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The Restatement Third of Conflict of Laws: An Idea Whose Time Has Not Come[†]

RUSSELL J. WEINTRAUB*

I. REASONS NOT TO BEGIN A NEW RESTATEMENT NOW

It is hard to disagree with Dean Symeonides's contention that it is "time" for a third restatement when his concept of time is a process that will last at least two decades.¹ Perhaps in twenty years we will have a body of coherent judicial opinions on choice of law that can be restated and the American Law Institute can guide courts over a few difficult patches. My point is that it is not time to embark on the drafting of a third restatement.

There is no coherent body of case law on choice of law: There are three reasons why courts have special difficulty writing satisfactory choice-of-law decisions—the *Restatement (Second) of Conflict of Laws* ("Second Restatement"),² the lawyers who brief and argue choice-of-law issues, and state courts' infrequent encounters with conflicts doctrine.

The *Second Restatement*, which guides courts and lawyers, is incoherent. I have elsewhere explained why I believe the *Second Restatement*, which itself was started prematurely, has failed.³ Suffice it here to state that the *Second Restatement*'s bizarre mixture of territorial bias and focus on the substance of conflicting laws has misled many courts into exchanging simple territorial rules for mind-numbing lists of territorial contacts "to be taken into account."⁴ Such courts choose law without advertent to the content of the law chosen or whether there is any conflict of laws in the first place.⁵

Courts that are mystified by the *Second Restatement* are likely to receive little useful guidance from lawyers' briefs and arguments. Enrollment in conflict of laws courses dropped precipitously when the subject was taken off the bar examinations.⁶ The lawyers probably did not take the course and they are struggling along with the court to understand the *Second Restatement*.

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1. Symeon C. Symeonides, *The Need for a Third Conflicts Restatement (And a Proposal for Tort Conflicts)*, 75 IND. L.J. 437, 438 (2000).

2. RESTATEMENT (SECOND) OF CONFLICT OF LAWS (1971) [hereinafter SECOND RESTATEMENT].

3. See Russell J. Weintraub, "At Least, To Do No Harm": Does the Second Restatement of Conflicts Meet the Hippocratic Standard?, 56 MD. L. REV. 1284 (1997).

4. See, e.g., SECOND RESTATEMENT, *supra* note 2, § 145(2).

5. See, e.g., Scheerer v. Hardee's Food Sys., Inc., 92 F. 2d 702, 708 (8th Cir. 1996); see also Hataway v. McKinley, 830 S.W.2d 53, 58 (Tenn. 1992) (stating that many courts "have merely counted contacts rather than engaging in an analysis of the interests and policies listed in the Restatement"); William M. Richman & William L. Reynolds, *Prologomenon to an Empirical Restatement of Conflicts*, 75 IND. L.J. 417, 432 (2000) (referring to the "disturbing frequency of decisions that misread the Second Restatement").

6. See Friedrich K. Juenger, *What Now?*, 46 OHIO ST. L.J. 509, 515 (1985).

Moreover, all courts, but especially state courts, encounter choice-of-law problems haphazardly at infrequent intervals. Changes in court personnel can cause a new court to reinvent the wheel that was invented at least a decade earlier, but this time not get it quite right. The reinvented choice-of-law wheel is square rather than round and gives a very bumpy ride. For example, in 1984 the Supreme Court of Texas decided *Duncan v. Cessna Aircraft Co.*⁷ The issue was whether the plaintiff released Cessna from a product liability claim when the plaintiff signed a release that did not name Cessna but did state that the document released "any other corporations or persons whomsoever responsible therefor, whether named herein or not."⁸ The suit was for wrongful death. Plaintiff's husband, a Texas resident, had been killed when a Cessna aircraft crashed in New Mexico where the husband was taking flying lessons. The release settled a lawsuit that plaintiff had brought in a Texas federal district court against the New Mexico company that owned the plane and the estate of the instructor, who had resided in New Mexico.⁹ Under Texas law, the release did not include Cessna, but under New Mexico law it did.¹⁰ The court held "that Texas law applies to the determination of the effect of the Duncan release on Cessna . . . [and] that Cessna's liability to Duncan is not discharged."¹¹

Although there are grounds on which reasonable persons might disagree with the result, the method that the court used to reach the result would gladden the heart of any academic adherent of interest analysis. The court first stated that in order to decide whether a choice-of-law analysis is necessary "we must first determine whether there is a difference between the rules of Texas and New Mexico on this issue."¹² The court then identified the difference noted above.¹³ Next the court recited the contacts that New Mexico and Texas had with the parties and the transaction, stating, "[t]he beginning point for evaluating these contacts is the identification of the policies or 'governmental interests,' if any, of each state in the application of its rule."¹⁴ The court concluded that Texas law applied because this was a "false conflict" in which only Texas policies underlying its release rule were affected.¹⁵ Texas would advance its interests in encouraging payment of settlements to its residents and protecting its residents from inadvertently releasing claims against

7. 665 S.W.2d 414 (Tex. 1984).

