

## Louisiana Law Review

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Volume 60 | Number 4

*Conflict of Laws, Comparative Law and Civil Law: A*

*Tribute to Symeon C. Symeonides*

*Summer 2000*

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# Courts Flailing in the Waters of the Louisiana Conflicts Code: Not Waving but Drowning

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### Repository Citation

Russell J. Weintraub, *Courts Flailing in the Waters of the Louisiana Conflicts Code: Not Waving but Drowning*, 60 La. L. Rev. (2000)

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# Courts Flailing in the Waters of the Louisiana Conflicts Code: Not Waving but Drowning

Russell J. Weintraub\*

## I. INTRODUCTION: CASES STUDIED

I analyzed the decisions of Louisiana state courts and of federal courts that, as of December 1, 1999, have applied Articles 3537 and 3540 of the Louisiana Civil Code, which govern choice of law for "conventional obligations."<sup>1</sup> Of the thirty-two cases in this group,<sup>2</sup> fifteen misapply the articles in the most fundamental

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\* Professor of Law and holder of Powell Chair, University of Texas School of Law. The title is from Stevie Smith, *Not Waving But Drowning*, in *Selected Poems* 18 (1964):

I was much too far out all my life. And not waving but drowning.

1. La. Civ. Code art. 3537 provides:

Except as otherwise provided in this Title, an issue of conventional obligations is governed by the law of the state whose policies would be most seriously impaired if its law were not applied to that issue.

That state is determined by evaluating the strength and pertinence of the relevant policies of the involved states in the light of: (1) the pertinent contacts of each state to the parties and the transaction, including the place of negotiation, formation, and performance of the contract, the location of the object of the contract, and the place of domicile, habitual residence, or business of the parties; (2) the nature, type, and purpose of the contract; and (3) the policies referred to in Article 3515, as well as the policies of facilitating the orderly planning of transactions, of promoting multistate commercial intercourse, and of protecting one party from undue imposition by the other.

La. Civ. Code art. 3540 provides:

All other issues of conventional obligations are governed by the law expressly chosen or clearly relied upon by the parties, except to the extent that law contravenes the public policy of the state whose law would otherwise be applicable under Article 3537.

See also La. Civ. Code art. 3515 which provides:

Except as otherwise provided in this Book, an issue in a case having contacts with other states is governed by the law of the state whose policies would be most seriously impaired if its law were not applied to that issue.

That state is determined by evaluating the strength and pertinence of the relevant policies of all involved states in the light of: (1) the relationship of each state to the parties and the dispute; and (2) the policies and needs of the interstate and international systems, including the policies of upholding the justified expectations of parties and of minimizing the adverse consequences that might follow from subjecting a party to the law of more than one state.

2. *Woodfield v. Bowman*, 193 F.3d 354 (5th Cir. 1999); *Davis Oil Co. v. TS, Inc.*, 145 F.3d 305 (5th Cir. 1998); *Roberts v. Energy Dev. Corp.*, 104 F.3d 782 (5th Cir. 1997); *Cherokee Pump & Equip. Inc. v. Aurora Pump*, 38 F.3d 246 (5th Cir. 1994); *In re Bank of Louisiana/Kenwin Shops Inc.*, No. 97 MDL 1193, 1999 WL 1072542 (E.D. La. Nov. 10, 1999); *Copelco Capital, Inc. v. Gautreaux*, No. 99-850, 1999 WL 1034740 (E.D. La. Nov. 10, 1999); *Pettigrew v. ABB Lummus Global, Inc.*, 53 F. Supp. 2d 864 (E.D. La. 1999); *Bauer v. Gov't Employees Ins. Co.*, 61 F. Supp. 2d 514 (E.D. La. 1999); *Metal Bldg. Components, Inc. v. Gibson Roofers, Inc.*, No. 97-2185, 1999 WL 225453 (E.D. La. Apr. 15, 1999); *Muirfield, L.P. v. Pitts, Inc.*, 17 F. Supp. 2d 600 (W.D. La. 1998); *CXY Chems. U.S.A. v. Gerling Global Gen. Ins. Co.*, 991 F. Supp. 770 (E.D. La. 1998); *N.J. Collins, Inc. v. Pacific Leasing, Inc.*, No. 97-2379, 1997 WL 786239 (E.D. La. Dec. 19, 1997); *R-Square Invs., Inc. v. Teledyne Indus.*,

manner. The courts in these cases never identify a difference between Louisiana law and the law of another state before making a choice-of-law analysis.<sup>3</sup> In three more cases, the courts apply the Code provisions even though the differences between Louisiana law and the law of the other state would not produce a difference in result.<sup>4</sup> Other cases make some other fundamental mistake in the mechanical process of applying the Code provisions.<sup>5</sup> Only five,<sup>6</sup> or perhaps six cases<sup>7</sup> apply the Code as the drafters intended. It is for these few cases that criticism reaches the level of evaluating the courts' sagacity in applying the Code to the circumstances.

