Choice of Law in the American Courts in 2016:
Thirtieth Annual Survey

By

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INTRODUCTION

This is the Thirtieth Annual Survey of American Choice-of-Law Cases.¹ Thirty years is a milestone of sorts. But if there is anything to celebrate, it is the interest of the readers, which by every objective indication has grown every year. That interest, for which this author is grateful, is the reason for continuing.

As in all the previous years, the Survey is written at the request of the Association of American Law Schools Section on Conflict of Laws,² and is intended as a service to fellow teachers and to students of conflicts law, both inside and outside the United States.³ Its purpose remains the same as it has been from the beginning:

² This Survey does not reflect the views of the Association of American Law Schools or its Section on Conflict of Laws.

³ Because a sizable portion of the readership consists of foreign scholars who may be less familiar with
to inform, rather than to advocate. Occasionally, however, small amounts of criticism escape the author’s self-censoring filters.

This Survey covers cases decided by American state and federal appellate courts during 2016, and posted on Westlaw by January 31, 2017. Of the 1,515 appellate cases that meet these parameters, the Survey focuses on those cases that may contribute something new to the development or understanding of conflicts law—and, particularly, choice of law.

The total number of conflicts cases decided in 2016 and posted on Westlaw by January 31, 2017, was 5,324. Table 1, below, breaks them down into categories. More than seventy percent of these cases have been decided by federal district courts and are not covered by this Survey.

**Table 1. Conflicts Cases, 2016.**

<table>
<thead>
<tr>
<th>Category</th>
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<tr>
<td>U.S. Supreme Court</td>
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<tr>
<td>Federal Courts of Appeals</td>
<td>516</td>
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<tr>
<td>State supreme and intermediate courts</td>
<td>989</td>
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<tr>
<td>Federal district and other federal lower courts</td>
<td>3,809</td>
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<tr>
<td>All cases</td>
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The following are some of the cases discussed in this year’s Survey:

- Three U.S. Supreme Court decisions, one holding that the civil part of RICO does not apply to foreign injuries, another forging a hybrid compromise in the ongoing sovereign immunity disputes between California and Nevada, and another reminding the Alabama Supreme Court of its elementary obligation to give full faith and credit to sister-state judgments;

- Five important Second Circuit decisions reaching the following results:
  - Narrowly upholding the Second Circuit’s lonely supposition that international law, as applied through the Alien Tort Statute, does not impose civil liability on corporations;
  - For reasons of international comity, choosing not to apply the Sherman Act to Chinese vitamin C manufacturers who engaged in horizontal price-fixing that affected the American market because the Chinese government required the manufacturers to engage in the particular conduct (sovereign compulsion);

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4 These cases were identified by searching Westlaw’s 2016 “All states,” “CTA,” and “SCT” databases with various queries, as well as with all the key numbers that Westlaw uses in placing cases into its “Conflict of Laws” database.

5 This number includes all decisions of the federal district courts and specialized lower federal courts, as well as a very small number of state trial-court decisions posted on Westlaw.
• Holding that Microsoft did not have to produce the contents of a customer’s email account because they were stored in Microsoft’s servers outside the United States;
• Holding that New York did not violate the Privileges and Immunities Clause by requiring nonresident members of its bar to maintain a physical law office in New York; and
• Applying New York’s fraudulent misrepresentation law, which did not impose liability on Citigroup, in a case filed by a Florida investor who claimed that Citigroup’s misrepresentations before the subprime mortgage crisis cost him an $800 million loss;
• Two federal cases striking down, and one upholding, state laws directed against unauthorized aliens;
• Two Montana Supreme Court cases showing the different roles of public policy under traditional and modern choice-of-law approaches in juxtaposition with “statutory choice-of-law directives”;
• A New Jersey Supreme Court decision endorsing a defendant-by-defendant analysis in tort conflicts;
• A Ninth Circuit decision applying California’s anti-SLAPP statute in a multistate defamation case involving the movie *Hurt Locker*;
• A North Carolina decision applying that state’s “alienation of affections” law against an Indiana man sued by a North Carolina husband;
• An Oregon Supreme Court decision formally endorsing the forum non conveniens doctrine;
• Several products liability decisions continuing the pro-defendant trend that began a few years ago;
• Numerous cases enforcing, and some not enforcing, choice-of-law clauses, as well as several cases involving the intriguing question of whether the clause encompasses the chosen state’s statute of limitations;
• A few cases involving the “chicken or the egg” question of which law governs the interpretation and enforceability of a forum-selection clause when the contract also contains (or does not) a choice-of-law clause, and the further question of whether state or federal law controls in federal courts sitting in diversity;
• Several cases resolving statute-of-limitations conflicts without using the traditional characterization of those statutes;
• Many other cases involving domestic relations conflicts, including two dealing with the relationship between acknowledgment and adoption and two cases interpreting the choice-of-law provisions of the Uniform Interstate Family Support Act.
• Another *Fauntleroy*-type case decided by the Mississippi Supreme Court, but this time without fear of reversal by the U.S. Supreme Court;
• A federal case involving the res judicata effects of a judgment dismissing as untimely an action refiled in federal court in another state when both courts’ jurisdiction is based on diversity; and
• Cases involving recognition of foreign judgments from Abu Dhabi, France, Hong Kong, Morocco, and Thailand.
I. Extraterritoriality (or Non) of Federal Statutes

1. Civil RICO and RJR Nabisco

In RJR Nabisco, Inc. v. European Community, the Supreme Court pushed the presumption against extraterritoriality to the farthest extreme so far, thus “out-Beale-ing Beale.” The Court held that courts must now apply this ill-conceived presumption separately for each section of a statute. In this case, the statute in question was the Racketeer Influenced and Corrupt Organizations Act (RICO). Section 1962 of RICO makes it a crime to engage, participate in, or profit from, certain racketeering activities affecting interstate or foreign commerce, while section 1964(c) provides a private action to persons injured by the violation of section 1962. Section 1962 clearly applies extraterritorially because it encompasses certain predicate crimes committed outside the United States, such as money laundering and providing material support to foreign terrorist organizations. One would assume, that since 1962 applies extraterritorially, so would section 1964(c). This assumption would have been entirely plausible, if not inevitable, until the Court decided otherwise in RJR Nabisco.

The plaintiffs were the European Community (as the EU then was) and 26 of its member states. They sued RJR Nabisco, a U.S. based tobacco manufacturer, alleging that the defendant engaged in racketeering activities prohibited by section 1962 and asking for damages for their losses under section 1964(c). In a 4 to 3 opinion authored by Justice Alito, the Court agreed that, “based on RICO’s text and context,” the prohibitions of section 1962 applied extraterritorially. However, the Court continued, just because “Congress intended the[se] prohibitions . . . to apply extraterritorially” does not mean that that same Congress also intended the civil remedies of section 1964(c) to apply extraterritorially. Instead, the Court posited that one must “separately apply the presumption against extraterritoriality” to section 1964(c). The Court undertook such a separate examination and found that section 1964(c) did not independently overcome the presumption. In the Court’s words, “[n]othing in § 1964(c) provides a clear indication that Congress intended to create a private right of action for injuries suffered outside of the United States.” Thus, the plaintiffs were not entitled to a remedy because their claims “rest[ed] entirely on injury suffered

6 136 S.Ct. 2090 (U.S. 2016).
9 Justice Scalia was no longer on the Court, and Justice Sotomayor did not participate.
10 RJR Nabisco, 136 S. Ct. at 2015 (“[O]ur conclusion, based on RICO’s text and context, [is] that Congress intended the prohibitions in 18 U.S.C. §§ 1962(b) and (c) to apply extraterritorially in tandem with the underlying predicates, without regard to the locus of the enterprise.”).
11 Id.
12 Id. at 2016. See also id., at 2018 (“the presumption against extraterritoriality must be applied separately to both RICO’s substantive prohibitions and its private right of action.”).
13 Id. at 2118.
abroad” and “Section 1964(c) requires a civil RICO plaintiff to allege and prove a domestic injury to business or property.”

*RJR Nabisco* has already generated a great deal of discussion in scholarly journals, most of it critical. The brief description offered here does not purport to be substitute for the detailed and thoughtful critiques these journals provide. Suffice it to say, however, that *RJR Nabisco* continues the Court’s disappointing drift into mechanical thinking exhibited in its recent decisions on this subject. The only plausible explanation the Court offered for its novel requirement of section-by-section extraterritoriality scrutiny is that, unlike criminal prosecutions under section 1962, the private remedies of section 1964(c) are not subject to the “check imposed by prosecutorial discretion” and thus “create[] a potential for international friction.”

This differentiation between public enforcement and private remedies is certainly defensible. But it is one that the Court chose to make, not one that Congress has actually made. In fact, it is contrary to the wording of section 1964(c), which incorporates section 1962 by providing a remedy to “[a]ny person injured in his business or property by reason of a violation of section 1962.” Secondly, as anyone involved in drafting legislation knows, such a section-by-section extraterritoriality analysis is inconsistent with the realities of the drafting process. Finally, the Court’s stated concern that “[a]llowing recovery for foreign injuries in a civil RICO action . . . presents [a] danger of international friction” is not only overstated but can also work in the opposite direction, especially in cases such as this one in which it is the foreign countries themselves that request the aid of American courts. *Refusing* to provide a remedy

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14 *Id.* at 2111.


16 *RJR Nabisco*, 136 S. Ct., at 2116.

17 18 U.S.C. 1964(c) (emphasis added).

18 See Maggie Gardenera, *RJR Nabisco and the Runaway Canon*, 102 VA. L. REV. ONLINE 134, 139 (2016) (“[T]he new requirement that Congress express its extraterritorial intent in every provision of a statute reflects an unrealistic understanding of how Congress works.”). See also *id.* at 142, citing evidence that “congressional staffers are simply not aware” of such a requirement.

to these foreign nation plaintiffs, while other plaintiffs can recover and U.S. prosecutors can prosecute at will (or not), can also be perceived as antagonistic to those nations’ legitimate interests.  

2. Sherman (Antitrust) Act

In the well-known 1993 case *Hartford Fire Ins. Co. v. California*, the Supreme Court held that the Sherman Act applied to anticompetitive conduct that occurred in London but was intended to produce, and did produce, effects in the United States. Writing for the Court, Justice Souter rejected the London reinsurers’ argument that just because their conduct was lawful under British law, they should be exempted from the reach of the Sherman Act on grounds of international comity. The Court reasoned that there is “[n]o conflict” when a person subject to regulation by two states “can comply with the laws of both.” Because the London reinsurers did “not argue that British law require[d] them to act in some fashion prohibited by the law of the United States . . . or . . . that their compliance with the laws of both countries [was] otherwise impossible,” the Court saw “no conflict with British law.” Thus there was “no need in this litigation to address other considerations that might inform a decision to refrain from the exercise of jurisdiction on grounds of international comity.

This very scenario, which Justice Souter called a “true conflict,” somewhat imprecisely, was present in the 2016 case *In re Vitamin C Antitrust Litigation*. The defendants, Chinese manufacturers of Vitamin C, engaged in conduct in China (horizontal price-fixing) that produced anticompetitive effects in the United States in violation of the Sherman Act. However, they claimed that the Chinese Government required them to engage in that conduct and as evidence they pointed to an amicus curiae brief filed by the Chinese Ministry of Commerce in support of their motion to dismiss. The brief confirmed that the Ministry required the defendants to engage in the particular conduct as part of a plan to facilitate China’s transition from a state-

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20 See, e.g., Anthony J. Colangelo, *The Frankenstein’s Monster of Extraterritoriality Law*, 110 AM. J. INT’L L. UNBOUND 51, 55 (2016) (“The plaintiff was comprised of precisely those nations into whose territories U.S. law would have extended. But instead of potentially resenting the application of U.S. law, they explicitly and repeatedly requested it. Thus we have affirmative evidence that the relevant foreign nations wanted RICO’s private right of action to extend into their territories. Indeed, the Court’s refusal to provide foreign governments the same access to justice as the U.S. government—and with no textual basis whatsoever for that distinction—smacks of unequal treatment and itself risks foreign resentment and international friction.” (footnotes omitted)).


22 Id. at 799 (internal quotation marks omitted).

23 Id. (emphasis added).

24 Id.

25 Id. at 798.

26 In choice-of-law terminology, a true conflict is any conflict in which the involved states’ laws would produce a different outcome and each state has an interest in applying its law, regardless of whether one state compels what the other state prohibits.

27 837 F.3d 175 (2d Cir. 2016).
run command economy to a market–driven economy, while ensuring that China remained a competitive participant in the global vitamin C market.

This sovereign compulsion created the “true conflict” that was absent in *Hartford Fire* and provided the reason for the Second Circuit’s holding that the trial court should have abstained from applying the Sherman Act on grounds of international comity. In applying a comity analysis, the court examined the nine balancing factors articulated by other circuits in *Timberlane* and *Mannington Mills* and concluded that they favored abstention. The court noted, *inter alia*, that:

1. The Chinese defendants did not act “with the express purpose or intent to affect U.S. commerce or harm U.S. businesses in particular,” although “it was reasonably foreseeable” that their conduct “would generally have a negative effect on [the American] Plaintiffs as participants in the international market”;  
2. The application of the Sherman Act would be “disrespectful” to China and would “negatively affect[] U.S.–China relations”;  
3. Any injunctive relief ordered by the American court would be unenforceable in China, for the same reasons that “a similar injunction . . . issued in China against a U.S. company, prohibiting that company from abiding by U.S. economic regulations” would be unenforceable in the United States; and  
4. The American plaintiffs were “not without recourse.” The court concluded: “Recognizing China’s strong interest in its protectionist economic policies and given the direct conflict between Chinese policy and our antitrust laws, we conclude that China’s interests outweigh whatever antitrust enforcement interests the United States may have in this case as a matter of law.”

3. **Alien Tort Statute (ATS)**

Once again, the Second Circuit has continued to insist on its lonely and ill-conceived position that customary international law as enforced by the Alien Tort Statute

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29 *See Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1297–98 (3d Cir. 1979).*  
30 *In re Vitamin C Antitrust Litig., 837 F3d, at 193.*  
31 *Id.*  
32 *Id.* at 194.  
33 *Id.*  
34 *Id.*  
35 *Id.* (internal quotation marks omitted)
(ATS) does not impose liability on corporate entities. The court first took this position, virtually alone among the federal circuits, in its 2010 decision in *Kiobel I*. In 2013, the Supreme Court affirmed the *Kiobel I* holding in *Kiobel II*, but based its decision on the presumption against extraterritoriality, without addressing the issue of corporate liability. In 2015, in *In re Arab Bank, PLC Alien Tort Statute Litigation ("Arab Bank I")*, another panel of the Second Circuit grudgingly accepted the position of the *Kiobel I* panel on corporate non-liability and invited the whole Circuit to reconsider the issue *en banc*. In 2016, in *In re Arab Bank, PLC Alien Tort Statute Litigation ("Arab Bank II")*, the Second Circuit sitting *en banc* voted 7 to 6 to deny rehearing. Judges Jacobs and Cabranes wrote opinions, joined by two other judges, explaining their vote against rehearing. Judge Cabranes, the author of *Kiobel I*, reiterated his position against corporate liability, but Judge Jacobs took a less supportive position. In his view, it was unnecessary to decide the case on grounds of corporate non-liability. Instead, the *Arab Bank I* panel should have remanded the case to the district court instructing it to examine whether, under *Kiobel II*, the plaintiffs had rebutted the presumption against extraterritoriality. In his view, the plaintiffs did not do so. Judge Jacobs predicted that most plaintiffs will be unable to displace this presumption. But he also allowed for the slight possibility that some plaintiffs may do so in some distant day: “[A] case may one day arise that cannot be disposed of under *Kiobel II*... If and when that comes to pass, it may be worth our time to consider the issue *en banc*. That time may never come; it has certainly not arrived.”

In fact, that day had already arrived. A series of cases involving this precise issue were already pending before the Second Circuit. In 2016, one of those cases, *Licci by Licci v. Lebanese Canadian Bank, SAL ("Licci III")*, came back to the Second Circuit for the third time. The two previous cases involved an American corporate defendant, American Express, and, although decided on different grounds, they assumed that corporate defendants can be liable under international law. *Licci III* arose from the same facts but involved a foreign corporate defendant, the Lebanese Canadian Bank (LCB), which did not have any branches, offices, or employees in the United States. The plaintiffs were Israeli and Canadian civilians who were injured or whose family members were killed in a series of rocket attacks by Hezbollah on civilians in Israel. In their ATS actions, the plaintiffs claimed that LCB aided and abetted

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38 808 F.3d 144 (2d Cir. 2015), discussed in *Symeonides, 2015 Survey*, 231-33.


40 *Id.* at 38, Jacobs, J., concurring.


Hezbollah in committing war crimes in violation of international law by: (1) knowingly maintaining bank accounts for an alleged Hezbollah affiliate, the Shahid Foundation; and (2) carrying out multiple international wire transfers totaling several million dollars on Shahid’s behalf, through its correspondent bank in New York. The district court dismissed the ATS claims under Kiobel II, reasoning that the plaintiffs failed to displace the presumption against extraterritorial application of the ATS.

The Second Circuit disagreed on this point in a thorough and thoughtful opinion. The court noted that LCB’s alleged conduct in aiding and abetting Hezbollah consisted of several wire transfers and the indirect provision of other banking services to Hezbollah through LCB’s correspondence bank in New York. The court pointed out that, according to the complaint, those services “were carried out by LCB in and through the State of New York.”43 The court concluded that this conduct “sufficiently ‘touche[d] and concern[ed]’ the territory of the United States so as to displace the presumption against extraterritoriality.”44

Nevertheless, the court felt obliged to affirm the dismissal of the action under the theory of corporate non-liability introduced in Kiobel I and reaffirmed in Arab Bank II. Both the Licci plaintiffs and the Arab Bank plaintiffs filed certiorari petitions to the Supreme Court. One hopes that the Court will grand these petitions and will eliminate or at least explain this ill-conceived theory.45

4. Extraterritorial Search and Seizure of Email Contents

The Stored Communications Act (SCA)46 was enacted in 1986, before the advent of the Internet, as part of the broader Electronic Communications Privacy Act, to extend to electronic records privacy protections analogous to those provided by the Fourth Amendment. The SCA imposes general obligations of non-disclosure on service providers and creates several exceptions to those obligations. Section 2703 of the Act establishes the conditions under which the government may require a service provider to disclose the contents of stored communications. For certain “priority

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43 Id.

44 Licci III, 834 F.3d at 215 (quoting Kiobel II, 133 S.Ct at 1669). See also id. at 217 (“Plaintiffs’ allegations ‘touch and concern’ the United States with sufficient force to displace the presumption, so long as such conduct also meets the second prong of our extraterritoriality analysis.”).

45 In Warfaa v. Ali, 811 F.3d 653 (4th Cir. 2016), petition for cert. docketed (U.S., May 4, and June 6, 2016), the Fourth Circuit held that the plaintiff, who was tortured in Somalia by a Somali colonel, did not rebut the presumption against the extraterritorial application of the ATS because the only contact with the United States was the colonel’s subsequent move to the United States. However, the court allowed the plaintiff’s claims under the Torture Victim Protection Act (TVPA) to go forward, holding that the colonel was not entitled to foreign official immunity for violations of jus cogens. In Mamani v. Berzain, 825 F.3d 1304 (11th Cir. 2016), petition for cert. docketed (U.S., Dec. 5, 2016), another TVPA case, the Eleventh Circuit held that the fact that the Bolivian plaintiffs obtained some compensation in Bolivia did not bar plaintiffs from suing under the TVPA provision that requires exhaustion of local remedies.

46 18 U.S.C. §§ 2701 et seq.
stored communications,” it requires the government to obtain a warrant issued “using the procedures described in the Federal Rules of Criminal Procedure.”\footnote{18 U.S.C. §§ 2703(b).} Under Federal Rule 41, the power of a federal magistrate or judge to issue a warrant does not extend beyond the borders of the United States and its territories and possessions.

In \textit{Matter of Warrant to Search a Certain E-Mail Account Controlled and Maintained by Microsoft Corp.},\footnote{829 F.3d 197 (2nd Cir. 2016), \textit{reh’g en banc denied}, ___ F.3d ___, 2017 WL 362765 (2nd Cir., Jan. 24, 2017).} federal prosecutors obtained a warrant ordering Microsoft, a Washington-based corporation, to produce the contents of an e-mail account the company maintained for a customer who used its e-mail services. The record did not disclose whether the customer was a U.S. citizen or alien. Microsoft refused to comply, arguing that the warrant could not apply extraterritorially to the account’s contents, which were stored in its servers in Dublin, Ireland. In a comprehensive opinion, a panel of the Second Circuit agreed with Microsoft.

After examining the text, history, and context of the SCA, the court concluded that Congress did not intend the SCA to apply extraterritorially. In particular, the court found that the Act’s reference to warrants issued only pursuant to the Federal Rules of Criminal Procedure confirmed the intra-territorial orientation of the Act because “a warrant protects privacy in a distinctly territorial way.”\footnote{829 F.3d at 212.} The court then tried to identify the “focus” of the statute under the second \textit{Morrison} step, in order to determine whether the challenged application of the SCA was in fact extraterritorial. The Government argued that the Act’s focus was the electronic service provider (here Microsoft), which was a domestic corporation. Thus, compelling the provider to produce data in its control did not entail an extraterritorial application of the Act. The court disagreed. The court found that the Act’s focus was neither on the service provider nor on the individual customer, whose citizenship was not disclosed. Rather the focus was “on protecting the privacy of the content of a user’s stored electronic communications.”\footnote{Id. at 217.} The court concluded as follows:

Although the Act’s focus on the customer’s privacy might suggest that the customer’s actual location or citizenship would be important to the extraterritoriality analysis, it is our view that the invasion of the customer’s privacy takes place under the SCA where the customer’s protected content is accessed—here, where it is seized by Microsoft, acting as an agent of the government. Because the content subject to the Warrant is located in, and would be seized from, the Dublin datacenter, the conduct that falls within the focus of the SCA would occur outside the
United States, regardless of the customer’s location and regardless of Microsoft’s home in the United States.51

The panel held for Microsoft, and the Second Circuit denied rehearing en banc, with four judges dissenting.52

5. The Lanham (Trademark) Act

In Steele v. Bulova Watch Co.,53 the Supreme Court held that the Lanham Act applies extraterritorially to protect a U.S. trademark, so long as “the rights of other nations or their nationals are not infringed.”54 In determining whether the Act can reach infringing activity occurring abroad, courts consider three factors: (1) whether the defendant’s foreign conduct had potential adverse effect on commerce in the United States; (2) the U.S. citizenship of the defendant; and (3) whether issuing an injunction would infringe on the sovereignty of the nation within which the alleged infringing conduct occurred.55

In Commodores Entertainment Corp. v. McClary,56 the district court granted a preliminary injunction enjoining an American musician from performing, either within or outside the United States, under the name “Commodores,” which was a U.S. registered trademark of the plaintiffs. On appeal, the defendant challenged, inter alia, the extraterritoriality of the injunction. He argued that the injunction posed a “potential threat to the sovereignty of another nation,” because he had applied for a Community Trade Mark (“CTM”) with the competent authorities of the European Union.57 The Eleventh Circuit rejected the argument, finding that the defendant “presented no evidence that a CTM ha[d] been issued,” nor did he “present any law under which submitting an application to a CTM would affect a United States court’s ability to protect the interests of its citizens here and abroad.”58

In Trader Joe’s Company v. Hallatt,59 the district court dismissed the plaintiff’s request for injunction under the Lanham Act because the defendant’s infringing activity occurred in Canada and the plaintiff, “Trader Joe,” did not adequately explain how that activity affected American commerce. The defendant’s activity consisted of purchasing Trader Joe’s-branded goods in Washington state, transporting them to Canada, and reselling them there in a store called “Pirate Joe” which was designed to

51 Id. at 220.
54 Id. at 286.
55 See id. at 285–87.
56 648 Fed. App’x. 771 (11th Cir. 2016).
57 Id. at 778.
58 Id.
59 835 F.3d 960 (9th Cir. 2016).
mimic a Trader Joe’s store. On appeal, the Ninth Circuit held that the Lanham Act applied to the defendants Canadian (and U.S.) activities and remanded the case to the district court.