8. *Id.* at 418.

9. *See id.* at 418, 421.

10. *See id.* at 419-20.

11. *Id.* at 422.

12. *Id.* at 419.

13. *See supra* text accompanying note 10.

14. *Duncan*, 665 S.W.2d at 421. The court noted that Cessna was a Kansas corporation that designed and manufactured the defective seats in Kansas. *Id.* The court excluded Kansas law from its analysis on the ground that "Cessna has not asserted any error in the trial court's application of New Mexico law." *Id.* at 421 n.6. Another ground on which the court might have excluded Kansas law from consideration is that if Kansas law favored Cessna, imposing that law on plaintiff would be unfair. The plane had been sold to the first user in Texas. *See id.* at 421. Kansas had no contact with the plaintiff or the accident.

15. *Id.* at 422.

unknown tortfeasors.¹⁶ Moreover, applying Texas law would protect plaintiff's reasonable expectation that Texas law "would govern the effect on third parties of a settlement agreement negotiated and executed in Texas."¹⁷

The court then held that New Mexico had no interest in having its law applied because that state was not "concerned with the application of its statutes to a Texas settlement to cut off a Texas resident's claim against a Kansas corporation."¹⁸ The court omitted from its interest analysis the fact that when the plaintiff sued Cessna, Cessna filed a counterclaim against the estate of the New Mexico instructor.¹⁹ A likely policy underlying the New Mexico rule is to protect New Mexico defendants from paying for a release and then being hauled back into court for contribution when the plaintiff sues parties that were not released.

Thus, although *Duncan*'s reasoning is flawed, the result is reasonable and the court uses the proper procedure for choice of law based on interest analysis. The court first makes certain that a choice is necessary because the laws of New Mexico and Texas differ. Then the court chooses law based on policies that underlie the conflicting laws and that are triggered by each state's contacts with the parties and the transaction.

Only twelve years later, the Texas Supreme Court forgets everything it said in *Duncan* regarding choice of law and made a hash of the analysis. The case is *Minnesota Mining & Manufacturing Co. v. Nishika, Ltd.*²⁰ No member of the court that decided *Duncan* is still sitting. *Nishika* was, like *Duncan*, a product liability case, but this time the claim was for profits lost and costs incurred by businesses affected by alleged defects.²¹ A key issue was whether businesses that did not use the product but supplied the business that did, could recover for their economic loss when the user ceased production because of the defects.²² It was clear that Texas law and the law of the jurisdictions where the plaintiffs were located did not permit such recovery.²³ The plaintiffs contended, and the defendant denied, that Minnesota, where the defendant was incorporated, had its principal place of business, and developed the product, had a uniquely generous rule permitting recovery of economic damages by claimants that did not acquire the product.²⁴ Without knowing whether there was any conflict of laws, the court, in a per curiam opinion, declared, "For reasons we will explain fully in our final opinion in this case, we conclude that Minnesota has the most significant relationship to the transaction between the *Nishika* plaintiffs and 3M. Therefore, Minnesota law applies."²⁵

16. *See id.*

17. *Id.*

18. *Id.* at 421.

19. *See id.* at 418, 433.

20. 955 S.W.2d 853 (Tex. 1996). I was co-counsel for the prevailing party. The brief, which I co-authored, presented an analysis of the choice-of-law problem following *Duncan*'s methodology. When the court reversed a judgment of over thirty million dollars against my client, I did not believe it prudent to ask the court to correct its choice-of-law analysis.

21. *Id.* at 853.

22. *See id.* at 857.

23. *See Plaintiff's Application for Writ of Error* at 34, *Nishika* (No. 94-1124).

24. *See Nishika*, 955 S.W.2d at 855-57.

25. *Id.* at 856.