I wish to make it clear at the outset that I am not disparaging the wisdom or competence of any judge. Judges are not stupid, just busy. They meet choice-of-law issues rarely. Of the twenty-nine judges on the Louisiana courts of appeal who participated in these decisions, only four had more than one choice-of-law case, and each of those had only two cases.<sup>8</sup> Of the twenty-one federal Fifth Circuit and district court judges who participated in these decisions, six had more than one case, and only one of these had more than two cases.<sup>9</sup> Perhaps in no other area of the law

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No. 96-2978, 1997 WL 436245 (E.D. La. July 31, 1997); *Coast Concrete Servs., Inc. v. Cooper Equip. Co.*, No. 95-3949, 1996 WL 577937 (E.D. La. Oct. 8, 1996); *Anderson v. T & D Mach. Handling, Inc.*, Nos. 94-3188, 94-3194, 94-3568, 95-0066, 94-1062, 95-4262, 1996 WL 518140 (E.D. La. Sept. 9, 1996); *Abell Corp. v. Northland Ins. Co.*, No. 96-0717, 1996 WL 481072 (E.D. La. Aug. 23, 1996); *Ludwig v. Bottomly & Assocs., Inc.*, No. 95-3830, 1996 WL 426678 (E.D. La. July 26, 1996); *Russellville Steel Co. v. Bohnert Constr. Co.*, No. 94-3332, 1995 WL 510081 (E.D. La. Aug. 25, 1995); *Davis Oil Co. v. TS, Inc.*, 93-0587, 1994 WL 449539 (E.D. La. Aug. 16, 1994); *Thomas v. Amoco Oil Co.*, 815 F. Supp. 184 (W.D. La. 1993); *First Ala. Bank v. Baber*, No. 92-1662, 1992 WL 245611 (E.D. La. Sept. 16, 1992); *Coleman v. Robinson*, No. 99-3097, 1999 WL 691887 (La. App. 4th Cir. Sept. 1, 1999); *Anderson v. Oliver*, 705 So. 2d 301 (La. App. 3d Cir.), *writ denied*, 718 So. 2d 434 (La. 1998); *Plyman v. Strain*, 702 So. 2d 1204 (La. App. 4th Cir. 1997); *Shell Oil Co. v. Hollywood Marine, Inc.*, 701 So. 2d 1038 (La. App. 5th Cir. 1997); *Trautman v. Poor*, 685 So. 2d 516 (La. App. 3d Cir. 1996); *Welch v. A.G. Edwards & Sons, Inc.*, 677 So. 2d 529 (La. App. 4th Cir. 1996); *Moore v. KLLM, Inc.*, 673 So. 2d 1268 (La. App. 5th Cir. 1996); *Gill v. Matlack, Inc.*, 671 So. 2d 395 (La. App. 1st Cir. 1995); *Sentilles Optical Servs. v. Phillips*, 651 So. 2d 395 (La. App. 2d Cir. 1995); *Holcomb v. Universal Ins. Co.*, 640 So. 2d 718 (La. App. 3d Cir. 1994); *Levy v. Jackson*, 612 So. 2d 894 (La. App. 4th Cir. 1993).

I located the cases by running through Westlaw various combinations of key words from Articles 3537 and 3540, sometimes including the numbers of the articles.

