Law Approaches: Modern Combined Approaches

- ◉ E.g., New York
- ◉ New York: Neumeier rules for torts
 - Conduct-regulating rules – law of the place of wrong
 - Loss-distributing rules – Neumeier rules

NEUMEIER RULES IN NEW YORK

1. If P and D have a **common domicile**, apply the law of the domicile.
2. The law of the **place of injury** applies if
 - a) the place of injury is defendant's home state and its law protects defendants, or
 - b) the place of injury is the plaintiff's home state and its law protects plaintiffs.
3. The law of the **place of injury** applies in any other case. A different law may be applied if it "will advance the relevant substantive law purposes without impairing the smooth working of the multistate system or producing great uncertainty for the litigants."

The Supreme Court of Georgia (explaining why it will adhere to the First Restatement and not adopt any of the newer approaches):

“This Court will retain its long-held conflict of laws rule not out of blind adherence but rather, out of the candid recognition that the subsequently-developed theories have significant problems. The relative certainty, predictability, and ease of the application of *lex loci delicti*, even though sometimes leading to results which may appear harsh, are preferable to the inconsistency and capriciousness that the replacement choice-of-law approaches have wrought.”

Dowis v. Mud Slingers, Inc., 279 Ga. 808, 816 (Ga. 2005)

- ◉ U.S. Constitution, Article IV, Section 1 (Full Faith & Credit Clause)
“Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof.”
- ◉ U.S. Constitution, 14th Amendment (Due Process Clause)
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U.S. Supreme Court:

“There must be a significant contact or a significant aggregation of contacts, creating state interests, with the parties and the occurrence of the transaction so that the choice is neither arbitrary nor fundamentally unfair.”

Allstate v. Hague, 449 U.S. 302 (1981)

Symeon C. Symeonides, *Choice of Law in the American Courts in 2012: Twenty-Sixth Annual Survey*, 61 *American Journal of Comparative Law* (2013), pp. 68 and 69.

Table 1. Alphabetical list of states and choice-of-law methodologies followed

States	Traditional	Signif. contacts	Restatement 2d	Interest Analysis	<i>Lex Fori</i>	Better Law	Combined Modern
Alabama	T+C						
Alaska			T+C				
Arizona			T+C				
Arkansas		C				T	
California				T			C
Colorado			T+C				
Connecticut			T+ C?				
Delaware			T+C				
Dist. of Columbia				T			C
Florida	C		T				
Georgia	T+C						
Hawaii							T+C
Idaho			T+C				
Illinois			T+C				
Indiana		T+C					
Iowa			T+C				
Kansas	T+C						
Kentucky			C		T		
Louisiana							T+C
Maine			T+C				
Maryland	T+C						
Massachusetts							T+C
Michigan			C		T		
Minnesota						T+C	
Mississippi			T+C				
Missouri			T+C				

Symeon C. Symeonides, *Choice of Law in the American Courts in 2012: Twenty-Sixth Annual Survey*, 61 *American Journal of Comparative Law* (2013), pp. 68 and 69.

States	Traditional	Signif. contacts	Restatement 2d	Interest Analysis	<i>Lex Fori</i>	Better Law	Combined Modern	
Montana			T+C					
Nebraska			T+C					
Nevada		C	T					
New Hampshire			C			T		
New Jersey			T				C	
New Mexico	T+C?							
New York							T+C	
No. Carolina	T	C						
North Dakota		T					C	
Ohio			T+C					
Oklahoma	C		T					
Oregon							T+C	
Pennsylvania							T+C	
Puerto Rico		T+C						
Rhode Island	C					T		
So. Carolina	T+C							
So. Dakota			T+C					
Tennessee	C		T					
Texas			T+C					
Utah			T+C					
Vermont			T+C					
Virginia	T+C							
Washington			T+C					
West Virginia	T		C					
Wisconsin						T+C		
Wyoming	T+C							
TOTAL	52	Torts 10 Contr. 12	Torts 3 Contr. 5	Torts 24 Contr. 23	Torts 2 Contr. 0	Torts 2 Contr. 0	Torts 5 Contr. 2	Torts 6 Contr. 10