Then the court did what it should have done before rendering an opinion on choice of law. It certified to the Supreme Court of Minnesota the question of whether Minnesota law was as the plaintiffs contended.²⁶ The Supreme Court of Minnesota answered the question and revealed that there was no conflict between the states on the crucial issue.²⁷ The court, instead of withdrawing as unnecessary its premature pronouncement on choice of law, issued a unanimous opinion containing a two-page justification of the choice of Minnesota law.²⁸ The court thus ignored the soundest lesson taught by the *Second Restatement*—do not spin your wheels with a choice-of-law analysis if all the laws are identical.²⁹ A common-sense extrapolation from this *Restatement* provision is that conflicts analysis is also unnecessary if the laws are different in form but produce identical results for the issue before the court.

II. WHAT WE CAN TELL JUDGES AND LAWYERS

Academics have no business telling judges what results to reach on choice-of-law issues when there is a clash of state policies. What we should do is help judges understand the issues and select a rational method for resolving those issues. Courts and legislatures should make the social and political choices between reasonable alternatives.

For example, in product liability cases, the law of the state where the manufacturer is headquartered and where the product was produced may be more favorable to the user than the law of the user's state. I have contended that in this situation the law of the user's state should apply unless the manufacturer's conduct is sufficiently outrageous that its home state may wish to punish and deter that conduct.³⁰ I contend that applying the law of manufacturer's state in these circumstances discourages manufacturers from locating there. Local manufacturers will be at a competitive disadvantage compared with manufacturers in the victim's state or in states that do not regard their product liability law as manna for the injured of the world.³¹ The tide, however, is running against this proposal and courts apply the law of the manufacturer's state to deter improper manufacture, even when liability does not require a showing of negligence.³² So be it. All I ask is that the court recognize the

26. *See id.* at 857-58.

27. *See* Minnesota Mining & Mfg. Co. v. Nishika Ltd., 953 S.W.2d 733, 735-36 (Tex. 1997) (explaining the Minnesota high court decision).

28. *See id.* at 735-37.

29. SECOND RESTATEMENT, *supra* note 2, § 186 cmt. c ("When certain contacts involving a contract are located in two or more states with identical local law rules on the issue in question, the case will be treated for choice-of-law purposes as if these contacts were grouped in a single state.").

30. *See* Russell J. Weintraub, *A Proposed Choice-of-Law Standard for International Products Liability Disputes*, 16 BROOK. J. INT'L L. 225, 238 (1990).

31. *See id.* at 230.

32. *See* Reyno v. Piper Aircraft Co., 350 F.2d 149, 168 (3d Cir. 1980) (basing the result on a "state's interest in the regulation of manufacturing . . . [and] in deterring defects in products"), *rev'd on another issue*, 454 U.S. 235 (1981); Baird v. Bell Helicopter Textron, 491 F. Supp. 1129, 1141 (N.D. Tex. 1980) (stating that "Texas is certainly interested in seeing that Bell markets the safest product possible"); Gantes v. Kason Corp., 679 A.2d 106, 113 (N.J.

competing policies and choose between them.

There are a few simple messages that academics can communicate to judges and lawyers. Here is what we should say.

A. Selecting a Territorial or a Consequences-Based Rule

Reasonable persons disagree on whether courts should use territorial or consequences-based choice-of-law rules. A territorial rule is one that selects a state's law without regard to the law's content but based on some contact that state has with the parties or the transaction. An example is the rule of the *First Restatement* that selected the law of the place of injury for torts.³³ A consequences-based rule is one that chooses the law of a state with knowledge of the content of that law and to advance the policies underlying that law. An example is the rule of the *Second Restatement* choosing the law that validates when a borrower raises the usury defense.³⁴

My preference is for a consequences-based rule because I do not want a court deciding any issue, even a choice-of-law issue, without regard to the social consequences that are likely to follow from that decision. Some prefer a territorial rule for its certainty and ease of application. The worst choice is for a court to adopt a territorial rule, depart from it in random and unpredictable ways in order to avoid the consequences of applying the law that the rule selects, and not explain the departure in the light of those consequences. A court that does this forfeits the certainty of the territorial rule for "reasons" that defy understanding.

An example is *Grant v. McAuliffe*,³⁵ which applied forum law to the issue of whether a tort action survived the death of the tortfeasor. Unfortunately the reason stated for applying the law of the forum was not that the forum, as the common domicile of victim and tortfeasor, would alone experience the social consequences of permitting the action to survive. The court said that forum law applied because the issue is procedural.³⁶

It may be possible to state territorial rules that minimize the risk of producing results that a consequences-based analysis would reject. If for example, Professor Beale, the reporter for the *First Restatement*, had stated his tort rule as "apply the law