3. See *infra* notes 10-23 and accompanying text.
4. See *infra* notes 34-44 and accompanying text.
5. See *infra* notes 15-19, 45-67 and accompanying text.
6. See *infra* notes 68-83 and accompanying text.
7. See *infra* notes 84-88 and accompanying text.
8. H. Charles Gaudin: *Shell Oil Co. v. Hollywood Marine, Inc.*, 701 So. 2d 1038 (La. App. 5th Cir. 1997); *Moore v. KLLM, Inc.*, 673 So. 2d 1268 (La. App. 5th Cir. 1996). Sol Gothard: same cases as Gaudin, *supra*. Glenn B. Gremillion: *Anderson v. Oliver*, 705 So. 2d 301 (La. App. 3d Cir.), *writ denied*, 718 So. 2d 434 (La. 1998); *Trautman v. Poor*, 685 So. 2d 516 (La. App. 3d Cir. 1996). Charles R. Jones: *Welch v. A.G. Edwards & Sons, Inc.*, 677 So. 2d 529 (La. App. 4th Cir. 1996); *Levy v. Jackson*, 612 So. 2d 894 (La. App. 4th Cir. 1993).
9. Stanwood R. Duval, Jr.: *In re Bank of Louisiana/Kenwin Shops Inc.*, No. 97 MDL 1193, 1999 WL 1072542 (E.D. La. Nov. 24, 1999); *Anderson v. T & D Mach. Handling, Inc.*, Nos. 94-3188, 94-3194, 94-3568, 95-0066, 94-1062, 95-4262, 1996 WL 518140 (E.D. La. Sept. 1996). Edith H. Jones: *Woodfield v. Bowman*, 193 F.3d 354 (5th Cir. 1999); *Davis Oil Co. v. TS, Inc.*, 145 F.3d 305

are judges as dependent on the parties' lawyers to provide guidance. The only time that it is fair to blame a judge for a botched choice-of-law decision is when counsel has held up the light and the judge persists in not seeing. Without studying the briefs and transcripts of arguments in all of these cases, I cannot know whether this has occurred, but it is counter-intuitive to think that such obduracy in error occurs frequently, if at all.

Part II of this article analyzes the cases. Part III draws some conclusions and suggests actions that might result in better choice-of-law decisions.

## II. ANALYSIS OF THE CASES

### A. Cases that Do Not Indicate any Differences Between the Laws

As stated in Part I, fifteen of the cases make the basic mistake of purporting to apply the Code without adverting to any differences between Louisiana law and the law of another state.<sup>10</sup> The reason that this is a basic mistake is that the Code selects law separately for each issue in the case and requires a court to apply "the law of the state whose policies would be most seriously impaired if its law were not applied to that issue."<sup>11</sup> In order to determine which state's policy "would be most seriously impaired," a court must first identify the substantive rule applicable to the issue in Louisiana and in the other state or states that have contacts with the parties and the transaction. If, and only if, there are different applicable rules, should the court proceed to identify the policies underlying the conflicting rules and then

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(5th Cir. 1998). Mary Ann Vial Lemmon: Bauer v. Government Employees Ins. Co., 61 F. Supp. 2d 514 (E.D. La. 1999); CXY Chems. U.S.A. v. Gerling Global Gen. Ins. Co., 991 F. Supp. 770 (E.D. La. 1998). G. Thomas Porteous, Jr.: Copelco Capital, Inc. v. Gautreaux, No. 99-850, 1999 WL 1034740 (E.D. La. Nov. 10, 1999); Coast Concrete Servs., Inc. v. Cooper Equip. Co., No. 95-3949, 1996 WL 577937 (E.D. La. Oct. 8, 1996). Nauman S. Scott: Muirfield, L.P. v. Pitts, Inc., 17 F. Supp. 2d 600 (W.D. La. 1998); Thomas v. Amoco Oil Co., 815 F. Supp. 184 (W.D. La. 1993). Morey L. Sear (four cases): Abell Corp. v. Northland Ins. Co., No. 96-0717, 1996 WL 481072 (E.D. La. Aug. 23, 1996); Ludwig v. Bottomly & Assocs., Inc., No. 95-3830, 1996 WL 426678 (E.D. La. July 26, 1996); Russellville Steel Co. v. Bohnert Constr. Co., No. 94-3332, 1995 WL 510081 (E.D. La. Aug. 25, 1995); First Ala. Bank v. Baber, No. 96-1662, 1992 WL 245611 (E.D. La. Sept. 16, 1992).