The Ninth Circuit’s elaborate analysis began with the three Bulova factors but added all the verbiage and the “two steps” from RJR Nabisco, continued with the “three Timberlane prongs,” and ended with Timberlane’s “seven subfactors.” Under the three Timberlane prongs, the Lanham Act applies if:

(1) the alleged violations . . . create some effect on American foreign commerce; (2) the effect [is] sufficiently great to present a cognizable injury to the plaintiffs under the Lanham Act; and (3) the interests of and links to American foreign commerce [are] sufficiently strong in relation to those of other nations to justify an assertion of extraterritorial authority.60

The court found that the plaintiff satisfied prongs one and two, by showing that the defendant’s poor quality control practices in Canada could tarnish the plaintiff’s reputation in the United States, reduce the value of its American-held trademarks, and cause the loss of sales in the United States. The court then examined the seven subfactors of Timberlane’s prong three for determining whether international comity counseled against the extraterritorial application of the Lanham Act. The court found, inter alia, that: (1) there was no conflict with Canadian law; (2) the defendant had acted in both Canada and the United States and his Canadian conduct produced foreseeable effects in the United States; and (3) enforcement of a judgment against the defendant would not be difficult because he held assets in the United States. The court concluded that Timberlane’s three prongs favored extraterritorial application of the Lanham Act.

6. Federal Criminal Statutes

Several appellate cases described in the footnotes upheld the convictions of foreign defendants whose acts in foreign countries violated federal criminal statutes that expressly or by clear implication apply extraterritorially, such as RICO,61 the Maritime Drug Law Enforcement Act,62 and other anti-drug trafficking statutes.63

60 Id. at 969 (internal quotation marks omitted).
61 See United States v. Leija-Sanchez, 820 F.3d 899 (7th Cir. 2016), reheg and reh’g en banc denied (June 10, 2016), petition for cert. docketed (U.S., Sep. 12, 2016) (arranging for a murder in Mexico in aid of racketeering and conspiracy in the United States).
63 See United States v. Epskamp, 832 F.3d 154 (2nd Cir. 2016), petition for cert. docketed (U.S., Jan. 17, 2017) (upholding a drug conviction of foreign defendants arrested aboard a U.S. registered airplane preparing to take off from a Dominican Republic airport on a flight to Belgium); United States v. Rojas,
United States v. Baston\textsuperscript{64} involved the extraterritorial application of the Trafficking Victims Protection Reauthorization Act (8 U.S.C. § 1596). This Act grants federal courts extraterritorial jurisdiction to punish sex trafficking by force, fraud, or coercion that occurs outside the United States, \textit{inter alia}, if the offender, regardless of nationality, is present in the United States. In this case, the court convicted the defendant for trafficking a victim he forced to prostitute for him in Australia and ordered him to pay restitution. The defendant, an alien, challenged the constitutionality of the Act’s extraterritoriality under the Foreign Commerce Clause and the Due Process clause of the Fifth Amendment. The Eleventh Circuit rejected both challenges.

The court found that the extraterritorial provisions of the Act were a constitutional exercise of Congress’s broad authority under the Foreign Commerce Clause and that Congress had a rational basis to conclude that sex trafficking, even when it occurs exclusively overseas, is part of an economic class of activities that have a substantial effect on commerce between the United States and other countries.\textsuperscript{65}

The court also found that the defendant’s prosecution did not violate the Due Process Clause because he had numerous contacts with the United States. For example, he resided for some time in the United States under a forged U.S. passport, and some of his trafficking activities occurred in the United States. Finally, the court also found that the prosecution was consistent with the protective principle of international law.

\textbf{7. Foreign Sovereign Immunity}

As in all previous years, several appellate cases involved lawsuits against foreign states or their instrumentalities under the Foreign Sovereign Immunities Act (FSIA) and its exceptions. These cases cannot be discussed here but are noted in the footnotes for readers interested in this area of the law. In alphabetical order, the de-

\textsuperscript{64} 818 F.3d 651 (11th Cir. 2016), \textit{petition for cert. docketed} (U.S., Aug. 2, 2016).

\textsuperscript{65} See id. at 668.
fendants included the following states or their instrumentalities: Antigua and Barbuda, the British Virgin Islands, Ecuador, Hungary, India, Kazakhstan, Libya, and Nepal. Several other cases involved efforts to enforce judgments against Iran and other foreign states.

II. CONSTITUTIONAL LIMITATIONS ON STATE CHOICE OF LAW

1. State Sovereign Immunity and Full Faith and Credit

Franchise Tax Bd. of California v. Hyatt is the third Supreme Court decision in the last four decades involving the question of whether the

66 See Frank v. Commonwealth of Antigua and Barbuda, 842 F.3d 362 (5th Cir. 2016) (commercial activity exception found not applicable).

67 See Richardson v. Donovan, 3rd Cir. 2016 WL 7240172 (3rd Cir. 2016) (personal injury exception).

68 See Arch Trading Corp. v. Republic of Ecuador, 839 F.3d 193 (2nd Cir. 2016) (commercial activity exception found applicable).

69 See Simon v. Republic of Hungary, 812 F.3d 127 (D.C. 2016) (Class action by Jewish survivors of the Hungarian Holocaust alleging that Hungary and the Hungarian state-owned railway company participated in perpetrating the Holocaust; holding that (1) the Treaty of Peace with Hungary was not the exclusive means of recovery; (2) some of the claims fell within the expropriation exception to the FSIA; (3) the alleged confiscation of the survivors’ personal property constituted genocide and thus the domestic takings rule did not apply; and (4) the railroad engaged in commercial activity in the United States, as required to satisfy commercial-activity nexus element).

70 See Barapind v. Government of Republic of India, 844 F.3d 824 (9th Cir. 2016) (finding that India had not waived its sovereign immunity through its diplomatic communications with the United States).

71 See Atlantica Holdings v. Sovereign Wealth Fund Samruk-Kazyna JSC, 813 F.3d 98 (2nd Cir. 2016), cert. denied, 137 S.Ct. 493 (U.S. 2016) (Securities fraud action against foreign wealth fund; holding that fund’s activities fell within the commercial activity exception).

72 See Janvey v. Libyan Investment Authority, 840 F.3d 248 (5th Cir. 2016) (holding that, even if a corporation wholly owned by another corporation that was wholly owned by Libyan government was itself an “agency or instrumentality” of Libyan government, the trading activity conducted by the corporation wholly outside the United States did not have “direct effect” in the United States and thus did not trigger the commercial activity exception to the FSIA).

73 See Chettri v. Nepal Rastra Bank, 834 F.3d 50 (2nd Cir. 2016) (commercial activity exception found not applicable).

74 See Bank Markazi v. Peterson, 136 S.Ct. 1310 (U.S. 2016); Weinstein v. Islamic Republic of Iran, 831 F.3d 470 (D.C. Cir. 2016), reh’g en banc denied (Sep. 19, 2016); Kirschenbaum v. 650 Fifth Avenue and Related Properties, 830 F.3d 107 (2nd Cir. 2016), petition for cert. docketed (U.S., Dec. 28, 2016); Rubin v. Islamic Republic of Iran, 830 F.3d 470 (7th Cir. 2016), petition for cert. docketed (U.S., Oct. 19, 2016); Bennett v. Islamic Republic of Iran, 825 F.3d 949 (9th Cir. 2016), petition for cert. docketed (U.S., Sep. 15, 2016); Ministry of Defense and Support for the Armed Forces of the Islamic Republic of Iran v. Frym, 814 F.3d 1053 (9th Cir. 2016)

75 See Harrison v. Republic of Sudan, 838 F.3d 86 (2nd Cir. 2016); Gilmore v. Palestinian Interim Self-Government Authority, 843 F.3d 958 (D.C. Cir. 2016); Villoldo v. Castro Ruz, 821 F.3d 196 (1st Cir. 2016).

76 136 S.Ct. 1277 (U.S. 2016). This case is critically discussed in P.J., Borchers, Is the Supreme Court Really Going to Regulate Choice of Law Involving States? 50 CREIGHTON L. REV. 7 (2016). For an approving
Full Faith and Credit Clause of the Constitution requires one state to honor a sister state’s claim of sovereign immunity from suit in the courts of the first state. The previous two decisions were *Nevada v. Hall*,77 and *Franchise Tax Bd. of California v. Hyatt*,78 (hereinafter “*Hyatt I*”). In all three cases, the forum state – California in *Hall*, and Nevada in *Hyatt I* and II – had sufficient contacts and interests constitutionally to apply its law under the Supreme Court’s jurisprudence represented by cases such as *Allstate Ins. Co. v. Hague*,79 and *Phillips Petroleum Co. v. Shutts*.80

*Hall*, the first case in this trilogy, involved a California traffic accident caused by an employee of a Nevada state agency, resulting in injury to a California domiciliary. The Supreme Court held that the Full Faith and Credit Clause did not require California (1) to honor Nevada’s assertion of sovereign immunity, or (2) to limit the amount of damages to the $25,000 maximum allowed by the Nevada Tort Claims Act for claims against Nevada state entities. Taking note of California’s interests in “providing full protection to those who are injured on its highways through the negligence of both residents and nonresidents,”81 the Court stated that, “requir[ing] California either to surrender jurisdiction or to limit respondents’ recovery to the $25,000 maximum of the Nevada statute would be obnoxious to its statutorily based policies of jurisdiction over nonresident motorists and full recovery.”82 The Court concluded that “[t]he Full Faith and Credit Clause does not require this result.”83 The Court also noted, in footnote 24, that California’s exercise of jurisdiction in that case “could hardly interfere with Nevada’s capacity to fulfill its own sovereign responsibilities” and “pose[d] no substantial threat to our constitutional system of cooperative federalism.”84 The Court left open the question of whether “different state policies . . . might require a different analysis or a different result.”85

*Hyatt I* and II involved, inter alia, intentional acts committed by a California tax collection agency in California as well as in Nevada and causing injury there to a Nevada domiciliary.86 In *Hyatt I*, California invoked the aforementioned footnote 24 to

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81 *Hall*, 440 U.S. at 424.
82 Id. (internal quotation marks omitted).
83 Id.
84 Id., at n. 24
85 Id.
86 The underlying dispute involved the tax liability of a former California domiciliary, the plaintiff, who moved his domicile to Nevada. After conducting an audit that the plaintiff considered abusive, the California Franchise Tax Board assessed him for taxes and imposed penalties for a period that he claims was after his change of domicile. He sued the Board in Nevada state court claiming that the Board committed several torts against him, some of them in Nevada (such as rifling through his private mail, rifling through his private mail,
argue that this case was different from *Hall* in that the Nevada court’s denial of immunity interfered with California’s ability to “fulfill its own sovereign responsibilities” in collecting taxes. In a unanimous decision, the Supreme Court rejected the argument, finding “no principled distinction” between Nevada’s interests in *Hall* and California’s interests in *Hyatt*.87 The Court noted that Nevada “sensitively applied principles of comity with a healthy regard for California’s sovereign status”88 because it accorded the California agency the same immunity that Nevada law conferred on Nevada’s own agencies, evenhandedly applying Nevada law, which provided immunity for negligent acts but not for intentional acts. Thus, the Court concluded, Nevada did not exhibit a “policy of hostility to the public Acts’ of a sister State.”89

On remand, the Nevada Supreme Court affirmed an award of $1 million in damages against the California tax agency, although the Nevada Tort Claims Act imposed a cap of $50,000 in similar suits against Nevada agencies. In *Hyatt II*, the United States Supreme Court granted California’s petition for certiorari to examine two questions: (1) whether to overrule *Hall*; and (2) if not, whether the Constitution permits Nevada to award damages against a California state agency that are higher than those that Nevada allowed in similar suits against its own state agencies.

That the Court took up the first question was surprising, considering that, in *Hyatt I*, the Court unanimously reaffirmed *Hall*. Equally surprising was the fact that the Court was divided 4-to-4 on this question,90 thus affirming the Nevada courts’ “exercise of jurisdiction”91 over the California state agency.

On the second question, a six-member majority held that Nevada’s decision was unconstitutional. The Court reasoned that Nevada applied neither California law, which provided complete immunity, nor Nevada law, as it then was, which did not provide immunity but limited damages to $50,000. Instead, Nevada constructed *ex nunc* and “applied a special rule of law applicable only in lawsuits against its sister

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87 *Hyatt I*, 538 U.S. at 498.
88 *Id.* at 499.
89 *Id.* (quoting *Carroll v. Lanza*, 349 U.S. 408, at 413 (1955)).
90 *Hyatt II* was decided after the death of Justice Scalia who, many observers speculate, would have voted to overrule *Hall*. The opinion does not contain any discussion of this question and does not disclose which Justices voted on each side.
91 *Hyatt II*, 136 S.Ct. at 1279 (emphasis added). *See also id.* at 1282 (referring to the Court’s affirmance of Nevada’s *exercise of jurisdiction* over California’s state agency (emphasis added). The italicized words show the difference between what the Court held and what California had asked, which was to “hold that the Nevada courts lack jurisdiction to hear this lawsuit.” *Id.* at 1279 (emphasis added). Indeed, there was no question that Nevada had in personam and subject matter jurisdiction over the California agency. The question, as in all sovereign immunity cases, was whether Nevada could exercise its jurisdiction.
States, such as California.”92 This special rule, said the Court, “evinces a ‘policy of hostility’ toward California” and thus “violates the Constitution’s requirement that ‘Full Faith and Credit shall be given in each State to the public Acts . . . of every other State.’”93

It is difficult to square this holding with the letter of the Full Faith and Credit Clause. When the clause is operable, it requires the forum state to give full faith and credit, namely to apply, the law of the other state. Conversely, when the clause is inoperable because the forum state has enough contacts and interests to apply its own law, the forum state may do just that. In this case, Nevada had the requisite contacts and interests and both Hyatt I and II held that the clause did not require Nevada to apply California’s immunity law and hence Nevada could apply its own non-immunity law. The Nevada Supreme Court did so and then examined the amount of damages under Nevada’s Tort Claims Act. Because, by its own terms, the Act and its damages cap applied only to Nevada agencies, the court was free to decide whether to apply the cap to California agencies. Its decision not to apply the cap amounted to the “special rule” that the Supreme Court characterized as “discriminatory,”94 leading it to conclude that “Nevada’s application of its damages law . . . [was] constitutionally forbidden.”95 As the Court stated, “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.’”96

Discriminatory treatment of sister states, if that is what it is, is certainly contrary to the spirit if not the letter of the Full Faith and Credit Clause. This is not the first time the Supreme Court has read an anti-discriminatory component into the Full Faith and Credit Clause. One well-known previous example is Hughes v. Fetter,97 in which Wisconsin refused to provide a forum for a wrongful death action arising from events in Illinois although it provided a forum for similar actions arising from events in Wisconsin. After noting that Wisconsin had “no real feeling of antagonism”98 against wrongful death suits in general, the Court held that Wisconsin’s refusal was “forbidden by the national policy of the Full Faith and Credit Clause.”99

92 Hyatt II, 136 S.Ct. at 1282 (quoting Hyatt I, 538 U.S. at 499 (quoting Carroll v. Lanza, 349 U.S. 408, at 413, (1955)).
93 Id. at 1281
94 Id. at 1282 (noting that “Nevada has not offered sufficient policy considerations to justify the application of a special rule of Nevada law that discriminates against its sister States.” (internal quotation marks omitted)).
95 Id., at 1279.
96 Id. at 1283 (quoting Hyatt I, 538 U.S. at 499).
98 Hughes, 341 U.S. at 612.
99 Id. at 613.
Another example is *Carroll v. Lanza*,\(^{100}\) from which the *Hyatt* Court resurrected the phrase about a “policy of hostility.” *Carroll* involved an Arkansas employment accident resulting in injury to the Missouri employee of a Missouri subcontractor. The questions was whether the Full Faith and Credit Clause permitted Arkansas to apply its law, which allowed the employee to sue the general contractor in tort, even though Missouri law did not allow the action. In answering this question in the affirmative, the Supreme Court compared *Carroll* to *Hughes*, noting that the Wisconsin court’s decision in the latter case was not supported by “sufficient policy considerations.”\(^{101}\) By contrast, in *Carroll*, the forum state of Arkansas had “large and considerable” interests to apply its law and, in doing so, “Arkansas . . . [was] not adopting any policy of hostility to the public Acts of Missouri. It [was] choosing to apply its own rule of law to give affirmative relief for an action arising within its borders.”\(^{102}\)

In *Hyatt II*, the forum state of Nevada had sufficient contacts and equally “large and considerable” interests to apply its own law as Arkansas had in *Carroll*. What was wrong then with Nevada’s application of its own law? First, it must be clarified that Nevada applied its own law, even if it did not apply the particular statute that imposed a cap on the amount of damages. The “special rule” the Nevada court created by not applying the statutory damages cap is itself part of Nevada’s common law, which the Nevada Supreme Court had every right to create. Nevertheless, there was something wrong with that special rule. It reflected a “policy of hostility” toward California and the Nevada court did not offer “sufficient policy considerations” to the Supreme Court’s satisfaction.\(^{103}\)

The Nevada court *did* offer a policy justification for its decision not to apply the damages cap to California agencies. The court reasoned that, unlike Nevada agencies which were “subject to legislative control, administrative oversight, and public accountability” in Nevada, California agencies operated “outside such controls.”\(^{104}\) Thus, Nevada’s “interest in providing adequate redress to Nevada citizens”\(^{105}\) injured in Nevada justified the non-application of the protective cap. The Supreme Court rejected this explanation:\(^{106}\)

\(^{100}\) 349 U.S. 408 (1955).

\(^{101}\) *Id.* at 413.

\(^{102}\) *Id.*

\(^{103}\) See *Hyatt II*, 136 S.Ct. at 1282 (“Nevada has not offered ‘sufficient policy considerations’ to justify the application of a special rule of Nevada law that discriminates against its sister States” (quoting *Carroll v. Lanza*, 349 U.S. 408, at 413 (1955))).

\(^{104}\) Franchise Tax Bd. of Cal. v. Hyatt, 335 P.3d 125, 147 (Nev. 2014).

\(^{105}\) *Id.*

\(^{106}\) By contrast, Chief Justice Roberts found Nevada’s explanation convincing in his dissenting opinion. Drawing from *Carroll v. Lanza*, the dissenting opinion noted:

Where a State chooses a different rule from a sister State in order to give affirmative relief for an action arising within its borders, the State has a sufficient policy reason for applying its own law, and the Full Faith and Credit Clause is satisfied. . . . In this case, the Nevada Supreme Court applied Nevada rather than California immunity law in order to uphold the state’s policy interest in providing adequate redress to Nevada citizens.
Such an explanation, which amounts to little more than a conclusory statement disparaging California’s own legislative, judicial, and administrative controls, cannot justify the application of a special and discriminatory rule. Rather, viewed through a full faith and credit lens, a State that disregards its own ordinary legal principles on this ground is hostile to another State. A constitutional rule that would permit this kind of discriminatory hostility is likely to cause chaotic interference by some States into the internal, legislative affairs of others.107

In closing, the Court reiterated its statement from Hyatt I that it does not intend to return to the “complex ‘balancing-of-interests approach to conflicts of law under the Full Faith and Credit Clause,’”108 which the Court abandoned in Hague. The Court concluded, however, that Nevada exceeded the lenient constraints of Hague by devising a discriminatory rule that was contrary to the desideratum of “cooperative federalism,”109 which is implicit in the spirit of the Full Faith and Credit Clause.

2. Privileges and Immunities Clause

Schoenefeld v. Schneiderman110 involved the Privileges and Immunities Clause of Article IV of the Constitution.111 The question was whether New York violated the Clause by requiring nonresident members of its bar to maintain a physical “office for the transaction of law business” within the state, while not requiring resident attorneys to maintain offices distinct from their homes.112 The Second Circuit Court of Appeals answered the question in the negative. The court found that the New York requirement

was not enacted for the protectionist purpose of favoring New York residents in their ability to practice law . . . [but rather] to ensure that

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107 Hyatt II, 136 S.Ct. at 1282
108 Id. at 1283 (quoting Hyatt I, 538 U.S. at 496). In Hyatt I, the Court characterized as “unsatisfactory” its experience in appraising and balancing state interests in the period between Bradford Elec. Light Co. v. Clapper, 286 U.S. 145 (1932) and Allstate Ins. Co. v. Hague, 449 U.S. 302 (1981). The Court made it clear that it was not about to revert to interest weighing, because “the question of which sovereign interest should be deemed more weighty is not one that can be easily answered.” Hyatt I, 538 U.S. at 498. “Without a rudder to steer us,” said the Court, “we decline to embark on the constitutional course of balancing coordinate States’ competing sovereign interests to resolve conflicts of laws under the Full Faith and Credit Clause.” Id. at 499.
109 Hall, 24440 U.S. at 424 n. 24.
111 The Privileges and Immunities Clause states that “[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.” U.S. Const. art. IV, § 2, cl. 1.
112 The court and the parties agreed that the practice of law is a privilege that comes within the protection of the Privileges and Immunities Clause.
nonresident members of the New York bar could practice in the state by providing a means, i.e., a New York office, for them to establish a physical presence in the state on a par with that of resident attorneys, thereby eliminating a service-of-process concern.\(^{113}\)

The court based its decision on the Supreme Court’s latest Privileges and Immunities decision in *McBurney v. Young*,\(^{114}\) which clarified the Court’s jurisprudence by declaring that “the Court has struck laws down as violating the privilege of pursuing a common calling only when those laws were enacted for the protectionist purpose of burdening out-of-state citizens.”\(^{115}\) As the Second Circuit put it, “it is protectionist purpose, and not disparate effects alone, that identifies the sort of discrimination prohibited by the Privileges and Immunities Clause, by contrast, for example, to the Commerce Clause,” which “regulates effects, not motives, and does not require court inquiry into reasons for enacting a law that has a discriminatory effect.”\(^{116}\) After examining the history of the New York requirement for a New York office and finding no discriminatory purpose in its enactment, the court dismissed the challenge.