	Traditional	Signif. contacts	Restatement (second)	Interest analysis	<i>Lex Fori</i>	Better law	Combined modern
1996	Torts 12 Contr. 10	Torts 3 Contr. 5	Torts 20 Contr. 25	Torts 3 Contr. 0	Torts 3 Contr. 0	Torts 5 Contr. 2	Torts 6 Contr. 10
2012	Torts 10 Contr. 12	Torts 3 Contr. 5	Torts 24 Contr. 23	Torts 2 Contr. 0	Torts 2 Contr. 0	Torts 5 Contr. 2	Torts 6 Contr. 10

Symeon C. Symeonides, *Choice of Law in the American Courts in 1996: Tenth Annual Survey*, 45 American Journal of Comparative Law 447 (1997), pp. 459 and 460.

Symeon C. Symeonides, *Choice of Law in the American Courts in 2012: Twenty-Sixth Annual Survey*, 61 American Journal of Comparative Law (2013), pp. 68 and 69.

Choice of Law in U.S. Federal Courts

- ◉ Federal question jurisdiction v. diversity jurisdiction
(v. supplementary jurisdiction)
- ◉ Federal question action: federal common law (= Second Restatement)
- ◉ Diversity action: choice of law rules of the state in which the court sits
- ◉ State law-regulated issue in a federal question action?

Class Actions

- FRCP 23 adopted in 1938, amended in 1966
- Class Action Fairness Act of 2005
- FRCP 23 prerequisites:
 - numerosity,
 - commonality,
 - typicality, and
 - adequacy of representation
- institutional reform class actions
- monetary class actions
 - predominance, and
 - superiority

Class Actions

➤ Plaintiffs:

- Want to achieve class action certification
- Need predominance – need one applicable law
- Argue that
 - There is no difference among potentially applicable state laws and therefore the forum law may apply
 - Choice-of-law provision points to one single law (a single place tort vs. multiple place tort)

➤ Defendants:

- Want to prevent class action certification
- Argue that multiple state laws should apply

Anti-Sharia State Laws

- ◉ Oklahoma, Arizona, Louisiana, Tennessee
- ◉ Oklahoma “Save Our State” – 2010 elections

Oklahoma Constitution Art. 7, §1 (Ariz. 2010)

The Courts ... shall uphold and adhere to the law as provided in the United States Constitution, the Oklahoma Constitution, the United States Code, federal regulations promulgated pursuant thereto, established common law, the Oklahoma Statutes and rules promulgated pursuant thereto, and if necessary the law of another state of the United States provided the law of the other state does not include Sharia Law, in making judicial decisions.

The courts shall not look to the legal precepts of other nations or cultures. Specifically, the courts shall not consider international law or Sharia Law. ...

The SPEECH Act, 2010

- ◉ Securing the Protection of our Enduring and Established Constitutional Heritage Act (“SPEECH Act”)
- ◉ A response to “libel tourism”
- ◉ Limitations on recognition of foreign libel judgments
- ◉ Codifies existing jurisprudence
- ◉ The same approach in cases involving intellectual property cases

The SPEECH Act

Sec. 4102. Recognition of foreign defamation judgments

(a) First Amendment Considerations-

(1) IN GENERAL- Notwithstanding any other provision of Federal or State law, a domestic court shall not recognize or enforce a foreign judgment for defamation unless the domestic court determines that--

(A) the defamation law applied in the foreign court's adjudication provided at least as much protection for freedom of speech and press in that case as would be provided by the first amendment to the Constitution of the United States and by the constitution and law of the State in which the domestic court is located; or

(B) even if the defamation law applied in the foreign court's adjudication did not provide as much protection for freedom of speech and press as the first amendment to the Constitution of the United States and the constitution and law of the State, the party opposing recognition or enforcement of that foreign judgment would have been found liable for defamation by a domestic court applying the first amendment to the Constitution of the United States and the constitution and law of the State in which the domestic court is located.

DOMA (Defense of Marriage Act, 1996)

Sec. 1738C. Certain acts, records, and proceedings and the effect thereof

No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.

Sec. 7. Definition of ‘marriage’ and ‘spouse’

In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word ‘marriage’ means only a legal union between one man and one woman as husband and wife, and the word ‘spouse’ refers only to a person of the opposite sex who is a husband or a wife.

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