10. In re Bank of Louisiana/Kenwin Shops Inc., No. 97 MDL 1193, 1999 WL 1072542 (E.D. La. Nov. 24, 1999); Pettigrew v. ABB Lummus Global, Inc., 53 F. Supp. 2d 864 (E.D. La. 1999); Metal Bldg. Components, Inc. v. Gibson Roofers, Inc., No. 97-2185, 1999 WL 225453 (E.D. La. Apr. 15, 1999); Muirfield, L.P. v. Pitts, Inc., 17 F. Supp. 2d 600 (W.D. La. 1998); CXY Chems. U.S.A. v. Gerling Global Gen. Ins. Co., 991 F. Supp. 770 (E.D. La. 1998); Coast Concrete Servs., Inc. v. Cooper Equip. Co., No. 95-3949, 1996 WL 577937 (E.D. La. Oct. 8, 1996); Anderson v. T & D Mach. Handling, Inc., Nos. 94-3188, 94-3194, 94-3568, 95-0066, 94-1062, 95-4262, 1996 WL 518140 (E.D. La. Sept. 9, 1996); Abell Corp. v. Northland Ins. Co., No. 96-0717, 1996 WL 481072 (E.D. La. Aug. 23, 1996); Russellville Steel Co. v. Bohnert Constr. Co., No. 94-3332, 1995 WL 510081 (E.D. La. Aug. 25, 1995); Davis Oil Co. v. TS, Inc., No. 93-0587, 1994 WL 449539 (E.D. La. Aug. 16, 1994); Thomas v. Amoco Oil Co., 815 F. Supp. 184 (W.D. La. 1993); First Ala. Bank v. Baber, No. 92-1662, 1992 WL 245611 (E.D. La. Sept. 16, 1992); Coleman v. Robinson, No. 99-3097, 1999 WL 691887 (La. App. 4th Cir. Sept. 1, 1999); Plyman v. Strain, 702 So. 2d 1204 (La. App. 4th Cir. 1997); Gill v. Matlack, Inc., 671 So. 2d 395 (La. App. 1st Cir. 1995).

11. La. Civ. Code arts. 3515, 3537, *supra* note 1.

determine which policy would be most seriously impaired if not given effect. Moreover, two years after the Code took effect, Professor Symeonides, who was the Reporter for the Conflicts Codification, wrote an article explaining the new law.<sup>12</sup> In this article, he commented on two of the cases discussed here<sup>13</sup> and criticized them for not determining whether there was any difference between the laws of Louisiana and the other states involved. He remarked, "[w]ithout [reference to the relevant policies of the two states] the choice-of-law decision is bound to degenerate into a quantitative counting of contacts."<sup>14</sup>

It may well be that in one or more of these fifteen cases the author of the opinion was aware of a difference in law that he or she did not mention. For example, one of the cases in the sample, *Davis Oil Co. v. TS, Inc.*,<sup>15</sup> emerged again in the Fifth Circuit in an opinion that indicates why a choice between Ontario and Louisiana law might be necessary.<sup>16</sup> Moreover, the Fifth Circuit opinion twice correctly stated that if there is no difference in law, the Code requires the court to apply the law of the Louisiana forum.<sup>17</sup> The Fifth Circuit opinion decided that a clause choosing Ontario law did not cover the issue before the court and that therefore Article 3540 did not require application of that law.<sup>18</sup> The opinion should have gone on to explain why, in the absence of an effective choice of law, Article 3537 required the court to apply Louisiana law. The opinion, however, simply assumes that if Ontario law does not apply under the choice-of-law clause, the court can eliminate Ontario law from its analysis.<sup>19</sup>

Could the drafters, by more clearly stating the central importance of determining whether it makes any difference which law applies, have prevented these fifteen courts from misapplying the Code? Products in everyday use have conspicuous warnings to guard against misuse. I have a four-legged aluminum ladder that has three such warnings. The ladder has a thin plastic shelf near the top for holding tools, pails, and such. Bold letters on this shelf read "NOT A STEP." Three steps from the top of this twelve-foot ladder there is a sign reading "DO NOT CLIMB ABOVE THIS STEP." Elsewhere there is a sign stating: "WARNING. MISUSE OF THIS LADDER CAN RESULT IN INJURY OR DEATH." Perhaps the drafters should have done the same for Article 3537. "WARNING. MISUSE OF THIS SECTION WILL PRODUCE NONSENSE. UNTIL YOU KNOW THAT THE LAW OF SOME OTHER STATE DIFFERS FROM LOUISIANA LAW IN A WAY THAT WILL AFFECT THE RESULT, USE LOUISIANA LAW."