3. State Immigration Laws

*Arizona Dream Act Coalition v. Brewer*\(^{117}\) involved a challenge under the Equal Protection Clause and the Supremacy Clause against an Arizona policy effectively denying drivers’ licenses to certain groups of immigrants. The plaintiffs were noncitizens who were brought to the United States as children. President Obama’s Deferred Action for Childhood Arrivals (“DACA”) program protected them from deportation for some period as long as they met certain conditions. Under DACA, these immigrants were eligible for Employment Authorization Documents (“EADs”), which they could use to obtain a driver’s license. However, Arizona authorities instituted a policy of rejecting these EADs, effectively denying driver’s licenses to plaintiffs. The district court granted the plaintiffs’ request for a permanent injunction after finding that Arizona’s policy was not rationally related to a legitimate government purpose and thus violated the Equal Protection Clause of the Fourteenth Amendment.

The Ninth Circuit affirmed. The court agreed with the district court that Arizona’s policy would be unconstitutional even under a rational basis review, which is the applicable standard when the alleged discrimination targets noncitizens who are not authorized to be present in the United States. However, applying the principle of constitutional avoidance, the Ninth Circuit based its decision on federal preemption grounds, holding that the federal government’s authority to classify noncitizens preempted the Arizona policy. The court noted that Arizona’s policy “is preempted

\(^{113}\) Schoenefeld, 821 F.3d at 276.

\(^{114}\) 133 S.Ct. 1709 (U.S. 2013).

\(^{115}\) Id. at 1715.

\(^{116}\) Schoenefeld, 821 F.3d at 280 (internal quotation marks omitted).

\(^{117}\) 818 F.3d 901 (9th Cir. 2016).
not because it denies state benefits to aliens, but because the classification it uses to
determine which aliens receive benefits does not mirror federal law.”  

By contrast, in *Puente Arizona v. Arpaio*, another Ninth Circuit case involving
Arizona, the plaintiffs, who were also unauthorized immigrants, did not fare as well.
They challenged certain provisions of Arizona’s identity theft statutes, which made it
a crime to use another person’s information with intent to obtain employment. After
finding that these provisions were facially preempted by federal immigration law, the
district court granted a preliminary injunction preventing Arizona from enforcing
them. The Ninth Circuit reversed, finding that the facial challenge failed because the
challenged provisions were “textually neutral—that is, they apply to unauthorized al-
iens, authorized aliens, and U.S. citizens alike.” The court remanded the case to the
district court for consideration of the “as-applied” preemption and equal protection
challenge to these provisions.

*Montana Immigrant Justice Alliance v. Bullock* involved a Montana statute
that denied state services to “illegal aliens.” The statute defined “illegal alien” as “an
individual who is not a citizen of the United States and who has unlawfully entered or
remains unlawfully in the United States.” Under this definition, a person who en-
tered the United States illegally but has since obtained lawful permanent residence
status under federal law would be deemed an “illegal alien” and thus ineligible for
state services. The Montana Supreme Court held that federal immigration law
preempted this definition, and ultimately the entire statute, under both a field
preemption and a conflict preemption analysis. The court explained that the statute
was “preempted by federal law, not because it denies state benefits to ‘illegal aliens,’
but because the term ‘illegal aliens’ is unknown to federal law, thus placing in the
hands of state agents immigration status decisions not authorized under federal
law.”

**III. CHOICE-OF-LAW METHODOLOGY**

**1. Public Policy and Localizing Rules**

Three decisions of the Supreme Court of Montana, discussed in this Section,
illustrate the differences between the negative and positive functions of public policy
in the choice-of-law process and their similarities with “localizing rules” that man-
date the application of forum statutes to certain multistate cases.

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118 Id. at 917.

119 821 F.3d 1098 (9th Cir. 2016).

120 Id. at 1105.


122 371 P.3d 430 (Mont. 2016).

123 Id. at 434 (quoting the Montana statute).

124 Id. at 442.

125 These rules are defined *infra* at III.c.
a. Public Policy as an Exception: The Negative Function

Under the first Restatement and other traditional choice-of-law systems, the choice of the applicable law was supposed to be made without regard to its content, flowing automatically from the application of the Restatement’s territorially focused, jurisdiction-selecting rules. However, under the heading “Access to Courts,” the Restatement provided certain exceptions to this blindfolded operation of the choice-of-law process, one of which was the public policy exception or reservation (ordre public). Section 612 of the Restatement provided, “No Action can be maintained upon a cause of action created in another state the enforcement of which is contrary to the strong public policy of the forum.” Curiously, the scope of this exception was narrower than the equivalent exception in most other countries. It was supposed to operate only against foreign “cause[s] of action,” but not, for example, defenses available under the otherwise applicable foreign law. The Restatement’s comments did not provide an explanation for the narrow scope and most American courts appropriately ignored it.

Thus, despite the First Restatement’s narrow phrasing, the traditional public policy exception had the same scope as in other systems, operating as a shield not only against foreign causes of action, but also against the application of foreign law in general. However, according to Judge Cardozo’s classic statement in Loucks v. Standard Oil Co. of New York, this exception had a very high threshold. A court should use it only if the foreign law “offends our sense of justice or menaces the public welfare,” “shock[s] our sense of justice,” or “violate[s] some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal.” A mere difference between the two laws “is not enough to show that public policy forbids us to enforce the foreign right.”

b. Public Policy as a Factor in Choosing a Law: The Positive Function

With the abandonment of the First Restatement and its replacement with modern policy-oriented approaches, the need for a public policy exception in the negative sense has diminished because a state’s public policy, especially the forum’s, has become an integral, affirmative factor in a court’s decision to apply or not apply that state’s law. Indeed, one of the differences between the First Restatement and modern approaches – such as interest analysis – is that, in Brainerd Currie’s words, interest analysis “summon[s] public policy from the reserves and place[s] it in the front lines where it belongs.” To be sure, there are additional differences between the two

126 Restatement (First) § 612.
127 For examples of recent cases from states that still follow the First Restatement, see SYMEON C. SYMEONIDES, CHOICE OF LAW: OXFORD COMMENTARIES 81-82, 142-43 (2016) [hereinafter SYMEONIDES, CHOICE OF LAW].
128 120 N.E. 198 (N.Y. 1918).
129 Id. at 202.
130 Id.
concepts. For example, the traditional public policy exception operated only in favor of forum law. By contrast, under the modern approaches, state policies (or interests) are a factor in choosing either forum law or foreign law. Moreover, as Cardozo's statements illustrate, the traditional public policy exception contemplated a much higher threshold than the affirmative use of public policy as a factor in choosing law under modern approaches.

Currie's statement about moving public policy from the back to the front line of choice-of-law analysis also describes other modern approaches. Among these is the Restatement (Second) under which the policies of the conflicting laws and the interests they embody are important criteria for choosing between or among those laws. As the Montana Supreme Court noted when it adopted the Restatement (Second) in Phillips v. General Motors Corp., "[c]onsiderations of public policy are expressly subsumed within the most significant relationship approach," making a public policy exception "redundant."132

Even so, Section 90 of the Restatement (Second) retained the public policy exception in its negative function. At first, this looks as an unnecessary duplication, which would be innocuous. But closer examination reveals that it is a continuation of the misguided tradition of the First Restatement, because: (1) Section 90 is placed in a chapter entitled "Limitations on the Exercise of Judicial Jurisdiction"; and (2) it is confined to foreign "caus[e]s of action," as opposed to defenses, that are contrary to the "strong public policy" of the forum.134 Thus, the forum may refuse to hear an action that offends its public policy but, if Section 90 is taken literally, the forum may not disallow a defense no matter how offensive. The Restatement comments purport to explain this confinement, but the explanation leaves much to be desired.135 This may explain why most courts have continued ignoring the confinement. As the Talbot court noted:

[C]ourts have applied a similar public policy exception to determine whether application of foreign law, as opposed to entertainment of a foreign cause of action, would run counter to the interests of the state's citizens. . . . [T]he public-policy concerns are essentially the same

132 See Restatement (Second) § 6(2)(a)(b).
133 Phillips v. General Motors Corp., 995 P.2d 1002, at 1015 (Mont. 2000), (discussed in Symeonides, 2000 Survey 3-8). For this reason, the court stated that its adoption of the Restatement (Second) for tort conflicts did not include Section 90.
134 See Restatement (Second) § 90 ("No action will be entertained on a foreign cause of action the enforcement of which is contrary to the strong public policy of the forum.").
135 See Restatement (Second) § 90. cmt. a ("The rule of this Section does not justify striking down a defense good under the otherwise applicable law on the ground that this defense is contrary to the strong public policy of the forum. Such action involves more than a mere denial of access to the court. Rather, it is a preliminary step to the rendition of a judgment on the merits. It involves application of the local law of the forum to determine the efficacy of a defense and thus to decide the ultimate rights of the parties.").
whether the question is one of applying foreign law or bringing a foreign action . . . .136

The Restatement comments do a better job in explaining the difference between the negative function of the public policy exception under Section 90 and the use of public policy as the affirmative reason for applying the law of the forum under Section 6 and other sections:

[Section 90] applies only to situations where the forum refuses to entertain the suit on the ground that the cause of action is contrary to a strong local public policy. The rule does not apply to situations where the forum does decide the controversy between the parties and, on the stated ground of public policy, applies its own local law, rather than the otherwise applicable law.137

c. “Localizing Rules” in Substantive Statutes

The affirmative role of public policy is also evident in certain statutory rules that are often neglected by the American conflicts literature. These are rules contained in substantive statutes and mandating the application of those statutes to certain multistate cases. These rules are referred to hereinafter as “localizing rules” and the statutes that contain them as “localized statutes.”138 They are far more numerous than commonly assumed. For example, virtually every state’s workers’ compensation statutes contain provisions authorizing, and often mandating, their extraterritorial application to injuries sustained outside the forum state when the employment relation is centered in that state.139 Such localizing rules exist in other statutes dealing

136 Talbot, 380 P.3d at 830 (internal quotation marks omitted).
137 Restatement (Second) § 90, cmt. a.
with franchises,\textsuperscript{140} consumer protection,\textsuperscript{141} construction contracts,\textsuperscript{142} and, especially insurance contracts.

For example, a Texas statute provides that,

\begin{quote}
[any contract of insurance payable to any citizen or inhabitant of this State by any insurance company . . . doing business within this State shall be . . . governed by [the laws of this State] notwithstanding such . . . contract . . . may provide that the contract was executed and the premiums . . . should be payable without this State.\textsuperscript{143}
\end{quote}

An Alabama statute provides that “[a]ll contracts of insurance, the application for which is taken within this state, shall be deemed to have been made within this state and subject to the laws thereof.”\textsuperscript{144} North and South Carolina have an identical statute providing that “[a]ll contracts of insurance on property, lives, or interests in this State shall be deemed to be made therein, and all contracts of insurance the applications for which are taken within the State shall be deemed to be made within this State and are subject to the laws thereof.”\textsuperscript{145} Statutes in several other states contain similar provisions.\textsuperscript{146}

\footnote{140 For example, an Iowa statute requires the application of forum law to franchises operated in that state, prohibits a contractual choice of another state’s law, and provides that a contractual choice of Iowa law does not alone render that statute applicable. See Iowa Code § 523H.2, 14. Similar statutes are found in other states. See, e.g., Minn. Stat. § 80C.21 (franchises); id. § 325.064 (farm equipment dealerships); id. § 325.064 (heavy equipment dealerships).

141 For example, an Indiana statute requires the application of forum law to consumer credit transactions that have certain connections to that state and prohibits a contractual choice of another state’s law. See, e.g., Ind. Code § 24-4.5-1-201. Similar statutes are found in many other states. See, e.g., La. Rev. Stat. Ann. §§ 9:3511, 9:3563, 51:1418.

142 See, e.g., La. Rev. Stat. Ann. § 9:2779 (requiring the application of Louisiana law to construction contracts to be performed in Louisiana and prohibiting the contractual choice of another state’s law). See also id. §§ 9:2778, 38:2196 (same with regard to contracts involving the state and its agencies or subdivisions).


144 Ala. Code § 27-14-22. Although the application usually is “taken” in the insured’s home state and often insures risks located there, the statute does not require these contacts, or any other Alabama contacts.


146 See, e.g., Wis. Stat. §632.09 (“Every insurance against loss or destruction of or damage to property in this state . . . is governed by the law of this state.”); Minn. Stat. §60A.08(4) (“All contracts of insurance on property, lives, or interests in this state, shall be deemed to be made in this state.”); Va. Code Ann. § 38.2-313 (“All insurance contracts on or with respect to the ownership, maintenance or use of property in this Commonwealth shall be deemed to have been made in and shall be construed in accordance with the laws of this Commonwealth.”); Tenn. Code Ann. §56-7-102 (“Every policy of insurance, issued to or for the benefit of any citizen or resident of this state . . . by any insurance company or association doing business in this state . . . shall contain the entire contract of insurance between the parties to the contract, and every contract so issued shall be held as made in this state and construed solely according to the laws of this state.”). See also Fla. Stat. §627.727; Okla. Stat. Tit. 36 §3636; La. Rev. Stat. §§ 22:611, 22:655 22:1406(D).}
Some of these localizing provisions take the further step of expressly prohibiting the contractual choice of another state’s law. For example, an Oregon statute provides that, in an insurance policy “delivered or issued for delivery in [Oregon],” any “condition, stipulation or agreement requiring such policy to be construed according to the laws of any other state or country . . . shall be invalid.”147 Similarly, an Arizona statute provides that:

No policy delivered or issued for delivery in this state and covering a subject of insurance resident, located or to be performed in this state, shall contain any condition, stipulation or agreement . . . [r]equiring the policy to be construed according to the laws of any other state or country.[]148

Despite their location in substantive statutes (and despite variations in content and wording), all of these localizing provisions qualify as choice-of-law rules, albeit of the unilateral type.149 These rules, like any other choice-of-law rules, qualify as “statutory directives” in the sense of Section 6 of the Restatement (Second). Section 6 provides that “[a] court . . . will follow a statutory directive of its own state on choice of law,” and only “[w]hen there is no such directive” will the court follow the factors listed in subsection 2 of section 6 or, for that matter, the rest of the Restatement. Thus, it should be abundantly clear that, both under principles of legislative supremacy and the Restatement’s own self-evident admonition, when a multistate case falls within the substantive scope of these localized statutes and has the contacts that the localizing rule requires for the statute’s application, the court must apply the statute without any judicial choice-of-law analysis. After all, the reason a legislature inserts a localizing rule in a particular statute is the legislative determination that the statute embodies a high level of public policy; a policy the legislature does not want jeopardized by relegating to the judicial choice-of-law analysis the question of the statute’s applicability to multistate cases.

This high level of public policy is the common denominator between localizing rules and what are known in the European and international literature as mandatory rules or, alternatively, “imperative rules” or “rules of immediate, direct, or necessary application.”150 These are substantive-law rules that embody an affirmative and strong public policy of the enacting state to protect and promote important public interests and values. Due to the importance of the interests these rules embody, they

147 OR. REV. STAT. §§ 742.001, 742.018.

148 ARIZ. REV. STAT. ANN. § 20-1115.

149 A unilateral choice-of-law rule is a rule that mandates the application of the law of the forum state to cases that have certain enumerated contacts with that state: (1) without regard to the corresponding claims of any other state to apply its law; and (2) without specifying which law will govern cases in which the forum state does not have the enumerated contacts. See SYMEON C. SYMEONIDES, PRIVATE INTERNATIONAL LAW: IDEALISM, PRAGMATISM, ECLECTICISM ___ (The Hague Academy of International Law, forthcoming 2017).

150 For a discussion of the doctrinal origin and current status of these rules in modern codifications and international conventions, see SYMEONIDES, IDEALISM, PRAGMATISM, ECLECTICISM ___, supra note ____.
take priority over other rules of substantive law, and, \textit{a fortiori}, over any otherwise applicable foreign law. Thus, whenever a case falls within the substantive ambit of such a rule, the rule applies necessarily, mandatorily, and \textit{directly}, that is, regardless of whether a choice-of-law rule authorizes the application of forum law, and even if a choice-of-law rule calls for the application of another law. In such a case, there is no question of applying foreign law and, therefore, no need to consider choice-of-law rules. The interests reflected in mandatory rules are simply too important to jeopardize by subjecting them to the ordinary choice-of-law process, which may lead to the application of foreign law. For these reasons, these rules enjoy a privileged status, both domestically and internationally.

The European Union’s Rome I Regulation, which applies to contract conflicts, describes these rules as those that the enacting country regards as "crucial . . . for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable."\textsuperscript{151} This sounds like a very high threshold and, in that sense, it resembles Cardozo’s threshold (although these rules operate offensively). In practice, rules of this category are found not only in public law fields that involve economic interests (such as antitrust, taxation or currency regulation), but also in areas implicating important social policies (such as labor law or consumer law), as well as those that tend to reflect certain moral values (such as family law).

The similarities between mandatory rules and localizing rules is that they both (1) embody a high level of public policy, (2) operate offensively; and (b) apply to certain multistate cases directly, that is without the aid of judicial choice-of-law analysis. The difference is that, unlike a localizing rule, a mandatory rule does not contain express language mandating its applicability to multistate cases, perhaps because, as it often happens, the legislature did not have the foresight to consider the rule’s applicability to multistate cases.\textsuperscript{152} To be sure, whether a rule that lacks the mandating language indeed embodies a strong public policy is a question for judicial determination. But, once a rule of the forum state has been determined by precedent, or by the court in the particular case, to embody such a policy, then the rule is supposed to operate in the same way as a localizing rule, mandatorily applying without further choice-of-law analysis. At least that is what the theory of mandatory rules teaches. It is also what Currie taught when he “summon[ed] public policy from the reserves and place[d] it in the front lines” of choice-of-law analysis.\textsuperscript{153}


\textsuperscript{152} In other words, all localizing rules mandatorily apply to the specified multistate cases, but not all mandatory rules contain express localizing language. However, both rules lead to the application of forum law. Localizing rules do so because of their express wording and without the need to examine whether they embody a high level of public policy. Mandatory rules, on the other hand, have this effect only if the court determines that they embody a high level of public policy.

\textsuperscript{153} See Currie supra .
In *Oberson v. Federated Mutual Insurance Co.*,\(^{154}\) the rule in question was contained in the Constitution of the forum state of Montana. Section 16, Article II of the Constitution provided in part: “No person shall be deprived of this full legal redress for injury incurred in employment for which another person may be liable except as to fellow employees and his immediate employer who hired him if such immediate employer provides coverage under the Workmen’s Compensation Laws of this state.”\(^{155}\) Montana courts had previously interpreted this provision as prohibiting out-of-state employers from asserting a worker’s compensation subrogation lien against an employee’s right to recover for injuries caused by a third party unless the recovery was adequate to ensure that the employee was “made whole.” As one court put it, this provision “is mandatory, prohibitive, and self-executing and it prohibits depriving an employee of his full legal redress, recoverable under general tort law, against third parties.”\(^{156}\)

In *Oberson*, the employee was a Michigan domiciliary and was working for his Michigan employer when he suffered severe injuries in Montana. After receiving worker’s compensation benefits through his Michigan employer, the employee sued the third-party tortfeasors in Montana and recovered a multimillion-dollar judgment. However, because one of the major tortfeasors was insolvent, the employee was unable to collect a large part of that judgment and thus was not “made whole.” Nevertheless, his employer’s workers’ compensation insurer attempted to recoup the workers’ compensation benefits paid to the employee, as allowed by Michigan law. Under Section 185 of the Restatement (Second), Michigan law would govern this question because the employee had received workers’ compensation benefits under Michigan law.\(^{157}\) Predictably, the insurer argued that the Montana Supreme Court should adopt Section 185, having adopted the Restatement (Second) in *Phillips*, a products liability case decided five years earlier.\(^{158}\) The court refused to adopt Section 185 because it consisted of a rigid choice-of-law rule and that rigidity was contrary to the inherent flexibility of sections 6 and 145, which was the reason for the court’s adoption of them in *Phillips*. The court held that “Montana’s public policy, as defined in Article II, Section 16, precludes application of Michigan subrogation law” because this provision is “mandatory and self-executing, and leaves no room for erosion


\(^{155}\) MT. CONST. Art. 2, § 16.


\(^{157}\) Restatement (Second) § 185 provides:

> The local law of the state under whose workmen’s compensation statute an employee has received an award for an injury determines what interest the person who paid the award has in any recovery for tort or wrongful death that the employee may obtain against a third person on account of the same injury.