1996) (stating that "New Jersey . . . has a cognizable and substantial interest in deterrence . . . and that interest is not outweighed by countervailing concerns over creating unnecessary and discriminatory burdens on domestic manufacturers or by fears of forum shopping and increased litigation in the courts of this State"); *Johnson v. Spider Staging Corp.*, 555 P.2d 997, 1002 (Wash. 1976) ("Unlimited recovery will deter tortious conduct and will encourage [the manufacturer] to make safe products for its customers."). *But see Harrison v. Wyeth Lab.*, 510 F. Supp. 1, 5 (E.D. Pa. 1980) (stating that "the United Kingdom [where injured users purchased the product], and not Pennsylvania [principal place of business of defendant that licensed production in the United Kingdom], has the greater interest in the control of drugs distributed and consumed in the United Kingdom"), *aff'd without opinion*, 676 F.2d 685 (3d Cir. 1982).

33. RESTATEMENT OF THE LAW OF CONFLICT OF LAWS §§ 377-378 (1934).

34. SECOND RESTATEMENT, *supra* note 2, § 203.

35. 264 P.2d 944 (Cal. 1953).

36. *See id.* at 946-49.

of the place of injury unless the tortfeasor and victim have the same domicile, in which case apply the law of their domicile," there probably would not have been a conflicts revolution. The results produced by this rule would occasionally offend interest-analysis purists, but the rule would eliminate the wrongly-decided "false conflict" cases that sparked the revolve.³⁷

B. Know the Content of Law Before Choosing It

Do not engage in a choice-of-law analysis until you know the content of the law that one of the parties contends should displace forum law. Do not engage in a choice-of-law analysis if all putatively applicable laws produce the same result. There are two ways to state the result in such cases. I prefer a statement that you will apply forum law because there is no reason to displace it. An alternative is to say, for example, "it does not make any difference whose law applies, defendant is not liable to plaintiff" or "is not liable unless . . . and I shall instruct the jury accordingly."

These rules are essential if a court is purporting to follow a consequences-based approach. They also are labor-saving suggestions for a court applying territorial rules. There is nothing sillier than a court applying territorial rules to choose between the law of two states and reaching a result that accords with the law of neither state. An example is *Nelson v. Eckert*.³⁸ An automobile carrying Arkansas residents crashed in Texas killing all its occupants.³⁹ The representatives of the passengers sued the estate of the driver for wrongful death.⁴⁰ The representatives filed the suit more than two years after the crash.⁴¹ Both Texas and Arkansas had two-year statutes of limitations for wrongful death actions.⁴² Surely the decision is a no-brainer and suit is barred? No, the Supreme Court of Arkansas worked the magic of applying neither statute of limitations. The court accomplished this by finding that the Arkansas statute did not apply because it was part of the Arkansas wrongful death act and therefore applicable only to fatal injuries in Arkansas.⁴³ The Texas limitation was not included in the Texas wrongful death act and therefore applied only to suits in Texas courts.⁴⁴ This left either the three-year Arkansas statute of limitations, which applied to obligations and property damage,⁴⁵ or the five-year statute, which applied to actions not otherwise covered,⁴⁶ under both of which the action was timely.⁴⁷

37. In a "false conflict" case, only one state's policies are affected by the choice of law. See, e.g., *id.*, at 944 (in which the choice of law affected only California survival policies).

38. 329 S.W.2d 426 (1959).

39. See *id.* at 427.

40. See *id.* at 427-28.

41. See *id.* at 427.

42. See *id.* at 428; *id.* at 430 (McFaddin, J., dissenting) (explaining that the Texas wrongful death statute, while not having a "built in" limitations period, is "based on the foundation of the Texas 2-year Statute").

43. See *id.* at 428.

44. See *id.*

45. See *id.* at 428-29 (describing the applicability of *Arkansas Statutes* section 37-206, which was later codified as ARK. CODE ANN. § 16-56-105 (Michie 1987)).

46. See *id.* ("[I]f [Ark. Stat. Section 37-206] does not apply, then the five-years limitation found in Ark. Stat. Section 37-213 will govern."). ARK. CODE ANN. § 16-56-115 (Michie

C. Choose Law with Regard to the Consequences

A consequences-based approach to choice of law selects the law that gives maximum effect to the policies underlying the law of each state that has a contact with the parties or the transaction. If applying the law of one state will advance the policies of that state without causing consequences in another state that violate the other state's policies, apply the law of the first state. If it is not clear that this "false conflict" exists, state a reason for choosing one law rather than the other and have that reason relate to the policies of each state. Reasonable people may disagree with your choice, but your opinion will reveal that you recognized the issues and made a reasoned choice.