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12. Symeon C. Symeonides, *Louisiana Conflict Law: Two Surprises*, 54 La. L. Rev. 497 n.\* (1994).

13. *Id.* at 524-27 (discussing *First Ala. Bank v. Baber*, No. 92-1662, 1992 WL 245611 (E.D. La. Sept. 16, 1992) and *Thomas v. Amoco Oil Co.*, 815 F. Supp. 184 (W.D. La. 1993)).

14. Symeonides, *supra* note 12, at 525.

15. No. 93-0587, 1994 WL 449539 (E.D. La. Aug. 16, 1994).

16. *Davis Oil Co. v. TS, Inc.*, 145 F.3d 305, 309 (5th Cir. 1998) (stating that Ontario, unlike Louisiana, might not permit the plaintiff to sue as a third party beneficiary of an agreement transferring the property from plaintiff's assignee to a successor).

17. *Id.* at 309 n.14.

18. *Id.* at 309.

19. *Id.* at 310.

Does not comment (d) to Article 3537 clearly convey this message? [T]he first step of the process is to identify "the relevant policies of the involved states." . . . The "relevant policies" of that state are identified through the resources of the interpretative process by focusing on the specific rules of substantive contract law whose applicability is being urged in the particular case.<sup>20</sup>

Not clear enough apparently. One of the fifteen cases, *CXY Chemicals U.S.A. v. Gerling Global General Insurance Co.*<sup>21</sup> quotes comment (d),<sup>22</sup> but never indicates whether Alberta and Louisiana laws differ with regard to construing the insurance policy in issue. Instead, the court discusses the abstract policies that might cause a state to construe an insurance policy as covering or not covering a loss.<sup>23</sup>

I have not included *Cherokee Pump & Equipment Inc. v. Aurora Pump*<sup>24</sup> in the fifteen cases, although it selects Illinois law without first determining whether that law is different from Louisiana law. In *Cherokee Pump*, a Louisiana distributor sued an Illinois manufacturer for wrongful termination of the distribution contract. The contract chose Illinois law, under which the termination was proper.<sup>25</sup> The reason that this case is not included as improperly choosing law when a choice is not necessary, is that by choosing Illinois law, the court avoided the difficult issue of whether the termination was improper under a recently enacted Louisiana statute and, if so, whether the court could constitutionally apply the statute retroactively.<sup>26</sup> It is legitimate adjudicative strategy to decide a case on an easy issue in order to avoid a difficult issue, especially one of constitutional dimensions.

The problem with this strategy in *Cherokee Pump* is that the choice-of-law issue was far more difficult than the court seemed to think. The opinion dismissed the dealer's contention that Illinois law "contravenes the public policy"<sup>27</sup> of Louisiana by abrogating the termination requirements of the Louisiana's Repurchase Statute:

We conclude that [the distributor] has not met that burden. It has adduced no authority to establish that the amendment to the Repurchase Statute expresses a public policy of Louisiana that would displace the choice-of-law determination made by the parties.<sup>28</sup>

Perhaps this dismissal of the public policy argument is justified in view of the Louisiana distributor's burden of persuasion. Nevertheless, a choice-of-law clause imposed by a franchiser or manufacturer should not deprive a state's franchisees

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20. La. Civ. Code art. 3537, cmt (d).

21. 991 F. Supp. 770 (E.D. La. 1998).

22. *Id.* at 774.

23. *Id.* at 776-77.

24. 38 F.3d 246 (5th Cir. 1994).

25. *Id.* at 247-48, 249-50.

26. *Id.* at 249-50.

27. La. Civ. Code art. 3540, *supra* note 1.

28. *Cherokee*, 38 F.3d at 252.

and distributors of protection under statutes specifically designed to ameliorate contracts of adhesion. In some states, the franchise statute specifically invalidates choice-of-law clauses which deprive local franchisees of the statute's protection.<sup>29</sup> Even without an express provision invalidating choice-of-law clauses, courts have refused to apply such clauses if they choose law that gives less protection than the franchisee's home-state statute.<sup>30</sup>