\(^{158}\) See supra text accompanying note 156.
based on what... the courts of other states would do pursuant to... the laws of other states." 159

*Talbot v. WMK–Davis, LLC* 160 involved a virtually identical scenario to *Oberson*. Talbot, an Oklahoma domiciliary, suffered extensive brain injury in a Montana traffic accident while working for his Oklahoma employer. After filing for workers’ compensation in Oklahoma, Talbot filed a tort action in Montana against the third party who caused the accident. The Oklahoma employer intervened in the tort action asserting a subrogation lien for the workers’ compensation benefits paid to employee. An Oklahoma statute provided such a lien on two-thirds of the net proceeds of the tort judgment. Montana’s "made whole" doctrine prohibited the lien because the judgment was unlikely to yield sufficient compensation to cover all of Talbot’s loses. The trial court dismissed the intervention, holding that *Oberson* "prohibited Montana courts from undertaking a choice of law analysis under the Restatement (Second) ... when determining whether a workers’ compensation subrogation lien could be asserted against an injured worker who had not been made whole." 161

On appeal, the Montana Supreme Court affirmed the dismissal. The court re-endorsed *Oberson*’s refusal to adopt Section 185 of the Restatement (Second), which would have led to the application of Oklahoma law. However, the court also decided to “supplement” 162 *Oberson*’s analysis by importing the public policy exception of Section 90 of the Restatement (Second), which the court had earlier characterized as "redundant." 163 Noting that “[t]he Montana Constitution is the supreme law of this State,” 164 the court reiterated that the above-quoted provision of the Constitution “is mandatory, prohibitive, and self-executing” and has “immortalized a strong public policy interest in preventing subrogation of tort awards prior to an injured worker being made whole.” 165 The court concluded that this provision was “evidence of an exceptionally strong public policy interest as contemplated by § 90 of the Restatement.” 166 That was true indeed, but what is illuminating is the court’s use of the word “supplement.” It accurately describes the usual role of Section 90 under the Restatement’s analysis, namely as a supplemental or additional reason justifying the rejection of foreign law and the application of forum law.

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160 380 P.3d 823 (Mont. 2016).

161 Id. at 825.

162 Id. at 831.


164 *Talbot*, 380 P.3d, at 831.

165 Id. 830 (quotation marks omitted).

166 Id. 831. The court also noted the “deep-seated disparity between the values embodied in Montana’s Constitution and those codified in the Oklahoma statute.” *Id.*
2. The Methodological Table

Table 2, below, depicts the judicial following of the various choice-of-law approaches in the fifty states, the District of Columbia, and the Commonwealth of Puerto Rico. As the readers of this Survey know, the table has seen little change in the last several years. Specifically, the last states to abandon the traditional system were Utah in contract conflicts in 1996 and Montana in tort conflicts in 2000. Since then, there have been only two other changes, both of them in tort conflicts: in 2006, Nevada switched from the lex fori approach to the Restatement (Second), and, in 2008, New Jersey switched from interest analysis to the Restatement (Second). No other change has occurred since then and ordinarily there would be no reason to reproduce this table every year. Nevertheless, readers have been asking for it. So here it is. It should be read with all the caveats expressed in the previous surveys.

TABLE 2. ALPHABETICAL LIST OF STATES AND CHOICE-OF-LAW METHODOLOGIES FOLLOWED.

<table>
<thead>
<tr>
<th>States</th>
<th>Traditional</th>
<th>Significant Contacts</th>
<th>Restatement (Second)</th>
<th>Interest Analysis</th>
<th>Lex Fori</th>
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IV. TORTS

1. Defendant-by-Defendant Analysis

When defendants domiciled and acting in different states cause interdependent injuries to the same plaintiff, is it appropriate to follow a defendant-by-defendant analysis and, if necessary, apply the law of different states to each defendant? This was one of the questions in the New Jersey case *Ginsberg ex rel. Ginsberg v. Quest Diagnostics, Inc.*171 in which a New Jersey couple sued New Jersey and New York medical providers for medical malpractice resulting in the “wrongful birth” and ultimate death of their daughter. The defendants’ conduct was confined to their respective states, and the injury occurred in New York, where the plaintiffs were domiciled at the critical time. In a decision discussed extensively and approvingly in last year’s Survey, New Jersey’s intermediate court following the Restatement (Second) employed a defendant-by-defendant analysis and applied New York’ pro-defendant law to the New York defendants and New Jersey’s pro-plaintiff law the New Jersey defendants.172 The court reasoned that the Section 146 presumption in favor of the state

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of injury was rebutted with regard to the New Jersey defendants and bolstered with regard to the New York defendants.

The New Jersey Supreme Court affirmed the lower court decision and approved the defendant-by-defendant analysis, concluding that “in the majority of cases,” such an analysis “furthers the Restatement principles.” The court reasoned that Sections 145 and 6(2) of the Restatement, under which a court determines whether the Section 146 presumption is rebutted, “suggest a defendant-specific analysis.” That determination depends in part on the parties’ relationship to the involved states, and “[t]he term ‘parties’ clearly includes not only the plaintiffs, but [also] the defendants.” Moreover, “[t]hree of the four contacts identified in Restatement § 145(2) direct the court’s attention to each defendant as an individual, not defendants in the aggregate,” and “the nexus between the state and each defendant” figures prominently in examining the policies listed in Section 6(2) of the Restatement. “For example,” said the court, a state has an interest “in deterring its own citizens from engaging in unlawful conduct” or in protecting their expectations but “may have little or no interest in protecting the expectations of nonresident individuals and entities.” Finally, the court noted that a defendant-by-defendant analysis is consistent with the Restatement’s issue-by-issue approach, “even if that approach complicates the trial,” such as in “very complex cases with many defendants and multiple claims.” The court explained, however, why in this case, which involved only two states, a defendant-by-defendant approach was “unlikely to prove impractical.”

It is important to note that, in this phase of the case, the dispute was confined to loss-allocation (as opposed to conduct-regulation) issues, and specifically, the availability of certain types of damages in one state but not in the other. As documented elsewhere, in conflicts involving those issues, virtually all states that have abandoned the lex loci delicti rule have applied the law of the parties’ common domicile. Thus, a defendant-by-defendant approach (as well as a plaintiff-by-plaintiff approach) is also consistent with this regime, subject always to considerations of practicality and feasibility. For example, the Louisiana codification, which adopted a

173 Ginsberg, 147 A.3d at 441.
174 Id.
175 Id.
176 Id.
177 Id. at 442.
178 Id.
179 Id.
180 Id.
181 See Symeonides, Choice of Law 194-201.
2. Multistate Defamation and Anti-SLAPP

Sarver v. Chartier is an interesting case involving the Oscar-winning Iraq war movie *Hurt Locker*. The movie’s main character was based on the plaintiff, a U.S. army sergeant who served as an Explosive Ordnance Disposal (EOD) technician in Iraq. He sued the screenwriter, movie director, and producers asserting claims for misappropriation of his right of publicity and defamation, contending that the movie’s false portrayal of him injured his reputation. The action was filed in federal court in New Jersey but was transferred to California under 28 U.S.C. § 1404(a). The California federal court decided the case under the conflicts law of New Jersey, which, since 2008, follows the Restatement (Second). The district court dismissed the action under California’s Anti–Strategic Lawsuit Against Public Participation (anti-SLAPP) statute, which was “enacted to allow early dismissal of meritless first amendment cases aimed at chilling expression through costly, time-consuming litigation.” New Jersey did not have a similar statute and the main question on appeal was whether the district court properly applied the California statute. The Ninth Circuit answered the question in the affirmative and affirmed the dismissal of the plaintiff’s lawsuit.

The court noted that, in cases of multistate defamation and invasion of privacy caused by an aggregate communication such as the exhibition of a motion picture, sections 150 and 153 of the Restatement (Second) establish a presumption in favor of the law of the state in which the plaintiff was domiciled at the time of injury if the communication was published in that state. The plaintiff argued that, at that time, he was domiciled in New Jersey for a two-year period while stationed at an army base there. The court was not persuaded that the plaintiff established a domicile in New Jersey but concluded that, even if he did, the other factors under sections 145 and 6 of the Restatement pointed to California as the state that had a more significant relationship than New Jersey, thus rebutting the two presumptions.

The court concluded that two of the section 145 contacts, the place of conduct and the domicile of most defendants, pointed to California. However, the other two contacts did not point to New Jersey because the relationship between the plaintiff and the screenwriter was established in Iraq during a series of interviews there, and

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182 See LA. CIV. CODE ART. 3544 cmt. (b) (“When one tortfeasor causes injury to more than one person, the applicable law should be determined separately with regard to each victim. When one person is injured by more than one tortfeasor, the latter’s obligations vis a vis the victim and the law governing these obligations should be determined separately with regard to each tortfeasor.”).

183 813 F.3d 891 (9th Cir. 2016) (decided under New Jersey conflicts law).

184 Id. at 896 (quotation marks omitted).

185 See id. at 898. The court noted that service personnel retain the domicile they had at the time of entry into the service and are presumed not to acquire a new domicile when they are stationed in a place pursuant to orders. The court added that the plaintiff did not offer other indicia of domicile in New Jersey, for example that he obtained a New Jersey driver’s license, registered to vote in the state, or acquired property there.
the injury occurred “in multiple states” when “the film was distributed nationwide.” The court also concluded that the principles of Section 6, which included the respective interests of the two states, also favored California. California had “expressed a strong interest in enforcing its anti-SLAPP law to ‘encourage continued participation in matters of public significance’ and to protect against ‘a disturbing increase in lawsuits brought primarily to chill the valid exercise of constitutionally protected speech.’” On the other hand, New Jersey did not adopt an anti-SLAPP statute, instead allowing defendants to bring a claim for malicious use of process in comparable circumstances. This meant “New Jersey’s interests would be less harmed by the use of California law,” whereas “California would appear to object strongly to the absence of a robust anti-SLAPP regime.” Thus, the court concluded, “California has the most significant relationship to this litigation, which is sufficient to overcome any presumption of [plaintiff’s] domicile, wherever that may be.”

3. Conduct-Regulation Conflicts

_AHW Investment Partnership, MFS, Inc. v. Citigroup Inc._ was an $800 million lawsuit for fraudulent misrepresentation filed by Florida plaintiffs against a New York corporation, Citigroup. The plaintiffs alleged that Citigroup fraudulently hid its exposure to subprime and other toxic mortgages, inducing the plaintiffs to hold on to shares they otherwise would have sold. Under New York law, a successful fraudulent misrepresentation plaintiff could recover only his out-of-pocket losses. By contrast, Florida followed the “benefit of the bargain” rule, under which the plaintiffs could recover (in addition to the out-of-pocket losses) an amount equal to what they would have received, including lost profits, if Citigroup had not acted fraudulently.

Applying New York Conflicts law, the Second Circuit characterized this as a conflict between conduct-regulating rules, because the rules define the type of injury that can support a claim of fraud,” that is, they define “which types of injuries must be shown to constitute a tort.” For example, the New York rule meant that “[a] misrepresentation is tortious . . . only if it causes out-of-pocket losses” and that any losses beyond that, such as those based on “a hypothetical lost bargain[, are] too undeterminable and speculative to constitute a cognizable basis for damages.” Then, observing that this was a cross-border tort in which the conduct occurred in New York and the injury in Florida, the court held that New York law should govern and therefore, plaintiffs could not recover anything.

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186 Id. at 899.
187 Id. (quoting Cal. Civ. Proc. Code § 425.16(a)).
188 Id. at 899-90.
189 Id. at 890.
191 Id. at __, 2016 WL 4155020 at *2.
192 Id.
The Second Circuit’s reasoning was conclusory. Without considering Florida’s interests, the court simply quoted the following excerpt from its earlier decision in *Licci ex rel. Licci v. Lebanese Can. Bank, SAL*,193 which had declined to follow a New York case in a similar pattern:194

> [W]hen the jurisdictions of the conduct and injury are distinct, ‘it is the place of the allegedly wrongful conduct that generally has superior “interests in protecting the reasonable expectations of the parties who relied on the laws of that place to govern their primary conduct and in the admonitory effect that applying its law will have on similar conduct in the future.”195

This holding deviates from the results reached by most American courts in cross-border torts such as this one, in which the state of injury imposes a higher standard of conduct than the state of conduct. In these situations, more than two thirds of the cases have applied the law of the state of injury, as long as the occurrence of the injury in that state was objectively foreseeable.196 It would seem that foreseeability would not be a problem in this case—it rarely is in intentional torts—but the court did not even mention this factor. Fortunately, the court designated its opinion as non-precedential.

*Marks v. Redner’s Warehouse Markets*197 was a simple slip-and-fall case that is nevertheless worth noting because it reaffirms the principle that, for conduct-regulation issues, the law of the state of conduct and injury governs, even if the parties are domiciled in the same other state.198 In this case, the plaintiff was a Pennsylvania deliveryman who tripped and fell while making a delivery at a Maryland warehouse owned by the defendant, a Pennsylvania corporation. Maryland followed the contributory negligence rule, which barred plaintiffs from recovering any damages if they were found to be negligent to any degree. Pennsylvania, the parties’ common home state, followed a comparative negligence rule that allowed proportional recovery for plaintiffs found to be 50% or less negligent.

The court acknowledged that Pennsylvania had “a significant relationship to the parties and a corresponding interest in providing redress for wrongs committed by or against its citizens.”199 However, it also noted that Pennsylvania appellate courts had applied the law of other states “where appropriate, even when it prevents

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193 739 F.3d 45 (2d Cir. 2013), (discussed in Symeonides, 2014 Survey 256-60).


196 See *SYMEONIDES, CHOICE OF LAW* 242-47.


198 See *SYMEONIDES, CHOICE OF LAW* 231-37.

199 *Marks*, 136 A.3d at 989.
Pennsylvania residents from obtaining a tort recovery.”\textsuperscript{200} The court concluded that this would be appropriate in this case and Maryland law should govern.

The court pointed out that Maryland had “a significant relationship with the occurrence itself, i.e., the place where both the injury and the negligent conduct occurred,”\textsuperscript{201} and thus, had “an interest in regulating the conduct of, and prescribing the liability of, businesses operating within its borders.”\textsuperscript{202} The court compared this case with cases involving defendants who were interstate common carriers that did not rely on the law of the particular state of the conduct and injury. In contrast to those cases, the court said, the defendant “operate[d] four brick and mortar facilities in Maryland and its decision to continue to conduct business in Maryland may, in fact, [have] been influenced by the state’s contributory negligence defense.”\textsuperscript{203} Thus, Maryland had “an interest in limiting [defendant’s] liability as a means of protecting the state’s business climate.”\textsuperscript{204} Moreover, the court continued, “the accident stems from the use and condition of property located in Maryland, ‘traditionally matters of local control,’ and that state undoubtedly has a significant interest in regulating the conduct of businesses operating there.”\textsuperscript{205}

\textit{Rahaman v. J.C. Penney Corp., Inc.}\textsuperscript{206} involved wrongful death actions filed in Delaware on behalf of several of the more than 1,000 garment workers killed in the collapse of a factory building in Bangladesh. At the time of the collapse, the workers were producing clothing for the American market. Delaware’s only connection was that the defendants, J.C. Penney and Walmart, were incorporated in that state. The actions were timely under Delaware’s two-year statute of limitations but were barred by Bangladesh’s one-year statute.\textsuperscript{207} The Delaware borrowing statute required the application of the shorter statute of limitation of the state in which the cause of action “arose.” Thus, the outcome depended on whether the plaintiffs’ causes of action arose in Bangladesh. The court answered that question not under Section 142 of the Restatement (Second), which applies to limitation conflicts but under Section 145, the general section for tort conflicts. The court concluded that Bangladesh had the most significant relationship and thus Bangladeshi law barred the actions. The court also

\begin{footnotes}
200 Id. at 992. The court quoted a statement from the Pennsylvania Supreme Court case \textit{Cipolla v. Shaposka}, 267 A.2d 854 (Pa. 1970), that “[i]nhabitants of a state should not be put in jeopardy of liability exceeding that created by their state’s law just because a visitor from a state offering higher protection decides to visit there.” \textit{Id.}

201 Id. at 989. The court appeared willing to entertain the plaintiff’s argument that the Maryland injury was the result of corporate decisions the defendant made in Pennsylvania, but found that the plaintiff’s evidence in that regard did not substantiate the argument. \textit{See id. at n.4.}

202 Id. at 990.

203 Id.

204 Id.

205 Id. at 992.


207 The plaintiffs argued unsuccessfully for the application of another Bangladesh statute, which provided for a six-year limitation period, and that in any event the limitation period was tolled for various reasons.
\end{footnotes}
held in the alternative that, even if the actions were timely, the plaintiffs would not succeed on the merits because, under Delaware law (which became applicable though the parties' consent at the trial), the defendants were not the plaintiffs' employers, and therefore did not owe a duty of care to the plaintiffs.

*Hayes v. Waltz* was an action for “alienation of affections” filed in North Carolina, a state which, along with Mississippi and Utah, still consider such conduct to be tortuous. The plaintiff and his wife were domiciled in North Carolina and the defendant in Indiana. The plaintiff alleged that the defendant engaged in conduct that led to the alienation of the wife’s affection toward the plaintiff, eventually causing the breakdown of the marriage. The defendant admitted that he engaged in several acts of sexual intercourse with the plaintiff’s wife but none of them occurred in North Carolina. The court acknowledged that for the plaintiff to succeed, he would have to show “that the defendant’s alienating conduct occurred within a state [such as North Carolina] that still recognizes alienation of affections as a valid cause of action.” However, the court also noted that the alienating conduct is not confined to acts of sexual intercourse but may include “any intentional conduct that would probably affect the marital relationship.” In this case, the evidence showed that the defendant and the wife “shared several thousand text messages and approximately 26 hours of telephone calls” over a four-month period, even after the plaintiff confronted the defendant and asked him to stop. Although the defendant sent the messages from outside North Carolina, the wife received them in North Carolina. Moreover, in one instance the defendant drove to North Carolina, picked up the wife, and took her to Indiana for six days. Along the way, they spent the night at a North Carolina hotel (although the defendant contended that, by his definition, they did not engage in sexual intercourse). Based on the above, the court concluded that the plaintiff presented “more than a scintilla of evidence” that the defendant had engaged in North Carolina in conduct that “proximately caused the alienation of [the plaintiff’s wife’s] love and affection.

**4. Forum non Conveniens**

Among the many tort conflicts cases decided on the basis of the forum non conveniens (FNC) doctrine, the most noteworthy 2016 cases have been decided by the supreme courts of Oregon, West Virginia, Texas, and the Court of Appeals for the Federal Circuit. Coincidentally, in all but one of those cases, the plaintiffs were able
to defeat the defendant’s motion for FNC dismissal. The only exception was the Texas case, in which the forum’s connection was very tenuous.215

In *Espinoza v. Evergreen Helicopters, Inc.*,216 the Supreme Court of Oregon held that this doctrine is available under the common law of Oregon and – in a comprehensive erudite opinion authored by Chief Justice Balmer – articulated the standard in slightly more hospitable terms than the standard followed in federal courts or in some other state courts. For example, the court found “no principled reason to vary the degree of deference afforded to the plaintiff’s choice of forum based on where the plaintiff, or real party in interest, resides.”217 In this case, the plaintiffs were Peruvian nationals who sued an Oregon defendant whose helicopter crashed while transporting workers to a copper mine in the Peruvian Andes, killing the plaintiffs’ relatives. The court stressed that in weighing the relevant private- and public-interest factors in the second step of forum non conveniens analysis, the standard is not, as the trial court thought, whether litigation in the alternative forum “would best serve the convenience of the parties and the ends of justice.”218 Rather, the question is whether allowing the action to proceed in the plaintiff’s chosen forum “would be contrary to the ends of justice.”219 The defendant must “affirmatively establish that the relevant private- and public-interest factors weigh so heavily in favor of dismissing or staying the action that allowing it to proceed would be contrary to the ends of justice.”220 The court reversed the trial court decision, which had dismissed the action on forum non conveniens grounds.

In *State ex rel. American Elec. Power Co., Inc. v. Nibert*,221 the Supreme Court of West Virginia, applying that state’s statutory version of forum non conveniens, upheld the lower court’s refusal to dismiss an action filed by plaintiffs from West Virginia, Ohio and Kentucky against the operator of an Ohio power plant for injuries caused by the plant’s emissions of coal combustion waste and fly ash. With regard to the choice-of-law factor, the lower court stated that it was “not especially daunted” by the possibility that Ohio law might govern the merits, because the court “essentially sits on the border of Ohio and West Virginia” and “is regularly called upon to,
and does, apply Ohio law.” 222 The Supreme Court agreed that this possibility did not weigh in favor of dismissal.

State ex rel. Khoury v. Cuomo223 involved a medical malpractice action filed in West Virginia by an Ohio plaintiff against a doctor who resided in West Virginia but performed the medical procedure at issue in Ohio. The lower court expressed the same confidence in its ability to apply Ohio law, if necessary. The court noted its location “on the border of Ohio wherein many medical doctors practice in both forums” and the fact that it had “regularly applied Ohio law . . . to medical malpractice claims.”224 The Supreme Court of Virginia affirmed the trial court’s denial of the defendant’s FNC motion.

In Halo Creative & Design Ltd. v. Comptoir Des Indes Inc.,225 both the plaintiff and the defendant were foreign entities, based in Hong Kong and Canada, respectively, but the object of the action was infringement of American patents, trademarks, and copyrights in the United States. The trial court granted the defendant’s motion for FNC dismissal after finding that Canada provided an alternative and adequate forum. The court focused only on the copyright infringement claims and based its adequacy decision on the fact that Canada, Hong Kong, and the United States are all signatories of the Berne Convention, which guarantees foreign plaintiffs the same treatment as domestic plaintiffs (“national treatment”).

The appellate court reversed, after pointing out that this “national treatment” did not mean that the Convention required Canada to provide remedies (under a foreign law) for intellectual property infringements occurring outside Canada, or to apply its own laws extraterritorially. “Territoriality is always of concern in intellectual property disputes,”226 said the court, and continued:

It cannot be assumed that a foreign court would adjudicate an intellectual property dispute where the alleged infringement occurred elsewhere . . . . The copyright and patent laws of the United States certainly reflect such territoriality. United States copyright law, for example, generally admits of no remedy for extraterritorial infringement unless a predicate act of infringement was first committed within the United States . . . [and the defendant] provided no evidence that Canadian copyright law operates any differently.227

The court concluded:

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222 Id. at 725.
224 Id. at 852.
225 816 F.3d 1366 (Fed. Cir. 2016).
226 Id. at 1371.
227 Id. In fact, according to a leading Canadian Copyright treatise, Canadian courts do not have jurisdiction to entertain action brought by authors alleging infringement committed outside Canada. See John S. McKeown, Canadian Law of Copyright and Industrial Designs S91 (3d ed. 2000).
The policies underlying United States copyright, patent, and trademark laws would be defeated if a domestic forum to adjudicate the rights they convey was denied without a sufficient showing of the adequacy of the alternative foreign jurisdiction. It is largely for this reason that district courts have routinely denied motions to dismiss on *forum non conveniens* grounds when United States intellectual property rights form the crux of the dispute.\(^{228}\)

**V. Products Liability**

The days in which products liability plaintiffs frequently, if not routinely, prevailed against manufacturers on the choice-of-law question are long gone. The 2016 cases confirm this observation, in that only one case held in favor of the plaintiff.\(^ {229}\) The pro-defendant turn began before the turn of the century, first in the federal courts, and then in state courts.\(^ {230}\) For example, in 2007, the New Jersey Supreme Court, perhaps the country’s most liberal court, reversed its previous pro-plaintiff stance and refused to apply New Jersey’s pro-plaintiff law in an action filed by an out-of-state plaintiff against a New Jersey defendant that manufactured in New Jersey a pharmaceutical that caused injuries in another state.\(^ {231}\)

In 2010, the California Supreme Court followed suit. In *McCann v. Foster Wheeler LLC*,\(^ {232}\) the court applied Oklahoma’s statute of repose barring a product liability action of a California plaintiff against a foreign defendant that was timely under California law. The plaintiff had been exposed to defendant’s asbestos products while living and working in Oklahoma.