For example, in *Intercontinental Hotels Corp. v. Golden*⁴⁸ a New York court enforced a gambling debt incurred by a New Yorker at a Puerto Rican casino.⁴⁹ Gambling debts were legal obligations under Puerto Rican law, but not under New York law.⁵⁰ The court forgot that a year and a half earlier it had adopted a consequences-based approach to choice of law.⁵¹ The court assumed that Puerto Rican law applied because "these gambling debts were validly contracted in Puerto Rico."⁵² The majority and dissent then engaged in an unedifying debate whether Puerto Rican law triggered the public policy that prevented New York courts from enforcing distasteful foreign rules.⁵³

Under a consequences-based approach, the court would use the policies underlying New York and Puerto Rican law to choose between those laws. Public policy is ushered in the front door, rather than providing a basis for refusing to enforce a law chosen by putting a pin in a map.

The majority opinion might have chosen Puerto Rican law on the ground that the court did not want to encourage New Yorkers to keep their winnings at Puerto Rican casinos but renege on their debts. Moreover, Puerto Rican law protected the essential New York interest that a breadwinner not gamble away funds needed to support a family. Puerto Rican law allowed courts "to reduce gambling obligations or even decline to enforce them altogether, if the court in its discretion finds that the losses

1987) replaced section 37-213.

47. *See id.*

48. 203 N.E.2d 210 (N.Y. 1964).

49. *See id.* at 214.

50. *See id.* at 211-12.

51. *See, e.g., Babcock v. Jackson*, 191 N.E.2d 279, 284 (N.Y. 1963) (choosing New York law permitting a guest passenger to sue a host driver rather than Ontario law barring such suits and stating "[c]omparison of the relative 'contacts' and 'interests' of New York and Ontario in this litigation, vis-à-vis the issue here presented, makes it clear that the concern of New York is unquestionably the greater and more direct and that the interest of Ontario is at best minimal").

52. *Intercontinental Hotels*, 203 N.E.2d at 212.

53. *See id.* at 213 (stating that legalized gambling in Puerto Rico does not violate New York public policy in view of "legalization of pari-mutual betting and the operation of bingo games"); *id.* at 215 (Desmond, C.J., dissenting) (stating that "we cannot in good conscience use our judicial process to recognize the gamester's claim by giving him a judgment").

are '[in an] amount [which] may exceed the customs of a good father of a family.'"⁵⁴ The dissent could have chosen New York law on the ground that this result would be fair to the parties. The Puerto Rican casino knew or should have known it was dealing with a tourist from a state that held gambling debts unenforceable. The result of applying New York law might be that Puerto Rican casinos would stop issuing credit to New Yorkers,⁵⁵ a result the dissent would welcome.

Thus, while a consequences-based approach does not yield an ineluctable answer to every choice-of-law problem, the approach does require the court to explain the result in terms of results that are likely to follow from applying the chosen law.

CONCLUSION

The time for a third restatement is when there is a body of coherent judicial decisions on choice of law. The American Law Institute could then state rules that summarize the results of these decisions.⁵⁶ When there is a split of authority, the ALI can exercise its prerogative of choosing between alternatives. In the meantime, academics should help courts reach reasonable results in choice-of-law cases. We can do this by explaining the costs and benefits of choosing between a territorial or a consequences-based choice-of-law rule. We can also give the following advice:

(1) No matter what choice-of-law method you use, do not displace forum law with the law of another state until you know that the law of the other state will produce a result different from that reached under forum law.

(2) If you use a consequences-based rule, explain your choice-of-law decision in terms of the results likely to follow from applying the chosen law.

When there is a body of decisions following these simple guidelines, it will be time to draft a third restatement.

54. *Id.* at 213 (quoting P.R. LAWS ANN. tit. 31, § 4774) (alterations in original).

55. Another possibility is that Puerto Rico could enact a long-arm statute conferring personal jurisdiction over tourists for recovery of debts incurred there. Then the casino could demand that New York give full faith and credit to a Puerto Rican judgment for the gambling debt. *See Marina Assocs. v. Barton*, 563 N.E.2d 1110 (Ill. App. Ct. 1990) (giving full faith and credit to a New Jersey judgment for a gambling debt). The commonwealth of Puerto Rico is a United States "territory" and its judgments are entitled to full faith and credit. *See Americana of Puerto Rico, Inc. v. Kaplus*, 368 F.2d 431, 436-67 (3d Cir. 1966).

56. *See Richman & Reynolds, supra* note 5, at 427 (describing scholarship that "reasons from multiple results in actual cases toward choice-of-law rules of thumb that courts actually follow").