*Cherokee Pump* suggests another question. Does what I have said above, that a court should determine whether the law of another state is different from Louisiana law, apply to Article 3540, which gives the parties power to choose law? Suppose, for example, the contract chooses Missouri law and neither party demonstrates that Missouri law "contravenes the public policy of the state whose law would otherwise be applicable under Article 3537."<sup>31</sup> Should the court, with the assistance of the parties, simply determine Missouri law and apply it? Perhaps so if the court can easily determine and apply Missouri law. On the other hand, it might be more efficient to assume that Missouri law would produce the same result as Louisiana law and apply Louisiana law until one of the parties rebuts this presumption. Otherwise a court might discourse learnedly on the law of another state, complete with citations to many decisions of the courts of that state, when there is not a dime's worth of difference between that law and Louisiana law. For example, *Russellville Steel Co. v. Bohnert Construction Co.*<sup>32</sup> applied Missouri law as the law chosen by the parties, cited Missouri cases, and concluded that "[u]nder Missouri law, a party claiming breach of contract must prove (1) performance by the party seeking to enforce the agreement; (2) non-performance by the other party; and (3) damages."<sup>33</sup> Isn't that amazing!

### *B. Cases in which Different Laws Produce the Same Result*

Nor should a Louisiana court displace Louisiana law with the law of another state if that state's law, although different from Louisiana law, produces the same result. It is more efficient for the court to say, "it does not make any difference whether X law or Louisiana law applies, the result is \_\_\_\_." In *Copelco Capital, Inc. v. Gautreaux*,<sup>34</sup> pursuant to a choice-of-law clause in a lease of medical equipment, the court applied New Jersey statutory requirements for disclaimer of warranties and concluded that a disclaimer was effective.<sup>35</sup> Then the court

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29. See, e.g., Del. Code Ann. tit. 6, § 4917(b) (1993); Ga. Code Ann. § 10-1-624(b) (1994); Minn. Stat. Ann. § 80C.21 (West 1999).

30. See *Flynn Beverage Inc. v. Joseph E. Seagram & Sons, Inc.*, 815 F. Supp. 1174 (C.D. Ill. 1993) (construing anti-waiver provision of Illinois Franchise Act); *Cusamano v. Norrell Health Care, Inc.*, 607 N.E.2d 246 (Ill. App. 1992); cf. *Cottman Transmission Systems, Inc. v. Melody*, 869 F. Supp. 1180, 1185 (E.D. Pa. 1994) (enforcing choice-of-law clause because law chosen is "virtually identical" with law of franchisee's state).

31. La. Civ. Code. art. 3540, *supra* note 1.

32. No. 94-3332, 1995 WL 510081 (E.D. La. Aug. 25, 1995).

33. *Id.* at \*2.

34. No. 99-850, 1999 WL 1034740 (E.D. La. Nov. 10, 1999).

35. *Id.* at \*3-\*4.

determined that applying New Jersey law is not contrary to Louisiana public policy because "the waiver is valid under the more stringent Louisiana law, as well as under New Jersey law."<sup>36</sup> It would have saved time and effort to simply find "even if Dr. Gautreaux is correct that Louisiana law applies, the disclaimer is effective, so there is no need to explore the intricacies of the New Jersey Commercial Transactions Code."

Two other cases in the sample also spin their wheels exploring the laws of other states pursuant to choice-of-law clauses when those laws do not affect the result. *Welch v. A.G. Edwards & Sons, Inc.*<sup>37</sup> determined that under Missouri law a broker's agreement to indemnify his employer for certain losses was valid.<sup>38</sup> The issue before the court, however, was whether it should overturn for "manifest disregard of the law" an arbitration award in the employer's favor.<sup>39</sup> Even if Louisiana law applied and the award was improper under that law, the court stated that "errors of fact or law do not invalidate a fair and honest arbitration award."<sup>40</sup> Moreover, the award may have been correct under Louisiana law if the employee was not "acting in the course and scope of his employment at the time the incidents forming the basis for indemnity occurred. . . ."<sup>41</sup> The case fills eight pages of the reporter when, after stating the facts, the court should have delivered a one-sentence opinion: No matter what law applies the employee has not come close to meeting his burden of demonstrating any of the bases that would justify overturning an arbitration award: "dishonesty, bias, or any conscious attempt to disregard [the applicable] law."<sup>42</sup>