In 2016, California’s intermediate court encountered a virtually identical case *Marley-Wylain Company v. Superior Court*,\(^ {233}\) and decided it the same way. The plaintiff was a California domiciliary who contracted mesothelioma following his exposure to the defendant’s asbestos products during a seven-year period in which he lived and worked in Michigan. The laws of California and Michigan differed in several significant respects with California law favoring the plaintiff and Michigan law favoring the defendant. The most critical difference was that the action was timely under California’s statute of limitation but was barred by Michigan’s statute of repose. The California court held that Michigan law governed. Relying on *McCann*, the court concluded: “Michigan has an interest in ensuring that its state welcomes outside businesses and commercial ventures, protecting them under Michigan law. California’s interest in

\(^{228}\) *Halo Creative & Design*, 816 F.3d at 1373.

\(^{229}\) See Lippens v. Winkler Backereitechnik GmbH, 138 A.D.3d 1507 (N.Y.A.D. 2016) discussed *infra*, at text accompanying note ___.

\(^{230}\) See *Symeonides, Choice of Law* 336.


\(^{232}\) 225 P.3d 516 (Cal. 2010). For a critique of this case, see *Symeonides, 2010 Survey* 325-30.

protecting its citizens is less impaired; California happens to be the state to which [plaintiff] moved and not the state where the exposure at issue occurred."  

*Sims v. Kia Motors of America, Inc.* was also decided under California’s comparative impairment, because the action was initially filed in federal court in California and then transferred to federal court in Texas. The plaintiffs were the children and grandchildren of a Texas domiciliary who died in a Texas accident when the Kia car in which he was riding caught fire due to a defect in the car’s fuel tank. California’s connection was that one of the defendants, the Korean manufacturer’s American distributor, was headquartered in California where the car had entered the American market (although it was sold in Texas through a local dealer). The court did not accept the plaintiffs’ argument that the car was designed in California. Texas, unlike California, required plaintiffs in design defect cases to show that there was a safer alternative design that the defendants could have used. Additionally, the law of California, but not Texas, allowed grandchildren to recover in a wrongful death suit. Neither party pleaded Korean law.

The trial court applied Texas law and the Fifth Circuit affirmed. In terms of the two states’ contacts with the case and the general trends in case law, the result is unremarkable and, on the surface, seemed consistent with the results in the *McCann* and *Marley-Wylain* cases. However, unlike those two cases in which the defendants had a permanent or long-term presence in Oklahoma and Michigan respectively, the Kia defendant in *Sims* had no such presence in Texas, except for selling cars there. Nevertheless, the court reasoned that Texas had an interest in applying its law “to attract businesses like Kia to the state.” When the plaintiffs argued that “states have no interest in limiting the recovery of their own residents where the tortfeasors are not residents of that state,” the court suggested limiting the argument to “situations wherein the out-of-state defendants are individuals, not corporations.” Continuing with the same logic, the court concluded that, even if California had an interest in applying its law, “Texas’s interests would be more impaired if California law applied

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234 *Id.* at *4*. In *Hoffman v. General Electric Co.*, 195 Wash. App. 1037 (2016), the Washington trial court applied Alaska’s statute of repose and dismissed the action of a Washington domiciliary who was exposed to defendants’ asbestos products while he lived and worked in Alaska. The action was timely under Washington’s statute of limitations. The Court of Appeals agreed on the applicability of Alaska’s statute of repose but remanded the case to the trial court for determining whether the case fell within the statute’s exceptions, which would make the action timely. In *Timothy v. Boston Scientific Corp.*, ___ Fed. App’x. ___, 2016 WL 7321227 (4th Cir. 2016), the court applied Utah’s statute of limitation barring the action of a Utah plaintiff against an out-of-state manufacturer of a medical device implanted in the plaintiff during a surgery in Utah. The case does not mention the state of manufacture or the manufacturer’s home state. The court based its decision not on the procedural characterization of Utah’s statute of limitation but rather on its conclusion that Utah had the most significant relationship, stating without further explanation that “[b]ecause the surgery and injury occurred in Utah, we find Utah has the most significant relationship and therefore apply Utah’s substantive law.” *Id.* at *2.

235 839 F.3d 393 (5th Cir. 2016) (decided under California conflicts law).

236 *Sims*, 839 F.3d at 399 n.9 (emphasis added).

237 *Id.*
than California’s would be by the application of Texas law.”238 Why? Because, according to a California case, “with respect to regulating or affecting conduct within its borders, the place of the wrong has the predominant interest.”239 However, the quoted case involved an intrastate tort, not a cross-border tort such as this one in which only the injury but not the conduct occurred in Texas. Moreover, at least one of the two issues in this case, the eligibility of grandchildren for the wrongful death action was clearly not a conduct-regulation issue.

In Hefferan v. Ethicon Endo–Surgery Inc.,240 the plaintiffs were an American citizen and his German wife who were domiciled in Germany. The husband was injured during a surgery in Germany when a surgical stapler malfunctioned. The defendant, an Ohio-based corporation owned by a New Jersey corporation, had manufactured the stapler in Mexico. The trial court dismissed the action on forum non conveniens grounds and the Sixth Circuit affirmed the dismissal. The plaintiffs argued, inter alia, that Germany did not provide an adequate forum because under German law, the wife would not have an action for loss of consortium. The court rejected the argument, reasoning that, if the case proceeded to trial in the United States under New Jersey conflicts law,241 the court would have applied German law. Thus, “[l]itigating in Germany would not result in an unfavorable change in law for [the wife] on her loss-of-consortium claim.”242 The court concluded that under the Restatement (Second), Germany had the most significant relationship because Germany was (1) the plaintiff’s domicile, (2) the place of the injury, and (3) the place of the parties’ relationship. The court found that, “[a]lthough the defendants are United States corporations and the conduct causing the injury occurred at least partially in the United States, those contacts do not outweigh Germany’s.”243 The court also reasoned that “neither Ohio nor New Jersey ha[d] an interest in protecting [the plaintiff’s] right to recover for loss of consortium.”244 Even if they had an interest in “regulating the safety of any activities in [a local] facility that might have contributed to the injury,” the staple was not manufactured in either state.245

The court also concluded that German law would govern the husband’s personal injury action. The court reasoned that the stapler’s design and manufacture by an American company did not outweigh Germany’s interest because “[t]he country

238 Id. at 499.
239 Id. (quoting Hernandez v. Burger, 102 Cal.App.3d 795, 802, 162 Cal. Rptr. 564 (1980)).
240 828 F.3d 488 (6th Cir. 2016) (decided under New Jersey conflicts law).
241 The action was initially filed in New Jersey federal court and was transferred to an Ohio federal court.
242 Hefferan, 828 F.3d at 497.
243 Id.
244 Id.
245 Id. (internal quotation marks omitted).
where a product is sold, used, and regulated has a strong interest, often an insur-
mountably strong interest, in litigation involving that product."246 In light of the plain-
tiff’s longtime German domicile, said the court, his American citizenship did “not in-
crease United States contacts enough to give it a greater interest in his claims.”247

In Solari v. Goodyear Tire and Rubber Company,248 the plaintiffs were French
workers who allegedly suffered injuries while working at a French tire plant operated
by Goodyear France. They filed suit in Ohio against the company’s corporate grand-
parent, Goodyear U.S., contending that their injuries were caused by toxic substances
which Goodyear U.S. manufactured and compelled Goodyear France to use at the
French factory. The trial court dismissed the action on forum non conveniens ground
and the Sixth Circuit affirmed the dismissal. In discussing the choice-of-law question,
the court addressed the plaintiffs’ argument that Ohio had an interest in applying its
pro-plaintiff law because Goodyear U.S.’s decision-making occurred in Ohio. The
court replied as follows:

[T]he location of Goodyear U.S.’s decision making simply cannot over-
come that Plaintiffs present a controversy centered in France: they live
in France, worked for a French company in a French factory, and suf-
f ered injuries in France. Indeed, when products or work conditions
cause injuries, the place of injury has a greater interest in resolving any
ensuing disputes than the place of corporate decision making. . . . More-
over, this case relates to and most touches the allegedly injured Amiens
factory workers and the surrounding community.249

Lippens v. Winkler Backereitechnik GmbH250 is perhaps the only 2016 products
liability case in which the plaintiff prevailed on the choice-of-law question. The plain-
tiff, a New York domiciliary, was injured in New York when his arm was caught in a
commercial bread-making machine during the course of his employment. The ma-
chine’s manufacturer was a German company, Winkler GmbH, which filed for bank-
ruptcy in Germany. The defendants in this case had purchased the company’s assets
from the German bankruptcy trustee. Under German law, a purchaser of assets from
a bankruptcy trustee is immune from successor liability for the pre-sale torts of the

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246 Id. at 500.
247 Id. at 501. The court also held that the district court acted within its discretion when it concluded
that the plaintiffs’ choice of an American forum was entitled to less deference than those of American
plaintiffs living in the United States. See id. at 494.
the court dismissed on forum non conveniens grounds the foreign plaintiffs’ lawsuit against an Amer-
ican manufacturer of a helicopter that crashed in Portugal, killing the plaintiff’s relatives. The appellate
court found that “[t]he trial court’s prediction that Portuguese law might apply was not manifestly
unreasonable, and the court did not abuse its discretion in making it.” Id. at *11. The court also noted
that the trial court considered the interest of the United States in deterring American manufacturers
from producing defective products, “but found it to be on an equal footing with Portugal’s national
interest in regulating safe aircraft operations within its borders.” Id. at *12.
seller. Under New York law, the defendants would be liable under the “de facto merger” and “mere continuation” theories of successor liability. The trial court applied New York law and held for the plaintiff. The Appellate Division affirmed, reasoning that, “inasmuch as plaintiff is a New York domiciliary and the situs of the alleged tort is in New York . . . choice of law principles . . . compel the application of New York’s successor tort liability rules.”

VI. CONTRACTS

1. Choice-of-Law Clauses

   a. Employment Contracts

      In *Merritt, Hawkins & Associates, LLC v. Caporicci*, the question was the enforceability of non-compete covenants in two employment contracts that contained Texas choice-of-law and forum selection clauses. The plaintiff, a California company headquartered in Texas, hired two California domiciliaries, the defendants, for work in California. They later quit their employment and started a new California business competing with their former employer. The employer sued in Texas, seeking enforcement of the non-compete covenants, which were valid under the law of Texas but not California. Following Section 187 of the Restatement (Second), the court held the clauses unenforceable under California law. The court found that: (1) in the absence of the choice-of-law clauses, California law would govern the employment contracts because California had a more significant relationship and a greater interest in applying its law than Texas; and (2) the application of Texas law would violate a fundamental policy of California embodied in a statute that expressly declared non-compete clauses void. The court noted that California courts consistently held that this statute “evinces a settled legislative policy in favor of open competition and employee mobility, protects Californians, and ensures that every citizen shall retain the right to pursue any lawful employment and enterprise of their choice.”

      *St. Jude Medical S.C., Inc. v. Biosense Webster, Inc.* involved the same pattern as the *Merritt, Hawkins* case, but the outcome was adverse to the California employee of a Minnesota employer. When the employee quit his employment, and began working for a competing California employer, the Minnesota employer sued in Minnesota seeking enforcement of the contract terms, one of which was a Minnesota choice-of-law clause. In upholding the clause, the Eighth Circuit did not mention the Restatement (Second) but recited Minnesota’s relevant standard, according to which “a contractual choice-of-law provision will govern so long as the parties act[ed] in good faith and without an intent to evade the law.” The court found no evidence of lack of

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251 *Id.* at 1509.


253 *Id.* at *4 (internal quotation marks omitted).

254 818 F.3d 785 (8th Cir. 2016) (decided under Minnesota conflicts law).

255 *Id.* at 788 (internal quotation marks omitted).
good faith and rejected the employee’s argument that the clause was an attempt to evade California law:

The very purpose of a choice-of-law provision is to select one body of governing law even though more than one could apply. It is unsurprising that the selected body of law will often favor one party over the other; that preference is simply part of the exchange of rights and obligations under the agreement.256

In *Hackney v. Lincoln National Fire Ins. Co.*,257 the employment contract between a Minnesota employer and a Kentucky employee also contained a Minnesota choice-of-law clause, but a Kentucky federal court, following Kentucky precedents, applied Kentucky law notwithstanding the clause. Until 2012, federal courts had been predicting that, like most state supreme courts, the Kentucky Supreme Court would follow Section 187 of the Restatement (Second) in cases involving contracts that contain choice-of-law clauses. However, in the 2012 case *Schnuerle v. Insight Communications Co.*,258 that court applied Kentucky law based on Kentucky’s interests and without considering the New York choice-of-law clause in the contract. Obligated to follow the Kentucky precedent, the Sixth Circuit in *Hackney* applied Kentucky law, without considering the enforceability of the Minnesota choice-of-law clause. The court reasoned that, “given that Hackney was to perform his obligations while living and working predominantly in Kentucky, it is likely that Kentucky’s interest in its citizens’ employment contracts—especially those which are to be performed within [Kentucky]—is sufficient for its law to apply.”259

b. Construction Contracts

In *Dancor Const., Inc. v. FXR Const., Inc.*,260 a construction contract between an Illinois contractor and a subcontractor for construction work in New York contained Illinois choice-of-law and forum selection clauses. However, like many other states (including Illinois261), New York had a statute that expressly declared void and unenforceable any choice-of-law or forum-selection provision requiring application of another state’s law to a New York construction contract. Following Section 187 of the Restatement (Second), the Illinois court held both clauses unenforceable because (1) New York had a more significant relationship and a greater interest in applying its law, and (2) enforcement of the Illinois forum selection clause would violate New York’s fundamental public policy embodied in the statute. As the court noted, that

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256 Id.
258 376 S.W.3d 561 (Ky. 2012).
259 *Hackney*, 657 Fed. App’x at 571.
261 Section 10 of the Illinois Building and Construction Contract Act provides that “A provision contained in [a] . . . building and construction contract to be performed in Illinois that makes the contract subject to the laws of another state or that requires any litigation . . . to take place in another state is against public policy. Such a provision is void and unenforceable.”
statute “is a fundamental public policy in New York”262 and “requires that, if you build in New York, you litigate in New York.”263 The court held that Illinois should honor this policy, especially because Illinois had “a similar public policy that contracts for Illinois construction be litigated in Illinois.”264

c. Lack of “Substantial Relationship”

Cases holding a choice-of-law clause unenforceable because the chosen state had “no substantial relationship” to the parties or transaction are relatively rare.265 Bank of America, N.A. v. Lahave266 is one of them, but the court also provided alternative substantive reasons for its holding. The case involved a guaranty contract between Bank of America, a multinational corporation headquartered in North Carolina, and a California domiciliary who guaranteed the payment by a New Mexico debtor of a promissory note secured by real property located in New Mexico. The guaranty was executed in California and contained a New Mexico choice-of-law clause. After pointing out that a guaranty is a separate and distinct obligation from the promissory note, the California court found that New Mexico had “insufficient connection with the parties or the guaranty to meet the ‘substantial relationship test’ required by both Section 187 of the Restatement (Second) and California precedents.267 The court also found no “other reasonable basis” for the parties’ choice of New Mexico law268 and then examined, “for the sake of the argument,”269 whether (assuming a substantial relationship or reasonable basis) the clause would be enforceable.

The court answered this question in the negative. Starting its analysis from the end of Section 187, the court held that the application of New Mexico law would violate a fundamental public policy of California on the disputed issue, which was the enforceability of a non-mutual attorney fee provision contained in the contract. This provision was valid under the law of New Mexico, but not California. Section 1717(a) of the California Civil Code provided that its provisions regarding attorney’s fees were un-waivable in language that the court characterized as “mandatory, unavoidable and emphatic” rather than a “default provision or gapfiller, subject to override by the parties.”270 Section 1717(a) represented “a basic and fundamental policy choice by the state of California that nonreciprocal attorney’s fees contractual provisions create reciprocal rights to such fees.”271 The court then explained why California had a more

262 Dancor, 64 N.E.3d, at 814.
263 Id. at 813.
264 Id. at 815.
265 See SYMEONIDES, CHOICE OF LAW 370-71.
267 Id. at *4.
268 See id. at *5.
269 Id.
270 Id.
271 Id.
significant relationship and a greater interest to apply its law than New Mexico. After noting that the California guarantor incurred the attorney fees in question because the Bank of America sued him in California, the court concluded:

The interest of California in seeing its residents receive fair play with respect to attorney fees, when resort is made to the California courts, is a fundamental equitable policy of this state. Because resort is made to the California courts, and implicates the equitable treatment of California citizens, California has a great material interest in the attorney fees issue—fees which are attributable to litigation in California. . . . This interest is materially greater than any interest New Mexico could have in assuring the enforcement of its law concerning attorney fees because here, the attorney fees are not being incurred as a result of any use of New Mexico courts.272

d. Choice-of-Law Clauses and Statutes of Limitation

Several cases involved the question of whether a choice-of-law clause includes the chosen state’s statute of limitations. States that follow the traditional procedural characterization of these statutes tend to answer this question in the negative,273 but only 28 states remain in this category today.274 For example, eight states have adopted the Uniform Conflict of Laws—Limitations Act, which treats statutes of limitation as substantive. Mountain States Adjustment v. Cooke275 was decided in a state that has adopted the Uniform Act—Colorado. The contract, between a bank located in Nebraska (which also adopted the Uniform Act) and a Colorado borrower, contained a Nebraska choice-of-law clause. When the bank’s assignee sued the defaulting borrower, the latter invoked the Nebraska statute of limitations, which, unlike the corresponding Colorado statute, barred the action. The Nebraska choice-of-law clause, if valid, would make Nebraska substantive law applicable. In turn, the Uniform Act would make applicable Nebraska’s statute of limitations because the Act provides that, if the claim is substantively based on the law of the non-forum state, the limitation period of that state applies. The court reached this result, holding for the borrower, albeit through a somewhat circuitous route.

Utah is one of the 28 states that continue to follow the procedural characterization despite having abandoned the traditional system in contract and tort conflicts.

272 Id. (internal quotation marks omitted).

273 For examples from the 2016 cases, see Discover Bank v. Swartz, 51 N.E.3d 694 (Ohio App. 2016) (holding that a Delaware choice-of-law clause applied only to substantive issues and not to statutes of limitations, which Ohio law characterizes as procedural); American Housing Preservation, LLC v. Hudson SLP, LLC, 2016 WL 7496181 (Md. App., Dec. 20, 2016) (holding that a Maine choice-of-law clause applied only to substantive issues and not to statutes of limitations, which Maryland regards as procedural).

274 For a list, see SYMEONIDES, CHOICE OF LAW, 547. For discussion of 2016 cases involving statutes-of-limitation conflicts but not choice-of-law clauses, see infra VIII.

In *Federated Capital Corp. v. Libby*, the contracts in question contained Utah choice-of-law and forum selection clauses conferring exclusive jurisdiction on Utah courts. Utah was the place of incorporation of one of the parties, a credit card company headquartered in Pennsylvania. The other parties were credit card holders domiciled in California and Texas. When they defaulted on their credit card payments, the company sued in Utah, only to discover that its lawsuits were untimely, not because of Utah’s six-year statute of limitations, but because of Pennsylvania’s four-year statute, which was applicable through Utah’s borrowing statute.

On appeal, the company argued that the forum selection clause required the Utah court to apply Utah procedural law, including Utah’s six-year statute of limitations, but not Utah’s borrowing statute which led to the application of a non-Utah statute of limitations. The Utah Supreme Court properly rejected the argument. The court noted that the combination of the choice-of-law and forum selection clauses “ensured that the entirety of Utah law would govern a dispute between the parties” and, “[b]ecause the borrowing statute is a Utah law, the Agreement requires that the statute apply.” In fact, said the court, the effect of a borrowing statute “is not to extend the procedural law of one state into another, but ... to adopt[] and make[] as its own ... the statute of the other.” In any event, the court concluded, the parties’ position was not different from “parties to an oral contract suing in a Utah court under Utah law,” in which case “nothing precludes the district court from applying the borrowing statute.”

The New York case *2138747 Ontario, Inc. v. Samsung C & T Corp.* involved the same issue as *Federated Capital* in that the contract contained both a choice-of-law and forum selection clause pointing to the forum state. The New York Appellate Division held that the combination of the two clauses encompassed New York’s borrowing statute, which led to the application of Ontario’s shorter statute of limitations, barring the action. The court did not focus as much on the forum selection clause as on the choice-of-law clause, which stated that the contract was to be “governed by, construed and enforced” in accordance with New York law. The court reasoned that (1) “the use of the word ‘enforcement’ ... should be interpreted as reflecting the parties’ intent to apply both the substantive and procedural law of New York,” (2) the borrowing statute “is itself a part of New York’s procedural law,” and (3) “[t]hus, applying the borrowing statute is perfectly consistent with a broad choice-of-law contract clause that requires New York procedural rules to apply.”

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276 384 P.3d 221 (Utah 2016).
277 *Id.* at 225-26.
278 *Id.* at 226 (internal quotation marks omitted).
279 *Id.* at 226-27.
280 39 N.Y.S.3d 10 (N.Y.A.D. 2016)
281 *Id.* at 11 (emphasis added).
282 *Id.* at 13-14.
The court explained that this holding was consistent with the decision of the New York Court of Appeals in *Ministers & Missionaries Benefit Bd. v. Snow*, 283 which held that a New York choice-of-law clause in a case involving New York’s Estates Powers and Trusts Law should not be read to encompass the choice-of-law provisions found in that law. The Appellate Division posited that the borrowing statute “is not and has never been considered a statutory choice-of-law directive. It is a statute of limitations.” 284 Of course it is a statute of limitations; but it is one that mandates the application of another state’s statute, and thus meets the definition of a statutory choice-of-law rule.

In *PNC Bank, N.A. v. Stromenger*, 285 another Pennsylvania bank suffered the consequences of its own choice-of-law clause when an Arizona court applied the chosen state’s statute of limitations, under which the bank’s action was untimely. This case differed from the two cases discussed above in that the contract did not contain a forum selection clause, and the forum state was one of the states that abandoned the procedural characterization of statutes of limitations 286 (although the court did not base its decision on this ground). The contract between a Pennsylvania bank and an Arizona credit card holder contained a clause stating that the contract was “entered into” in Pennsylvania and was to be governed by Pennsylvania law “without regard to conflict of law rules.” 287 As in *Federated Capital*, Pennsylvania had a four-year statute of limitations, which barred the action, whereas Arizona had a six-year statute, which did not. Moreover, the Arizona statute provided that it applied to contracts “executed” in Arizona. Finally, under Arizona case law, the parties had the power to contractually shorten the limitation period. In upholding the Pennsylvania choice-of-law clause, the Arizona court noted that “[t]he parties, by choosing to apply Pennsylvania law, essentially chose to contract for a shorter statute of limitations.” 288 Because Arizona law allowed such contractual shortening and the contract was not “executed” in Arizona, that state had no “materially greater interest in the application of its own statute of limitation.” 289 Thus, under Section 187 of the Restatement (Second) which Arizona follows, there was no basis on which to refuse to honor the Pennsylvania clause.

e. Choice-of-Law Clauses and Attorney Fees

Whether a choice-of-law clause encompasses the chosen state’s provision regarding attorney fees is a frequently litigated question on which courts disagree. Some courts have taken the position that attorney fee issues are procedural and thus

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284 39 N.Y.S.3d 10 at 15.
286 See SYMEONIDES, CHOICE OF LAW, 540-41.
287 *PNC Bank*, 2016 WL 4434310 at *3 (emphasis by the court).
288 *Id.*
289 *Id.* at *4.
governed by the law of the forum; other courts regard them as substantive and thus susceptible to be included within the scope of a choice-of-law clause. A more nuanced position is to differentiate between different types of attorney fees, such as those provided in a contract, those awarded to the prevailing litigant by a court, and those imposed by law as a sanction for bad faith litigation practices. Boswell v. RFD-TV the Theater, LLC is one of the cases that made this differentiation. The contract between the plaintiff, a Tennessee banjo player known as "Leroy Troy," and the defendant, a Nebraska theater, contained an attorney fee provision and a Nebraska choice-of-law clause. Neither party questioned the validity of the choice-of-law clause, but the dispute centered on the attorney fee provision, which was enforceable under the law of Tennessee but not Nebraska. The Tennessee trial court applied Tennessee law, reasoning that this was a procedural issue.

In reversing the trial court, the appellate court framed the question narrowly, as follows: "[I]s a claim for attorney's fees pursuant to a contract a substantive issue governed by a choice of law provision in that contract, or is such a claim governed by the procedural law of the forum?" The court concluded that this issue was substantive: "Contracts providing for attorney's fees impose a contractual liability that one enforces as a matter of substantive right. . . . [They] define the parties' rights and obligations." In this case, the court reasoned, the plaintiff's claim for attorney fees was "part and parcel" of the contract that the choice-of-law clause submitted to Nebraska law. That being the case, the court concluded, "We decline to apply Tennessee caselaw regarding contractual attorney's fee provisions to the parties' Contract otherwise governed by the substantive law of Nebraska."

f. Maritime Cases

In World Fuel Services Singapore PTE, Ltd. v. Bulk Juliana M/V, the choice-of-law clause in a maritime contract provided for the application of the "General Maritime law of the United States." The question was whether the quoted phrase encompassed, in addition to the judicially created maritime common law, the statutory maritime law of the United States, specifically the Federal Maritime Lien Act (FMLA). The

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293 Id. at 559.

294 Id. at 560.

295 Id.

296 822 F.3d 766 (5th Cir. 2016).
answer would determine whether a Singapore-based creditor was entitled to a lien on the ship, the Bulk Juliana, to secure payment of a debt arising from supplying fuel to the vessel’s charterer, who later became insolvent. The ship owner argued that the clause did not include the FMLA, which was the only vehicle through which the creditor could obtain a lien.

The Fifth Circuit rejected the owner’s argument, holding that the phrase “General Maritime law of the United States” included the FMLA. The court based its reasoning on both the history of the FMLA and the contract’s other provisions, which contained numerous references to maritime liens. For example, the contract provided that “The General Maritime Law of the United States shall apply with respect to the existence of a maritime lien.”297 This language, the court said, “would make no sense if ‘General Maritime Law’ were construed as a term of art that distinguishes between U.S. maritime common law and the FMLA.”298

Petrobras America, Inc. v. Vicinay Cadenas, S.A.299 was a tort rather than a contract case, but it is discussed here because it involved what one may characterize as a tacit choice-of-law agreement. An oil company filed a products liability lawsuit against the manufacturer of an underwater tether chain used to secure the company’s oil piping system in the Outer Continental Shelf of the Gulf of Mexico. The chain broke, causing the collapse of the piping system and other damages. The parties (and their insurers) litigated the case on the assumption that it was governed by maritime law. The trial court rendered a judgment denying the company’s $400 million claim under the economic loss doctrine of maritime law. The company then discovered that, under the Outer Continental Shelf Lands Act (“OCSLA”), the case was governed not by maritime law but rather by the more favorable law of Louisiana as the adjacent state. Indeed, OCSLA, which applies, inter alia, to artificial islands and fixed structures on the outer Continental Shelf of the United States, contains what is often referred to as a "choice-of-law provision," which for certain non-maritime matters adopts as surrogate federal law the “civil and criminal laws of each adjacent State.”300

The question on appeal was whether the oil company had waived its right to invoke OCSLA by failing to raise it at the trial court. The Fifth Circuit answered the question in the negative. The court reasoned that, "[b]ecause OCSLA’s choice of law scheme is prescribed by Congress, parties may not voluntarily contract around Congress’s mandate."301 Consequently, "If parties cannot choose to avoid Congress’s choice of law provision under OCSLA, then, a fortiori, the provision cannot be waived by failure to raise the issue below."302

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297 Id. at 775.
298 Id.
299 815 F.3d 211 (5th Cir. 2016).
301 Petrobras America, 815 F.3d at 215.
302 Id.
In a later *per curiam* opinion, the Fifth Circuit clarified that its holding “depended upon the unique statutory scheme created by OCSLA” and “did not address waiver of a choice of law argument outside of the OCSLA context . . . [or] disturb authorities holding that, in other contexts, a choice of law argument may be waived.”

2. What Law Governs Forum Selection Clauses?

The question of which law governs the interpretation and enforceability of a forum selection clause has divided American courts for some time. This division continued in the 2016 cases.

For purposes of analysis, one can distinguish between: (1) Cases in which the lawsuit is filed in the state chosen in the forum selection clause; and (2) cases filed in another state. In cases of the first category, courts rarely discuss the choice-of-law question. Instead, they resolve any question involving the clause by reflexively applying the internal law of the forum. In cases of the second category, courts tend to be more aware of the choice-of-law question. These cases can be divided into two groups: (1) those in which the contract contains only a forum selection clause; and (2) those in which the contract contains both a forum selection clause and a choice-of-law clause (almost always pointing to the same state). In the cases of the first group, most courts again apply the internal law of the forum state, often without a choice-of-law discussion. However, a 2016 case discussed below is one of the few and promising exceptions.

For obvious reasons, the cases of the second group are more numerous. Parties who have the foresight to seek jurisdictional certainty through a forum selection clause also tend to be equally concerned with choice-of-law certainty. In any event, in these cases, the courts’ options for determining the meaning and enforceability of the forum selection clause are to:

1. Apply the internal law of the forum, without a choice-of-law analysis;
2. Employ a choice-of-law analysis and apply the law of the state chosen in the choice-of-law clause (subject always to the public policy limitations of the *lex causae*); or
3. Apply the law of the state chosen in the forum selection clause.

Because forum selection and choice-of-law clauses almost always point to the same state, the last two options cannot be easily distinguished. In any event, this
author has not identified any case that applied the law of the state designated in the forum selection clause but not the choice-of-law clause. One can safely conclude that the third option, which is not a sound one to begin with, has no following among American courts. Thus, for all practical purposes, American courts move between the first two options.

From the court’s perspective, the first option is much easier, but even that option presents complications when the court is a federal court sitting in diversity. This is because, in Atlantic Marine, the Supreme Court did not answer (at least not clearly) the question of whether federal or state law governs the enforceability of a forum selection clause that designates a non-federal (American or foreign) court. This year’s cases have not shed any light to that uncertainty. Leaving that aside for the moment, the first option, that is, applying the internal law of the forum, has been by far the most popular among American courts, and this year is no exception.

In recent years, however, a promising distinction has emerged between interpretation and enforceability of the forum selection clause, with several cases applying the chosen law to interpretation and the lex fori to enforceability. Of course, not all cases raise both categories of issues. For example, among the 2016 appellate cases:

- Eight cases involved only issues of enforceability of the forum selection clause. All eight cases applied the internal law of the forum state rather than the law of the state chosen in the choice-of-law clause. Seven cases held the clause enforceable and one case held it unenforceable;
Three cases involved only issues of interpretation of the forum selection clause. All three cases applied the *lex fori*, but in two of those cases\(^{314}\) that clause was not accompanied by a choice-of-law clause;\(^{315}\)

One case, *Weber v. PACT XPP Technologies, AG*,\(^ {316}\) which is discussed below, involved both issues of interpretation and enforceability. The court applied the chosen law to the first and the *lex fori* to the second category of issues.

Two cases, *Barnett v. DynCorp International, L.L.C.*,\(^ {317}\) and *Summit Diamond Bridge Lenders, LLC v. Philip R. Seaver Title Co., Inc.*,\(^ {318}\) also discussed below, involved only the enforceability of the forum selection clause. The courts held the clauses unenforceable under both the *lex fori* and the law chosen in the choice-of-law clause.\(^ {319}\)

In *Weber v. PACT XPP Technologies, AG*,\(^ {320}\) a diversity jurisdiction case filed in federal court in Texas, the contract did not contain a choice-of-law clause but contained a forum selection clause written in German and stating that "*Soweit gesetzlich zulässig, ist Gerichtsstand und Erfüllungsort der Sitz der PACT AG.*" The contract was an employment contract between a company named PACT AG (the defendant) and its former CEO (the plaintiff), a German-born U.S. citizen domiciled in the United States. Partly translated into English, the clause would read as follows: "To the extent permitted by law, jurisdiction and place of performance shall be at the *Sitz* of PACT AG." The untranslated word "Sitz" presented the first problem of interpretation. The company argued that it meant the company’s statutory seat (place of incorporation), which was in Munich, Germany. The plaintiff argued that it meant the company’s "residence" or principal place of business, which, at the critical time, was in the United States. The clause also presented a second interpretation issue—whether it was mandatory or permissive—as well as issues of enforceability, explained below. In a thoughtful opinion under Texas conflicts law, authored by Judge Jerry E. Smith, the

\(^{314}\) See New Greenwich Litigation Trustee, LLC v. Citco Fund Services (Europe) B.V., 41 N.Y.S.3d 1 (N.Y.A.D. 2016) (applying New York law to determine whether a Dutch forum selection clause was mandatory); Turnkey Projects Resources v. Gawad, 198 So.3d 1029 (Fla. App. 2016) (applying Florida law to determine whether a Nigerian forum selection clause encompassed tort claims).

\(^{315}\) In the third case, *KC Ravens LLC v. Nima Scrap*, LLC, 369 P.3d 341 (Kan. App. 2016 (unpublished), the Kansas court applied Kansas law in determining the meaning of a District of Columbia forum selection clause in a contract that also contained a D.C. choice-of-law clause.

\(^{316}\) 811 F.3d 758 (5th Cir. 2016) (decided under Texas conflicts law).

\(^{317}\) 831 F.3d 296 (5th Cir. 2016) (decided under Texas conflicts law).


\(^{320}\) 811 F.3d 758 (5th Cir. 2016) (decided under Texas conflicts law).
Fifth Circuit held that German law should govern the interpretation of the forum selection clause and forum-federal law should govern its enforceability.

The court stressed that “the question of enforceability is analytically distinct from the issue of interpretation,” and that “[o]nly after the court has interpreted the contract to determine whether it is mandatory or permissive does its enforceability come into play.” The court acknowledged that several courts fail to recognize this distinction and apply to both issues “general common-law contract principles without addressing the precise source of that law.” Other courts recognize the distinction but subject interpretation issues to a choice-of-law analysis only if the contract contains a choice-of-law clause. In this case, the contract did not contain such a clause but, as the court reasoned, the absence of such a clause did not relieve the court from its general obligation to conduct a choice-of-law analysis. This was especially true in this case, which was laden with foreign contacts and in which the defendant extensively pleaded and exhaustively argued for the application of foreign law. The court concluded that “the proper method” was “to apply Texas choice-of-law rules when interpreting a [forum selection clause].”

Because Texas follows the Restatement (Second), the court did likewise. The court concluded that, under sections 6 and 188 of the Restatement, Germany had the most significant relationship, and its law should govern the interpretation of the forum selection clause. Under German law: (1) the word “Gerichtsstand” is a term of art that means jurisdiction and venue; (2) the word “Sitz” refers to the corporate seat;

\[\text{See id. at 771:}\]

This is a German-language contract, governing the compensation of a German-born businessman by a German company for his service on its supervisory board of directors, specifying that performance would be in Munich and contemplating at least permissive jurisdiction in the German courts for disputes arising under the contract. That the contract calls for performance ‘at the corporate seat of PACT AG’—which the parties agree is in Munich—likely settles the issue. Such a contractual specification of a place of performance is generally independently conclusive as to what law to apply.

321 Weber, 811 F.3d at 770.
322 Id. The plaintiff argued that the court should apply such “general common law” and interpret the clause against its drafter, which was the company.
323 As the court put it, cases employing a choice-of-law analysis when the contract contains a choice-of-law clause do not “stand for the inverse proposition that in the absence of a choice-of-law clause courts must apply general [forum] law. Nothing in those decisions suggests that, when choice of law is important to the outcome despite the absence of a choice-of-law clause in the contract, a court should not engage in an ordinary choice-of-law analysis to decide how to interpret the language of the [forum selection] clause.” Id. at n. 19.
324 See id. at 771 (“Courts may be justified in pretermitting this analysis when neither party contends that any distinctive feature of the relevant substantive law decides the dispute. And indeed, parties’ failure to brief choice-of-law analysis or arguments about distinctive features of foreign law seems to have driven many courts to default to general contract principles, even when they recognize that either ordinary choice-of-law rules or a valid choice-of-law clause would, in principle, dictate application of foreign law. But that is not the case here, when the choice of law might be determinative . . . and the parties vigorously dispute the proper source of law that should apply.”) (Footnote omitted).
325 Id. at 771.
326 See id. at 772:
and (3) a forum selection clause is presumed to be (and in this case it was) mandatory and exclusive rather than permissive, thus mandating litigation at the defendant’s seat in Munich.

The court then turned to the enforceability of the clause. The plaintiff argued against enforcing the clause because, inter alia, the underlying employment contract was invalid under German law for lack of ratification by the company’s shareholders, thus denying plaintiff a contractual remedy. Interestingly, like most other American courts, the Fifth Circuit did not conduct a choice-of-law analysis in examining the enforceability of the clause. Instead, the court applied forum law, which the court assumed must be federal law rather than state law. Under Atlantic Marine, the presence of a forum selection clause establishes a virtually insurmountable presumption that the private-factors imported from the forum non conveniens analysis mandate dismissal of the lawsuit, unless, “in truly extraordinary cases,” the public-interest factors justify “disregarding the parties’ agreement.” The court found that the plaintiff did not rebut this presumption.

The court also noted that the invalidity of the underlying employment contract did not prevent enforcement of the forum selection clause because, under the American separability doctrine (which is also part of German law), a party challenging the clause “must demonstrate that the [clause itself] is invalid rather than merely claim the contract is invalid.” Finally, the court found that the lack of a contractual remedy under German law did not mean the lack of any remedy because German law provided other remedies on quasi-contractual or equitable grounds.

In Barnett v. DynCorp International, L.L.C, another diversity case filed in federal court in Texas, the contract contained a forum selection clause conferring exclusive jurisdiction to Kuwaiti courts. This case differed from Weber in two respects: (1) The forum selection clause was unambiguous and thus did not present issues of interpretation; and (2) the contract contained a Kuwaiti choice-of-law clause. The defendant, a Texas company providing logistics support to the U.S. Army in Kuwait, hired the plaintiff, a Georgia resident, for work in Kuwait. The plaintiff challenged the forum selection clause under Texas law, arguing, inter alia, that he would not have any remedy under Kuwaiti law, which imposed a one-year statute of repose that would bar his action. His action was timely under Texas’s statute of limitation. He specifically invoked Section 16.070 of Texas Civil Practice & Remedies Code, which provided that “a stipulation, contract, or agreement that establishes a limitations period that is shorter than two years is void in this state.”

327 See SYMEONIDES, CHOICE OF LAW 435-62. For a case conducting such an analysis, see Barnett v. DynCorp Int’l LLC, 831 F3d 296 (5th Cir. 2016), discussed infra, at text accompanying note ___.

328 Weber, 811 F.3d at 776.

329 Id. at 773.

330 831 F.3d 296 (5th Cir. 2016) (decided under Texas conflicts law).

331 TEXAS CIVIL PRACTICE & REMEDIES CODE §16.770
The plaintiff tried to frame this as a question of “validity” rather than “enforceability” of the clause. The court saw these terms as synonymous but reasoned that, even if they were not, the plaintiff could not prevail because, in either case, the applicable law would be either: (1) federal law; or (2) the law that would be applicable under Texas’s choice of law rules, which, the court concluded, would be Kuwaiti law. The court did not consider the third possibility of applying Texas internal law.  

The court discussed at length the question of whether, under *Atlantic Marine*, federal courts sitting in diversity must apply federal law (as the *Weber* court did) or state law in determining the enforceability (or validity) of a forum selection clause. The court noted the circuit split on this question and discussed the pros and cons of each option, but decided not to answer the question because it concluded that the plaintiff could not prevail under either option:

If federal law alone controls the validity and enforceability of this forum-selection clause, [the plaintiff] must show that the clause is unreasonable … [which the plaintiff was unable to show, or that] the clause’s enforcement would contravene a strong public policy of Texas.

If, instead, the issue of a forum-selection clause’s “validity” is separate from its “enforceability” and not determined by federal law in diversity cases, it seems that the law applicable to that determination would be the same law applicable to forum-selection clause interpretation—that is, the law selected by the forum state’s choice-of-law rules.  

Thus, if we were to look to nonfederal law to determine the validity of this forum-selection clause, we would not automatically apply Texas’s substantive law; rather, we would apply the state’s choice-of-law rules. Under those rules, Texas law would control only if the Agreement’s choice-of-law clause—which ‘exclusively’ selects Kuwaiti law to govern the Agreement and disputes between the parties—is itself unenforceable.

The court then examined the enforceability of the choice-of-law clause under Section 187 of the Restatement (Second), which Texas courts follows. The court found that:

(1) Kuwait had a “substantial relationship” with the case;

(2) Kuwaiti law would have been applicable even in the absence of the choice-of-law clause because the contract called for services in Kuwait;

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332 For an explanation and defense of this option, as well as the arguments against it, see SYMEONIDES, CHOICE OF LAW, 456-60

333 *Barnett*, 831 F.3d at 303-04.

334 *Id.* at 304 (emphasis added).
(3) “[E]ven . . . assum[ing] that Texas law would apply absent a choice-of-law provision, and further . . . that Texas has a materially greater interest”\textsuperscript{335} in applying its law, the application of Kuwaiti law would not violate a “fundamental policy” of Texas, and thus the choice-of-law clause would be enforceable.

Regarding the latter point, the court offered two explanations, neither of which is entirely convincing. The first was that Section 16.070, which prohibited the contractual shortening of the statute of limitations to less than two years, applied “only in contracts otherwise governed by Texas law.”\textsuperscript{336} Conflicts teachers would recognize this as the successor of the provision involved in \textit{Home Insurance Co. v. Dick},\textsuperscript{337} in which the Supreme Court held that Texas could not constitutionally apply this provision to a contract made outside Texas in a case that had virtually no other contacts with Texas. In \textit{Barnett}, Texas was the defendant’s home state and the contract was made there. Of course, the two cases dealt with a different question—what is permissible as a matter of constitutional law (\textit{Dick}), and what is appropriate as a matter of choice of law (\textit{Barnett}). But even if the \textit{Barnett} court was correct in stating that Section 16.070 did not apply to contracts not governed by Texas law, the statement is inconsistent in this context with the court’s hypothetical assumption “that Texas law would apply absent a choice-of-law provision.”\textsuperscript{338}

The court’s second explanation was that Section 16.070 prohibited only agreements that \textit{directly} establish a shorter limitation period but not to agreements that do \textit{so indirectly} by choosing the law of another state that impose a limitation shorter than two years.\textsuperscript{339} The court rejected the plaintiff’s argument that the latter agreements have the same practical effect as the former. The court also thought that the fact that the Kuwaiti period was one of repose rather than limitation somehow strengthened the court’s conclusion. After explaining that statutes of repose are substantive rather than procedural, the court concluded that Section 16.070 did not “bar[] provisions selecting foreign law that includes, as a substantive matter, a shorter-than-two-years statute of repose.”\textsuperscript{340}

The court summarized its conclusions as follows:

\[\text{W}e \text{ conclude that enforcing the Kuwaiti choice-of-law provision would not contravene a fundamental Texas policy. . . . [Consequently] we would not invalidate the choice-of-law clause, and if nonfederal contract law controls the 'validity' of the forum-selection clause, that law is Kuwait's. For the same reasons, if federal law alone controls, [the plaintiff] has failed to show that enforcement of the forum-selection}\]

\textsuperscript{335} \textit{Id.} at 306.

\textsuperscript{336} \textit{Id.}

\textsuperscript{337} 281 U.S. 397 (1930).

\textsuperscript{338} \textit{Supra}, at text accompanying note ____.

\textsuperscript{339} “We are dealing not with a contractual limitations period, but with a contractual choice of foreign law.” \textit{Barnett}, 831 F.3d at 306-07.