*Sentilles Optical Services v. Phillips*<sup>43</sup> refused to enforce an employee's covenant not to compete with his former employer. The employment contract selected North Carolina law. *Sentilles* devotes two and a half pages to discussing the operation of Articles 3537 and 3540 and applying them to the circumstances of the case before delivering a final sentence that rendered everything that preceded it an exercise in superfluous erudition: "While we consider the covenant unenforceable under either [North Carolina or Louisiana] law, we shall mechanically apply the Louisiana statutory requirement and affirm the judgment holding the covenant unenforceable."<sup>44</sup>

### C. Cases that Fail to Apply a Special Statutory Choice-of-Law Rule

Articles 3515, 3537, 3540 and the rest of the 1992 Louisiana Conflict Code (Book IV) do not apply if some other statute provides a choice-of-law rule for the

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36. *Id.* at \*4.

37. 677 So. 2d 529 (La. App. 4th Cir. 1996).

38. *Id.* at 524.

39. *Id.*

40. *Id.*

41. *Id.* at 526.

42. *Id.* at 524 (stating the standard for overturning an arbitration award).

43. 651 So. 2d 395 (La. App. 2d Cir. 1995).

44. *Id.* at 400.



specific matter in issue. This is made clear by Article 14: "Unless otherwise expressly provided by the law of this state, cases having contacts with other states are governed by the law selected in accordance with the provisions of Book IV of this Code."<sup>45</sup> Revision comment (a) to Article 3537 repeats this message:

According to Article 14, this and any other Article of this Title apply "[u]nless otherwise expressly provided by the law of this state." The following are among the Revised Statutes that "provide otherwise" [citing the Uniform Commercial Code, the Insurance Code, the Lease of Movables Act, and statutes applicable to consumer transactions]. When applicable, these statutes will prevail, being more specific, over the provisions of this Section.<sup>46</sup>

What could be clearer? Nevertheless four cases in the sample apply Articles 3537 and 3540 even when the court is aware of a more specific statutory rule.<sup>47</sup>

Two of the cases, *Anderson v. Oliver*<sup>48</sup> and *Holcomb v. Universal Insurance Co.*,<sup>49</sup> refused to apply the following choice-of-law provision in the Insurance Code:

This Subparagraph and its requirement for uninsured motorist coverage shall apply to any liability insurance covering any accident which occurs in this state and involves a resident of this state.<sup>50</sup>

In *Anderson*, a Georgia insured was injured by a collision in Louisiana with a vehicle driven by a Louisiana resident. The issue was the amount of the Georgia resident's underinsured motorist coverage: \$1,000,000 if Louisiana law applied, \$40,000 if Georgia law applied. The court applied Georgia law to protect the reasonable expectations of insurer and insured and because "[t]here is no compelling Louisiana interest that would override the application of Georgia law to its contracts in this case."<sup>51</sup> In *Holcomb*, a collision in Louisiana with a Louisiana resident injured Arkansas residents. The issue was whether the Arkansas residents had waived underinsured motorist coverage: yes if Arkansas law applied; no if Louisiana law applied. The court applied Arkansas law because that result advanced Arkansas' legitimate interests in regulating insurance issued in its state to Arkansas residents and impinged on no Louisiana interest.<sup>52</sup>

Both cases would have reached the right result if it were not for the provision of the Louisiana Insurance Code mandating application of Louisiana law.<sup>53</sup> It may

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45. La. Civ. Code art. 14, *supra* note 1.

46. La. Civ. Code art. 3537, revision cmt. (a).

47. *Coast Concrete Servs., Inc. v. Cooper Equip. Co.*, No. 95-3949, 1996 WL 577937 (E.D. La. Oct. 8, 1996); *Anderson v. Oliver*, 705 So. 2d 301 (La. App. 3d Cir.), *writ denied*, 718 So. 2d 434 (La. 1998); *Moore v. KLLM, Inc.*, 673 So. 2d 1268 (La. App. 5th Cir. 1996); *Holcomb v. Universal Ins. Co.*, 640 So. 2d 718 (La. App. 3d Cir. 1994).

48. 705 So. 2d 301 (La. App. 3d Cir.), *writ denied*, 718 So. 2d 434 (La. 1998).

49. 640 So. 2d 718 (La. App. 3d Cir. 1994).

50. La. R.S. 22:1406(D)(iii) (1995).

51. *Anderson*, 705 So. 2d at 306.

52. *Holcomb*, 640 So. 2d at 722.