\textsuperscript{340} \textit{Id.} at 307.
clause is unreasonable because it would contravene a strong forum-state policy.341

*Summit Diamond Bridge Lenders, LLC v. Philip R. Seaver Title Co., Inc* 342 was a state court case and thus did not present the *Atlantic Marine* complications. An escrow agreement between a California lender, a Michigan borrower, and a Michigan escrow agent contained a California choice-of-law clause and a forum selection clause providing that “[a]ny dispute arising from or related to this Agreement . . . shall be handled by the appropriate state or federal court located in California.”343 When the borrower sued the escrow agent in Michigan, the trial court granted the defendant’s motion to dismiss based on the forum selection clause. The Court of Appeals reversed the dismissal, following an obviously flawed reasoning.

The court accepted the plaintiff’s argument that, when the contract contains both a choice-of-law clause and a forum selection clause, the enforceability of the latter clause should be determined under the law of the state designated in the former clause, in this case California. This led the court to a California statute which provided that “[a]ny person may maintain an action” in California courts against a foreign corporation if the action arises out of an agreement that contains California choice-of-law and forum selection clauses and the underlying transaction “involve[es] in the aggregate not less than one million dollars.”344 The court read the last quoted phrase as preventing California courts from entertaining actions in which, as in this case, the underlying transaction falls short of the one-million mark. Based on this reasoning, the court found that the California forum selection clause would be unenforceable in California. The court’s interpretation of the California statute is obviously erroneous. As the dissenting judge pointed out, the statute was designed “not to preclude anything, but rather specifically to attract big-ticket litigation to California by expressly allowing parties to maintain actions against foreign corporations under forum-selection clauses if the dollar value and other criteria are met.”345 The statute is similar to statutes enacted in other states (such as Delaware, Florida, Ohio, Texas, and of course New York) in this competitive “Law Market”346 in hopes of attracting high value litigation in their courts. The statute is simply inapplicable to cases involving lesser amounts, leaving courts to entertain those cases under general principles.

The court then turned to a Michigan statute which, in some respects, is the reverse of the California statute in that it defines the circumstances in which Michigan courts should not enforce a forum selection clause mandating litigation outside in a state other than Michigan. One of those circumstances is when the “plaintiff cannot secure effective relief in the other state for reasons other than delay in bringing the

341 Id. at 308.


343 Id. at *1.

344 Id. at *3, quoting CAL CODE CIV. PROC § 410.40.

345 Id. at *9, Boonstra, J., dissenting.

The court found this provision applicable, reasoning that "plaintiff cannot secure effective relief in California because the parties' action fails to meet the threshold jurisdictional amount required to maintain an action against a foreign corporation in a California court." Thus, the court held the forum selection clause unenforceable under both California law and Michigan law and allowed the action to go forward. One can hope that the Michigan Supreme Court will have an opportunity to correct the intermediate court's reasoning.

3. Contracts without Choice-of-Law or Forum Selection Clauses

Among the relatively few multistate contract cases in which the contract does not contain a choice-of-law or forum selection clause, Garza v. Gama is the most interesting. The defendant was an Arizona based company that employed about 80,000 truck drivers in 26 states. The drivers filed a class action against the company for breach of implied covenant of good faith and fair dealing, charging that the company systematically underpaid them. The forum state of Arizona and 10 other states imposed a duty of good faith in every contract, but the remaining 15 states did not do so. Because of this difference, the Arizona trial court denied class certification, reasoning that the lead plaintiff did not meet his burden of showing "that class certification does not present insuperable obstacles." The appellate court reversed, holding that Arizona law would govern the claims of all class plaintiffs.

The court acknowledged that, under Section 196 of the Restatement (Second), contracts for services are ordinarily governed by the law of the state in which the services are rendered. However, a comment under Section 196 states that, unlike situations in which "the major portion of the services called for by the contract is to be rendered in a single state," Section 196 "is unlikely to aid in the determination of the law governing contracts for employment aboard a ship sailing the high seas or to serve as a traveling salesman in two or more states." The court concluded that the quoted comment supported its conclusion that Arizona had a more significant relationship than the other 25 states:

By their nature, the services [plaintiffs] perform are not restricted to any one state; drivers' work takes them across the country. . . . [A] driver's temporary presence in any particular state is unlikely to create in that driver any reasonable expectations about applicable common-law duties of good faith and fair dealing arising out of contract. . . .

On the other hand, . . . the acts by [defendant] that are at the center of petitioners' good-faith claim all were performed in Arizona, not in the many states through which its employees drive. Regardless of the terminal out of which drivers work or where their trips take them, it was

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347 Summit Diamond, 2016 WL 7427500, at *6, quoting M.C.L 600.745(3).
348 Id.
350 Id. at 1006.
351 Restatement (Second) § 196 cmt. a
in Arizona that [defendant] allegedly decided to use the particular [practices] . . . of which petitioners complain and it is within Arizona that [defendant] prepares all of its drivers’ payroll documents and issues their checks.352

The court reiterated that the application of Arizona law would be consistent with the parties’ expectations: “[G]iven the transitory nature of the drivers’ worksites and the fact that [defendant’s] payroll functions are performed solely from within Arizona, to the extent they thought about it, the parties were more likely to expect that Arizona law, not the laws of the many other states, would apply . . ..”353

**VII. Arbitration**

Although arbitration often involves many issues at the intersection of vertical and horizontal conflicts, it is nevertheless a distinct and complex field that this Survey cannot aspire to cover. In previous years, the Survey covered several arbitration cases, especially those decided by the Supreme Court, that were too important or too tempting to leave out. This year, the space limitations of the Survey do not allow discussion of arbitration cases, but do allow a partial list of some cases, accompanied by abbreviated descriptions in the footnotes.

1. **Arbitration Clauses**

   Among cases involving arbitration clauses, interested readers may want to review the following cases: a case discussing extensively, but not resolving, the question of whether the “prospective waiver” and “effective vindication” dicta in *Mitsubishi Motors* can defeat a motion to compel arbitration under Article II of the New York Convention;354 three cases involving the arbitrability of wrongful death claims against nursing home operators;355 two conflicting cases involving arbitration of employee claims under California labor law;356 one case holding that the FAA preempted a California statute imposing a 30-day rescission period in medical malpractice arbitration

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352 *Garza*, 379 P.3d, at 1010.

353 *Id.* at 1011.

354 *See* Suazo v. NCL (Bahamas), Ltd., 822 F.3d 543 (11th Cir. 2016) (arbitration clause in maritime employment contract calling for arbitration in Nicaragua; holding that Nicaraguan seaman failed to establish that the costs of arbitration would preclude him from arbitrating his Jones Act claims). For another maritime employment case, see *Alberts v. Royal Caribbean Cruises, Ltd.*, 834 F.3d 1202 (11th Cir. 2016) (holding that that phrase “performance abroad” in the New York Convention included seaman’s work traveling from Miami to the Caribbean and back).

355 *See* Weaver v. Doe, 371 P.3d 1170 (Okla. Civ. App. 2016) (holding that the FAA preempted Oklahoma’s statutory prohibition of pre-dispute arbitration agreements of claims against nursing homes); Kindred Nursing Centers Limited Partnership v. Cox, 486 S.W.3d 892 (Ky. App., 2015), *review denied* (April 27, 2016) (holding that the FAA did not preempt a Kentucky precedent that wrongful death claims were not subject to arbitration because the resident’s agent who signed the contract could not bind the wrongful death beneficiaries); Roth v. Evangelical Lutheran Good Samaritan Soc., 886 N.W.2d 601 (Iowa 2016) (holding that a wrongful death action filed against nursing home operator and arising from a home resident’s death was arbitrable, but the claims of the decedent’s children’s were not subject to arbitration).

356 *See* Carbajal v. CWPS, Inc., 199 Cal.Rptr.3d 332 (Cal. App. 2016) (holding that the FAA did not apply to an arbitration clause in an employment agreement because it did not involve interstate commerce,
agreements; and a decision of the New York Court of Appeals holding that the McCarran-Ferguson Act did not reverse preempt the FAA in the particular case, which involved a California insurance statute.

2. Arbitration Awards

Among cases involving enforcement of foreign arbitral awards, the following are noteworthy: two cases rejecting a challenge against an arbitration award filed by the Government of Belize on grounds of international comity, public policy, forum non conveniens, and statute of limitations; one case rejecting a public policy challenge against an arbitral award rendered against the Government of Nigeria; a case holding enforceable an award against the Czech Republic, after finding that the case fell within the arbitration exception to the Foreign Sovereign Immunities Act and the dispute qualified as commercial under the New York Convention; a case holding that an instrumentality of the Mexican Government had acted as a State, and thus was not entitled to the jurisdictional protections of the Fifth Amendment’s Due Process Clause; a case holding that a Chinese-language notice of arbitration – when the contract and all other communications between the parties were in English – was not reasonably calculated to apprise the other party of the arbitration proceedings, and thus the award was unenforceable under the New York Convention; and a case confirming an award against the challenge that it was not sufficiently reasoned.

Among cases involving enforcement of domestic arbitral awards, the following are worth perusing: a decision of the Texas Supreme Court holding that “manifest disregard of the law” is not a ground for vacating an arbitration award under the Texas Arbitration Act; a decision of the Second Circuit rejecting on the merits a and finding the clause procedurally and substantively unconscionable and non-severable; Da Loc Nguyen v. Applied Medical Resources Corp., 209 Cal.Rptr.3d 59 (Cal. App. 2016) (finding that the FAA applied to arbitration clause in employment agreement and that procedural unconscionability was “at best modest”).


363 See CEEG (Shanghai) Solar Science & Technology Co., Ltd v. LUMOS LLC, 829 F.3d 1201 (10th Cir. 2016).

364 See Leeward Construction Company, Ltd. v. American University of Antigua–College of Medicine, 826 F.3d 634 (2nd Cir. 2016).

“manifest disregard of the law” challenge; and a decision of the New Hampshire Supreme Court holding that the FAA did not preempt New Hampshire’s standard of reviewing arbitral awards.

VIII. STATUTES OF LIMITATION

Among the cases involving statutes of limitation conflicts but not a borrowing statute, four cases are worth discussing. Two of these cases were decided under California’s comparative impairment approach, and the other two under the Uniform Conflict of Laws—Limitations Act.

The first case, Medinger v. Bayer Healthcare Pharmaceuticals Inc., was a federal transfer case decided by the Second Circuit under California conflicts law. It was a products liability action filed against a California manufacturer by plaintiffs who were domiciled in other states and injured by the defendant’s products in those states. The plaintiffs’ actions were timely under the statutes of those states, but not under the California statute of limitations. The court held the actions barred, reasoning that, even if the plaintiffs’ home states had an interest in applying their longer statutes of limitation, California’s interest in protecting its courts from hearing stale claims would be more impaired if the California statute were not applied. The court quoted the following statement from a Ninth Circuit case:

Where the conflict concerns a statute of limitations, the governmental interest approach generally leads California courts to apply California law, and especially so where California’s statute would bar a claim. California’s interest in applying its own law is strongest when its statute of limitations is shorter than that of the foreign state, because a state has a substantial interest in preventing the prosecution in its courts of claims which it deems to be stale. Hence, subject to rare exceptions, the forum will dismiss a claim that is barred by its statute of limitations.

The court concluded that the plaintiffs did not demonstrate that their case qualified for such a “rare exception” or that “any other state ha[d] an interest more substantial than California’s.”

368 For cases involving choice-of-law clauses and limitations conflicts, see supra VI.1d. By contrast, a case not worth discussing is Gallagher Bassett Services, Inc. v. Canal Ins. Co., 202 So.3d 1160 (La. App. 2016), writ denied (La., Dec. 5, 2016), in which neither the attorneys nor the court appeared aware that the second-hand authorities on which they relied were superseded by legislation enacted more than a quarter-century ago.
370 Id. at *2, quoting Deutsch v. Turner Corp., 324 F.3d 692, 716-17 (9th Cir. 2003), (italics added by the Second Circuit).
371 Id.
The second California case, *J.B. Painting and Waterproofing, Inc. v. RGB Holdings, LLC*, a product liability case filed against a California manufacturer. The plaintiff was a Florida company that used the defendant’s products in Florida and sustained damages to its Florida building. Again, the California statute of limitations barred the action, which was timely under the Florida statute. The Ninth Circuit, relying on the same precedent as the Medinger court, concluded quickly that California law should govern because California had “a more substantial interest than Florida in the application of its shorter limitations period to protect the California defendants from stale claims.”

*Woodward v. Taylor* was decided under the Uniform Conflict of Laws—Limitations Act, which is in force in the forum state of Washington, along with six other states. The Act provides that, subject to some exceptions not applicable here, if the claim is “substantively based” on the law of a state other than the forum, the limitation period of that other state applies. This case arose out of a single car accident in Idaho, involving a Washington driver and her Washington passenger. The passenger sued the driver for negligence. Her action was barred by Idaho’s two-year statute of limitations, but not by Washington’s three-year statute. Rejecting the defendant’s contrary arguments, the Supreme Court of Washington found that there was no conflict between the substantive laws of the two states, thus making applicable Washington’s substantive law as the residual law. In turn, this finding made applicable the Washington statute of limitations under the Uniform Act.

*Blake Marine Group v. CarVal Investors LLC* was also decided under the Uniform Act, which is in force in the forum state of Minnesota. It was an action for interference with contract brought by an Alabama plaintiff against a Minnesota-based company and its affiliated companies. The defendant’s interfering acts occurred in Minnesota, but the injury occurred in Alabama. Alabama’s two-year statute of limitations barred the action, which was timely under Minnesota’s six-year statute. Under the Uniform Act, the Alabama statute would be applicable if Alabama law also governed the merits of the action. In determining whether Alabama law would govern the merits, the court followed Minnesota’s (Leflar’s) better-law approach or “choice-influencing considerations.” The court found that three of those five considerations

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372 650 Fed. App’x. 450 (9th Cir. 2016).
373 *Id.* at 452-53.
374 366 P.3d 432 (Wash. 2016).
375 For example, the court found that, although Washington’s and Idaho’s comparative fault rules differed, this difference did not create a conflict. Because the plaintiff was sleeping in the rear passenger seat when the defendant lost control of the vehicle, it was “almost inconceivable that a jury could assign more fault to [plaintiff]” and hence “the result under either state's laws would be the same.” *Id.* at 923.
376 829 F.3d 592 (8th Cir. 2016).
(including the better-law criterion) were irrelevant in this case, and one was neutral.377

This left only one factor, the “advancement of the forum’s governmental interest.”378 The court posited that this factor required analysis of not only Minnesota’s interests, but also those of the other involved state, Alabama. The court then concluded that (1) Minnesota did not have an interest in applying its pro-plaintiff law for the benefit of a foreign plaintiff and against a defendant who was based and acted in Minnesota, but (2) Alabama had an interest in “compensating” an Alabama plaintiff,379 even though Alabama law would not provide any compensation. The court rejected the plaintiff’s argument that Minnesota had an interest in holding its own residents accountable for wrongful conduct occurring in Minnesota. Stressing that “the resulting injury occurred outside of Minnesota,” the court said: “[W]e fail to see how any important [Minnesota] governmental interest is significantly furthered by ensuring that nonresidents are compensated for injuries that occur in another state.”380 The court concluded that this factor (i.e., the “advancement of the forum’s governmental interest”) favored the application of non-forum law, namely “Alabama law.”381 In turn, this made applicable the Alabama statute of limitations, barring the action.

Among cases involving borrowing statutes, Taylor v. First Resolution Invest. Corp.,382 a case decided by the Supreme Court of Ohio, is the most typical.383 A Delaware bank sued an Ohio consumer for failure to pay a credit card debt. The action was timely under Ohio’s six-year statute of limitation, but Ohio also had a borrowing statute mandating the application of the shorter statute of limitations of the state in which the cause of action accrued. The court found that the cause of action accrued in Delaware, where the plaintiff made her payments to the bank under the credit card contract. This made applicable Delaware’s three-year statute of limitation, barring the action. The court also held that: (1) the application of the Ohio borrowing statute, which was enacted after the accrual of the cause of action but before the filing of the

377 The court concluded that the “maintenance of the interstate order” factor was neutral because the plaintiff did not engage in impermissible forum shopping, given that Minnesota was the defendant’s home state and place of conduct. See id. at 595-96.

378 Id. at 596.

379 Id.

380 Id. (quotation marks omitted, emphasis in original).

381 Id.


383 For other such cases, see, e.g., North American Midway Entertainment, LLC v. Murray, 200 So.3d 437 (Miss. 2016) (holding that a tort action arising out of an accident in Louisiana and filed in Mississippi after the lapse of Louisiana’s one-year statute of limitation but before the lapse of Mississippi’s three-year statute of limitation was barred because the Mississippi borrowing statute required the application of the shorter statute of limitation of the state in which the action accrued, in this case Louisiana).
action, was not unconstitutionally retroactive; and (2) the filing of a time-barred collection action may form the basis of a violation under both the federal Fair Debt Collection Practices Act, and the Ohio Consumer Sales Practices Act.

McMillan v. Pilot Travel Centers, LLC\(^\text{384}\) involved both a borrowing statute and a “saving” statute. A plaintiff who was injured in a Louisiana accident sued the Missouri defendant in Missouri. That action was timely under both Louisiana’s one-year statute of limitation and Missouri’s longer statute. Subsequently, however, the plaintiff voluntarily dismissed that action and refiled it in Missouri, one month after the dismissal but two years after the accident. The refiled action was timely under Missouri’s saving statute which provided a one-year grace period within which to refile a voluntarily dismissed lawsuit. However, Louisiana did not have a saving statute, and the defendant argued that the Missouri borrowing statute required the application of Louisiana’s one-year statute of limitation, barring the refiled action. The court rejected the argument. The court reasoned that the borrowing statute was inapplicable, in both the initial action and the refiled action, because (1) the initial action was timely under the Louisiana statute of limitation, and (2) the refiled action was controlled by the Missouri saving statute, which applied to all actions filed or refiled in Missouri.

IX. DOMESTIC RELATIONS

1. Marriage and Divorce

Matter of Geraghty\(^\text{385}\) involved the question of what law governs the annulment of a marriage on grounds of fraud. The parties were married in New York. After living there for three years, they moved to two other states before settling in New Hampshire where, eight years later (and twenty years after the marriage), the wife filed for divorce. The husband responded with a petition for annulment of the marriage for fraud in the inducement. He claimed that the wife concealed from him certain facts about her prior life and that, had he known about them, he would not have married her.\(^\text{386}\) Under the law of New York, but not of New Hampshire, the wife’s concealment could be ground for annulling the marriage.\(^\text{387}\) The trial court applied New Hampshire law and dismissed the husband’s annulment petition.


\(^{385}\) 150 A.3d 386 (N.H. 2016).

\(^{386}\) The husband claimed that the wife had concealed that she had previously engaged in prostitution, used illegal drugs, and had undergone certain medical procedures.

\(^{387}\) Under New York law, “[a]ny fraud is adequate which is material, to that degree that, had it not been practiced, the party deceived would not have consented to the marriage, and is of such a nature as to deceive an ordinarily prudent person.” \textit{Id.} at 394. Under New Hampshire law, “[f]raud by one of the parties as to character, morality, habits, wealth, or social position is generally held insufficient to annul a marriage. . . . The fraudulent representations for which a marriage may be annulled must be of something essential to the marriage relation—of something making impossible the performance of the duties and obligations of that relation or rendering its assumption and continuance dangerous to health or life.” \textit{Id.} (internal quotations and citations omitted).
The New Hampshire Supreme Court affirmed in an opinion based on Leflar’s five choice-influencing considerations. The court found that one of those considerations was inapplicable, one was neutral, and another (“predictability of results”) favored New York law. However, the court found that the remaining two considerations ---“advancement of the forum’s interests” and the “better law” criterion—favored New Hampshire law. The court found that “New Hampshire’s substantial interest in regulating the dissolution of its residents’ marriages . . . outweigh[ed] any interest New York ha[d]” because “the parties had not resided in New York for approximately 25 years” but “were residents of New Hampshire . . . for approximately eight years.”

Regarding the better-law factor, the court had no doubt that New Hampshire law was the “sounder rule of law.” The court reasoned that New Hampshire’s stricter standard for annulling of marriage for fraud was the sounder rule of law because “annulment of a marriage . . . should not be an easy substitute for legal separation or divorce,” nor should it be as easy as “the voiding of an ordinary civil contract.” Although a marriage is based on a contract, it creates “a status containing more than an ordinary contractual relationship and not subject to the ordinary rules of contract law.” To treat marriage as an ordinary contract, the court said, is “to overshadow the greater importance of its institutional character.”

Among other cases involving the validity of marriages, two cases arising out of common law marriages, two cases arising out of Indian marriages, and one case involving a California registered partnership are worth noting.

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388 Id. at 393.
389 Id. at 394.
390 Id. at 395.
391 Id.
392 Id.
393 See Cerovic v. Stojkov, 134 A.3d 766 (D.C. 2016) (holding that the standard of proof for determining whether the parties had entered into a non-marital cohabitation in Serbia or a common law marriage in the District of Columbia was preponderance of the evidence rather than clear and convincing evidence); Cutler v. Cutler, 2016 WL 4444418 (Tex. App. 2016) (divorce and marital property dispute between parties who lived together first in Florida and then in Texas; holding that because Florida did not allow common law marriages, the time spent in Florida did not produce a common-law marriage).
394 See Hussain v. Hussain, 2016 WL 3057493 (Oh. App. 2016) (rejecting husband’s argument that a marriage solemnized according to Islamic custom in India was invalid just because the marriage certificate did not bear the signature of all necessary parties); Bhandaru v. Vukkum, 2016 WL 4410088 (Ky. App. 2016) (rejecting husband’s argument that the application of Kentucky’s no-fault divorce law to grant divorce to his wife who married him in India violated the Free Exercise Clause and restricted his freedom to exercise his faith).
395 See Gardenour v. Bondelie, 60 N.E.3d 1109 (Ind. App. 2016) (finding that the parties had validly entered into a registered domestic partnership under California law and treating it as the equivalent of a marriage under Indiana law for purposes of divorce and parental rights; rejecting as “outdated” one party’s argument that such a treatment was contrary to Indiana’s public policy).
2. Marital Property

Kirilenko v. Kirilenko\(^{396}\) involved the classification and distribution for marital property purposes of a spouse’s disability benefits earned in a state other than the state that grants a divorce. The spouses lived in Connecticut, where the husband worked for the state government. Upon his retirement, the spouses moved to Kentucky, where four years later the wife filed for divorce. Under Connecticut law, a portion of the husband’s retirement disability benefits would be considered marital property and subject to equitable distribution. Under Kentucky law, they would be classified as non-marital assets and would not be subject to equitable distribution. The Kentucky court of appeals, following sections 258 and 259 of the Restatement (Second), concluded that Connecticut had the most significant relationship and its law should govern the classification and distribution of the disability benefits.

The Kentucky Supreme Court reversed. The court noted that, although it has followed the Restatement in other areas of conflicts law, it has not adopted sections 258 and 259. Instead, the court stated, “[a]bsent an agreement to the contrary, in dissolution of marriage proceedings the law of the marital domicile applies.”\(^{397}\) The court posited that this is the majority rule in the United States and quoted a justification for it from a secondary source that the court did not clearly identify.\(^{398}\) According to that source, “any other rule would pose immense practical problems” because judges “have had substantial difficulty construing their own law correctly, let alone understanding the law of other jurisdictions.”\(^{399}\) Moreover, the application of non-forum law would “lead to unjust results” because “[p]roperty division systems cannot be viewed in isolation; they are an integral part of each state’s overall domestic law, and there are often complex trade-offs between property division and other issues.”\(^{400}\) The court saw “no reason to depart from the majority rule that the classification and division of all property in dissolution cases is governed by the law of forum—i.e. Kentucky.”\(^{401}\)

3. Acknowledgement and Adoption

The Supreme Court of Nebraska decided two important cases arising from the same facts and involving the right of a person who had acknowledged a child, but who is not the biological father, to object to the child’s adoption.\(^{402}\) The child was born in Ohio, where the plaintiff, named Jesse, and the child’s mother signed in the presence of a notary an “Acknowledgement of Paternity Affidavit” naming Jesse as the father.

\(^{396}\) ___ S.W.3d ____, 2016 WL 7655781 (Ky. 2016).

\(^{397}\) Id. at *2 (internal quotes omitted).

\(^{398}\) See id., quoting from “1 Equit. Distrib. of Property, 3d § 3:13 (Choice of Law) (2015),” without author or publisher identification.

\(^{399}\) Id.

\(^{400}\) Id.

\(^{401}\) Id. at *3.

\(^{402}\) See In re Adoption of Jaelyn B., 883 N.W.2d 22 (Neb. 2016) and Jesse B. v. Tylee H., 883 N.W.2d 1 (Neb. 2016).
The affidavit was recorded in Ohio’s office of vital statistics and, under Ohio law, it had the same effect as a paternity judgment, conferring all the rights and obligations of a father, including the right to object to the child’s adoption. The mother moved to Nebraska and initiated adoption proceedings to which Jesse objected. After protracted litigation, during which genetic tests established that the biological father was another man (who did not object to the adoption), the lower court issued the adoption decree.

The Nebraska Supreme Court reversed. The court based its decision primarily on a Nebraska statute that required Nebraska to give full faith and credit to “a determination of paternity made by any other state,” including one “established through voluntary acknowledgment.”403 The court stressed that under Ohio law, as well as under Nebraska law, the acknowledgment had made Jesse the legal father, not just the presumed father, and that status had not changed by any intervening events, including the proof that another man was the biological father. The two cases, totaling 40 pages, discuss many other interesting issues, including constitutional ones, but this brief description suffices for the purposes of this Survey.

*Montgomery v. Brewhaha Bellevue, LLC*404 was a wrongful death case that also involved the effect of an acknowledgment of paternity executed in another state. The decedent was not the biological father but he and the child’s mother signed an act of acknowledgement before witnesses at the Arizona Office of Vital Records and obtained an amended birth certificate naming him as the child’s father. He was later killed in a barroom fight in Seattle and the child sued the bar in Washington. The question was whether the child qualified as a beneficiary of the wrongful death action as the decedent’s child. A Washington statute required Washington courts to “give full faith and credit to an acknowledgement . . . of paternity effective in another state if the acknowledgment . . . has been signed and is otherwise in compliance with the law of the other state.”405 Under Arizona law, an acknowledgment had the effect of a judgment establishing a presumption of paternity, but the presumption could be rebutted by clear and convincing evidence under certain circumstances. After some equivocal discussion, the court concluded that, under both Arizona and Washington law, a wrongful death defendant lacked standing to challenge the presumption.

*Burnett v. Maddocks*406 was the third case decided by the Nebraska Supreme Court in 2016 involving an adoption. In 2006, a Colorado court approved the adoption of a 58-years old man as the adopter’s “heir in law.” The question was whether the adoptee qualified as a “son” for purposes of inheriting a tract of Nebraska land under a 1938 will of the adopter’s great uncle, which bequeathed the property to the adopter’s “son.” The adopter died without children, and the dispute was between the

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403 NEB. REV. STAT. § 43–1406(1) (“A determination of paternity made by any other state, whether established through voluntary acknowledgment, genetic testing, or administrative or judicial processes, shall be given full faith and credit by this state.”).


405 *Id.* at *3.

406 881 N.W.2d 185 (Neb. 2016).
plaintiff and the testator's other heirs. Under Nebraska law, a person adopted as an adult had the same rights as a person adopted as a minor, and both are treated as the adopter's children for all purposes. However, under Colorado law, the adoption of an adult did not create a parent-child relationship, although it did make the adoptee eligible to be an intestate heir of the adopter.

After noting that the Full Faith and Credit Clause required Nebraska to give the Colorado adoption decree the same effect it had in Colorado, the Nebraska court held that this obligation meant that Nebraska could not give the decree a greater effect than it had in Colorado.407 In the court's words, "[W]e cannot assume that any foreign decree with 'adoption' in its title has the same effect as an adoption decree entered by a Nebraska court. Not all "adoption" decrees are equal."408 In this case,

[T]he Colorado decree did not create a parent-child relationship between [the adopter and the adoptee]. There is more to being a parent than serving as a medium through which property passes to an heir under the laws of intestate succession. The critical point is not that Colorado might define the parent-child relationship differently than Nebraska, but that Colorado extends the relationship to one class of adoptees and not to another. [The adoptee] is a member of the latter class.409

4. Child Support

The Uniform Interstate Family Support Act (UIFSA), which is in force in all states, provides that: "In a proceeding to modify a child support order, the law of the state that is determined to have issued the initial controlling order governs the duration of the obligation of support."410 In Studer v. Studer,411 the initial order was issued in Florida. It was then registered in Connecticut and its amount modified twice, once at the behest of the obligor and once at the behest of the obligee. The obligee sought to modify the order for the third time to extend its duration beyond the child's twenty-first birthday. Because the child was autistic, Florida law allowed the extension. Connecticut law did not. The obligor argued that Connecticut law should govern this question because the two Connecticut modifications superseded the Florida order. The Connecticut Supreme Court disagreed. Underscoring the word "initial" in the above-quoted provision, but also providing additional contextual and policy support, the court held that Florida law governed this question.412

407 See id. at 191 ("[A] foreign adoption decree has the same validity and effect in Nebraska as in the state rendering judgment. A foreign judgement is not entitled to greater effect in Nebraska than it would have in the rendering state.") (Internal quotation marks omitted).
408 Id.
409 Id. at 190-91.
410 Uniform Interstate Family Support Act § 611(d) (emphasis added).
411 131 A.3d 240 (Conn. 2016).
412 In In re Marriage of Jones, 48N.E.3d 700 (Ill. App. 2016), the law of the responding state, Illinois, allowed post-majority support, but the law of the issuing state, Georgia, did not. The Illinois law held that Georgia law governed.
Section 604 of UIFSA provides, in subsection (b), that the law of the responding state governs the enforcement “procedures and remedies” and, in subsection (c), that the statute of limitations of either the issuing state or the responding state, whichever is longer, governs the timeliness of the action to enforce a support order.\(^{413}\) In Matter of Paternity of M.H.,\(^{414}\) the outcome depended on which of the above provisions was applicable. Indiana was the issuing state, and Washington was the responding state. The Indiana order was issued in 1994 and the obligee sought its enforcement in Washington by attaching the obligor’s wages in 2014, slightly less than 20 years later. A Washington statute, RCW 4.56.210(2), provided that “[a] judgment . . . for accrued child support shall continue in force for ten years after the eighteenth birthday of the youngest child.”\(^ {415}\)

The Washington Court of Appeals held that this statute barred the enforcement of the Indiana judgment because by 2014 the child was 29-years old. The court based the applicability of this statute on subsection (b) of §604 of UIFSA, which provides that the law of the responding state governs the enforcement “procedures and remedies.” The Washington Supreme Court reversed. The court reasoned that RCW 4.56.210(2) was not a statute pertaining to enforcement “procedures and remedies” but rather a statute of limitations. In turn, this characterization made applicable subsection (c) of §604 of UIFSA, which authorizes the application of the statute of limitations of either the responding state or the issuing state, whichever is longer. Under this provision, the Indiana judgment was enforceable in Washington, albeit barely, because Indiana had a twenty-year statute of limitations.

**X. RECOGNITION AND ENFORCEMENT OF JUDGMENTS**

1. **Sister State Judgments**

In 2015, the Alabama Supreme Court denied recognition to a Georgia decree that had approved a woman’s adoption of her same-sex partner’s children.\(^{416}\) In summary, the Alabama court found that the Georgia court misapplied Georgia law in approving the adoption, and that somehow that misapplication deprived the court of subject-matter jurisdiction. In criticizing this decision, last year’s Survey noted that it “should not, and probably will not, survive review by the Supreme Court.”\(^ {417}\) Indeed, it has not. In a short per curiam opinion in *V.L. v. E.L.*,\(^ {418}\) the United States Supreme Court reversed the Alabama decision.

The Court recited the elementary principle that the Constitution’s Full Faith and Credit Clause “precludes any inquiry into the merits of the cause of action, the logic or consistency of the decision, or the validity of the legal principles on which the

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\(^{413}\) UIFSA § 604(b) and (c).

\(^{414}\) 383 P.3d 1031 (Wash. 2016).

\(^{415}\) Id. at 1032.


\(^{418}\) 136 S.Ct. 1017 (U.S. 2016).
The Court noted that, although the recognizing court may inquire into the rendering court’s jurisdiction, that inquiry is a limited one. “[I]f the judgment on its face appears to be a record of a court of general jurisdiction, such jurisdiction over the cause and the parties is to be presumed unless disproved by extrinsic evidence, or by the record itself.” In this case, the Georgia court had exclusive jurisdiction “in all matters of adoption” under Georgia law and thus had the “adjudicatory authority over the subject matter required to entitle its judgment to full faith and credit.” The Alabama court was wrong both in refusing to accept the Georgia court’s determination of its own jurisdiction and in its own conclusion that the Georgia court lacked subject-matter jurisdiction.

Linde Health Care Staffing, Inc. v. Claiborne County Hosp., was very similar to the classic case Fauntleroy v. Lum, except that the outcome was the opposite. As in Fauntleroy, Mississippi was asked to recognize a Missouri judgment that had incorporated an erroneous arbitral award. But this time, Mississippi could refuse to recognize the judgment without running afoul of the Full Faith and Credit Clause. Linde, the Missouri judgment creditor, obtained the Missouri arbitral award against a Mississippi County Hospital after representing to the arbitrator that the Hospital received notice of arbitration but chose not to appear. This was only partly true. Linde had sent a demand letter to the Hospital but the Hospital denied any involvement because Linde’s contract and arbitration agreement was not with the Hospital but rather with a private company to which it leased the hospital building. A Missouri court affirmed the arbitral award and Linde sought enforcement of the resulting judgment in Mississippi. In response to the Hospital’s objections, Linde argued that the Hospital was bound by the Missouri judgment because it did not seek to vacate the award in Missouri within the time limits provided by the Federal Arbitration Act (FAA). The Mississippi trial court rejected Linde’s arguments and refused to recognize the Missouri judgment. The court found that: (1) Missouri did not have jurisdiction because the Hospital never contracted to arbitrate in Missouri and did not transact any business there; and (2) the Missouri judgment or the underlying award was obtained by extrinsic fraud because the plaintiff misrepresented to the arbitrator that he had given notice to the other party.

The Mississippi Supreme Court affirmed. The court acknowledged its policy in favor of arbitration but noted that sometimes this policy “run[s] up against the more fundamental underlying policy that parties should . . . not [be] forced to submit to

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419 Id. at 1020 (quotation marks omitted).
420 Id. (internal quotation marks omitted).
421 Id. at 2021.
422 198 So.3d 318 (Miss. 2016).
423 210 U.S. 230 (1908).
424 Unlike Fauntleroy, which involved a Mississippi award, this case involved a Missouri award.
contracts to which they are not parties.”

This was “indeed one of those times,” said the court:

Linde cannot invoke the FAA to argue the Hospital is time-barred when the Hospital has affirmatively shown it was not the party that contracted with Linde. That is why the Hospital could not be forced to arbitrate or be bound to an arbitration award. . . . Nor did the Missouri court obtain jurisdiction over the Hospital when it confirmed the arbitration award.

*Chavez v. Dole Food Company, Inc.* involved the complex question of the res judicata effects of a judgment dismissing a claim as untimely when both the dismissing court (F1) and the recognizing court (F2) are federal courts sitting in diversity in different states. Under the Supreme Court’s decision in *Semtek*, this is a federal law question but, in keeping with the goals of “the watershed decision . . . in *Erie,*” federal law “adopt[s], as the federally prescribed rule of decision, the law that would be applied by state courts in the State in which the federal diversity court sits.” In *Chavez*, the F1 court, which dismissed the action as untimely, was a federal court in Louisiana and the F2 court was a federal court in Delaware, where the plaintiffs sued the same defendants before dismissal of their Louisiana actions.

The *Chavez* court concluded that *Semtek* required “evaluat[ing] the res judicata effects of the Louisiana District Court’s timeliness dismissals by looking to Louisiana’s law of claim preclusion.” After an extensive and creative discussion of Louisiana res judicata law, the court concluded that, although an untimeliness dismissal had claim preclusion effects within Louisiana, it did not necessarily bar litigation of the same claim in other states. Instead, Louisiana law allowed some equitable exceptions to its res judicata doctrine, and the court concluded that those exceptions were applicable in this case, which was exceptional for a variety of reasons.

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425 *Linde Health Care*, 198 So.3d at 325.
426 *Id.*
427 836 F.3d 205 (3rd Cir. 2016).
429 *Id.* at 508.
430 *Chavez*, 836 F.3d, at 225.
431 For other cases involving recognition of sister-state judgments, see *Pacific Western Bank v. Eighth Judicial District Court*, 383 P.3d 252 (Nev. 2016) (holding that the New Mexico bank accounts of a California judgment debtor who was subject to Nevada’s jurisdiction could be garnished to satisfy the California judgment); *Mensah v. MCT Federal Credit Union*, 132 A.3d 332 (Md. 2016) (holding that Maryland could garnish the Texas wages of a former Maryland domiciliary to satisfy a Maryland judgment served on the debtor’s employer in Maryland, even though Texas prohibited garnishment of wages for debts other than child support). For enforcement of federal judgments in other federal districts, see *Wells Fargo Equipment Finance, Incorporated v. Asterbadi*, 841 F.3d 237 (4th Cir. 2016) (holding that registration of a Virginia federal court judgment in Maryland, at a time when the judgment was not time-barred by Virginia law, functioned as a new judgment in the federal district of Maryland, and Maryland’s 12-year limitations period for enforcement of money judgments began running.
2. Foreign-Country Judgments

The Uniform Foreign–Court Monetary Judgment Recognition Act exempts from its scope, and thus does not require recognition of, judgments imposing a “fine or other penalty.”\textsuperscript{432} In \textit{de Fontbrune v. Wofsy},\textsuperscript{433} the enforceability of a French judgment in California turned on the meaning of the French term \textit{astreinte}, which literally translates as penalty. If it meant penalty in the sense that term is used in the Uniform Act, then the judgment would not be entitled to recognition under California’s version of the Act. The story began in 2001, when de Fontbrune obtained a French judgment against Wofsy, ruling that Wofsy infringed on de Fontbrune’s intellectual property right in certain Picasso photographs. Besides awarding damages for past infractions, the judgment prohibited Wofsy from reproducing the photographs “under penalty . . . \textit{[astreinte]} of 10,000 francs by proven infraction.”\textsuperscript{434} Wofsy continued the infractions and, in 2012, de Fontbrune obtained a second French judgment ordering Wofsy to pay him 2,000,000 euros as “\textit{liquidation d’astreinte}.”\textsuperscript{435} De Fontbrune then sought enforcement of this judgment in California. The trial court concluded that the \textit{astreinte} functioned as a penalty and thus the judgment was not cognizable under the Uniform Act.

The Ninth Circuit reversed. The court invoked the standard established by the Supreme Court in the nineteenth-century case \textit{Huntington v. Attrill},\textsuperscript{436} which asked whether the purpose of the foreign rule was “to punish an offense against the public justice of the state, or to afford a private remedy to a person injured by the wrongful act.”\textsuperscript{437} The court acknowledged that the \textit{astreinte} “cannot be neatly categorized as either essentially penal or wholly civil in nature. It is hybrid, with elements that cut both ways.”\textsuperscript{438} After extensively discussing the testimony of both parties’ French-law experts, but also drawing on its own research, the court concluded that the purpose of the \textit{astreinte} award “was not to punish a harm against the public, but to vindicate de Fontbrune’s personal interest in having his copyright respected and to deter further future infringements by Wofsy.”\textsuperscript{439} Thus, the judgment was eligible for recognition.

\textsuperscript{432} For California’s version of the Act, see CAL. COD. CIV. PROC. § 1715(b)(2).
\textsuperscript{433} 838 F.3d 992 (9th Cir. 2016), \textit{as amended on denial of reh’g and reh’g en banc} (Nov. 14, 2016).
\textsuperscript{434} \textit{Id.} at 995 (quoting the French judgment).
\textsuperscript{435} \textit{Id.}
\textsuperscript{436} 146 U.S. 657 (1892).
\textsuperscript{437} \textit{Id.} at 673–74,
\textsuperscript{438} \textit{de Fontbrune}, 838 F.3d at 1002.
\textsuperscript{439} \textit{Id.} at 1005.
In *In re Parentage of A.H. v. Harlow H.*, an Illinois court recognized a Thai paternity judgment. The judgment held that the defendant, an Illinois domiciliary, was the father of triplets born in Thailand to the plaintiff, a Thai woman with whom the defendant cohabited at the time of conception. The children were conceived through artificial insemination using the defendant’s sperm, in a procedure to which he consented in writing and signed as “husband.” The defendant, who was represented by counsel in the Thai proceedings, argued that the judgment was “obtained by fraud.” He based his argument on his claim that the plaintiff misled him into consenting to the insemination. This claim, even if true, would at best suggest intrinsic (rather than extrinsic) fraud, which ordinarily does not render the judgment ineligible for recognition. The defendant’s main argument was that the Thai judgment was contrary to Illinois public policy. He based this argument on a provision of the Illinois Parentage Act, which he interpreted as saying that a man who donates semen for use in the artificial insemination of a woman who is not the donor’s wife shall not be treated in law as if he were the natural father of the resulting child. The court disagreed. The court found that the defendant’s interpretation was out of context and, in any event, that provision was repealed effective January 1, 2017, and no longer reflected Illinois public policy.

In *Badawi v. Wael Mounir Alesawy*, a New York court had no trouble enforcing an Abu Dhabi divorce judgment ordering the husband to pay $250,000 to the wife as mahr. The parties had been married in New York in a civil ceremony and a religious ceremony under Islamic law. As part of the latter ceremony, they signed a mahr agreement requiring the husband, in the event of divorce, to pay a mahr or deferred dowry of $250,000. The wife obtained the divorce when the spouses were living and working in Abu Dhabi. The New York court noted that “no strong public policy of New York was violated” by enforcing the Abu Dhabi judgment.

By contrast, in *Baze-Sif v. Sif*, an Ohio court refused to recognize a Moroccan divorce decree, primarily on public policy grounds. The parties were born and grew up in Morocco, but they married in Ohio, where they both had emigrated in the meantime. The husband filed for divorce in Morocco, while the spouses were there on a short visit to their families. Although the wife was represented by counsel, the husband grossly understated his income and assets, resulting in a very small property settlement for the wife. The Ohio court described in detail the husband’s reprehensible conduct before and after the Moroccan proceedings and held that the Moroccan divorce decree “offended the public policy of [Ohio] regarding the division of marital assets, as it contained no discussion of the parties’ marital assets or debts, and did not address Said’s retirement account.” The court also found that “neither party con-

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441 24 N.Y.S.3d 683 (N.Y.A.D. 2016)
442 Id. at 684.
444 Id. at *4.
tended" that they were residents of Morocco, and "since they were not bona fide residents of Morocco, the Moroccan Court lacked subject matter jurisdiction over the parties when Said ambushed Sanaa with the petition for divorce during their vacation."445

In *Shanghai Commercial Bank Ltd. v. Kung Da Chang*,446 the question was whether a judgment rendered against a spouse for a debt incurred in his individual capacity could be enforced against the debtor’s community property. The judgment was rendered by a Hong Kong court and was otherwise enforceable in Washington, which was the debtor’s and his wife’s domicile. However, the debtor, using his father’s Shanghai address and not disclosing his Washington domicile, signed documents with a Shanghai bank establishing a credit agreement allowing him and his father to borrow money from the bank. The documents included Hong Kong choice-of-law clauses. After the debtor defaulted, the bank obtained a $9 million judgment in Hong Kong and sought to enforce it in Washington. The debtor argued that, under Washington law, a spouse’s separate debt could not be enforced against the community. The court replied that, when the debt is incurred outside Washington, “Washington courts use a conflict of laws analysis to decide what law to apply to decide if the judgment can be collected from that spouse’s marital community.”447

The court undertook such an analysis, basing it on Section 6 of the Restatement (Second) rather than on the more specific Restatement sections or the Honk Kong choice-of-law clause. The court concluded that Hong Kong law governed and, because under Honk Kong law the judgment could be enforced against property that Washington law classifies as community property, the court held that the judgment was enforceable against such property. The court acknowledged Washington’s policy of “shield[ing] community property from collection for a judgment arising from one spouse’s debt obligations,” but also noted that Washington had “no policy interest in being a sanctuary for fleeing debtors.”448 By contrast, Hong Kong had an interest in “ensur[ing] the predictability of business relations and preventing debtors from avoiding liability with the protection of foreign laws—at least when their foreign residency is unknown to the other party and the agreement requires the application of Hong Kong law.”449 The court concluded that, based on the two jurisdictions’ policies and the parties’ justified expectations, Hong Kong had the most significant relationship.

445 Id.
447 Id. at 215.
448 Id. at 216 (internal quotation marks omitted).
449 Id. (internal quotation marks omitted).