53. See *supra* note 50 and accompanying text.

be that the Insurance Code is wrong in this regard, that it officiously meddles in what is the concern of sister states. Nevertheless, the legislature has spoken and unless its choice-of-law mandate is so outrageous as to be unconstitutional, Louisiana courts must obey. It is exceedingly unlikely that the statute is unconstitutional. The Supreme Court of the United States has left the states free to do what they will with choice of law, so long as they do not do it in the street and scare the horses.<sup>54</sup>

*Moore v. KLLM, Inc.*<sup>55</sup> held that the Louisiana Office of Workers' Compensation had subject matter jurisdiction of a claim for benefits filed by a Louisiana employee hired in Louisiana by a trucking company headquartered in Mississippi. The worker was injured on the job in California. The employment contract provided that Mississippi Workers' Compensation law "shall be the exclusive remedy against the employer on account of injury . . . arising out of employment."<sup>56</sup> First, the opinion spends a page and a half quoting Articles 3515, 3537 and 3540. Then, for good measure, the court throws in Articles 3542 and 3544 covering choice of law for torts.<sup>57</sup> As an afterthought, the court quotes portions of the Louisiana Workers' Compensation law<sup>58</sup> that provide coverage for any worker "working under a contract of hire made in this state"<sup>59</sup> and declare that "[n]o contract . . . shall operate to relieve the employer, in whole or in part, from any liability created by this Chapter. . . ."<sup>60</sup> These provisions of the Workers' Compensation law are special statutory choice-of-law rules that controlled the case and are all that the court should have cited in a one paragraph rather than a four page opinion.

*Coast Concrete Services, Inc. v. Cooper Equipment Co.*<sup>61</sup> concerned a lease between a North Carolina lessor and a Louisiana lessee. The court quoted Article 3540 and decided that applying the law of North Carolina, as stipulated in the lease, did not violate Louisiana public policy.<sup>62</sup> The reason the court gives for this conclusion is that Louisiana Revised Statutes 9:3303, governing leases of movables, expressly authorizes the parties to choose the law of the state of the lessor's principal office.<sup>63</sup> Section 9:3303 is a specific statutory choice-of-law provision and renders Article 3540 inapplicable. Moreover, the court does not indicate why it makes a difference whether it applies North Carolina or Louisiana law.

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54. See *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 101 S. Ct. 633 (1981) (permitting a Minnesota court to determine the level of uninsured motorist insurance under Minnesota law although the insurer issued the policy in Wisconsin to a Wisconsin resident who was killed in Wisconsin).

55. 673 So. 2d 1268 (La. App. 5th Cir. 1996).

56. *Id.* at 1269.

57. La. Civ. Code arts. 3542 ("General Rule"), 3544 ("Issues of Loss distribution and financial protection").

58. *Moore*, 673 So. 2d at 1272.

59. La. R.S. 23:1035.1(1)(b) (1998).

60. La. R.S. 23:1033 (1998).

61. No. 95-3949, 1996 WL 577937 (E.D. La. Oct. 8, 1996).

62. *Id.* at \*2-\*3.

63. *Id.* at \*3 (quoting La. R.S. 9:3303(B) (1997)).

Apparently Article 14<sup>64</sup> and comment (a) to Article 3537<sup>65</sup> are not sufficient to deter courts from applying the general conflicts provisions of the Civil Code when more specific choice-of-law provisions in other Louisiana statutes control the outcome. Perhaps another warning sign should precede Articles 3515 through 3549 in the conflicts code: "STOP. READ THE FOLLOWING STATUTORY PROVISIONS: [here insert every special choice-of-law provision in any Louisiana statute and keep the list up to date]. IF ANY OF THEM APPLY, USE THAT STATUTE TO CHOOSE LAW. DO NOT USE THIS ARTICLE." Silly? Maybe, but no sillier than the warning signs on my ladder.<sup>66</sup> If there had been this warning, the court in *Holcomb* could not have said:

Finally, we conclude that [the specific choice-of-law provision in the Louisiana Insurance Code] is inapplicable under the circumstances. This is so because we conclude, under our conflicts of law provisions, that Arkansas law should govern the outcome of this proceeding. The sub-part of the cited [insurance] statute referred to above is Louisiana law and therefore inapplicable.<sup>67</sup>

#### D. Cases that Got It Right

Five of the cases in the sample mastered the mechanics of applying the Conflict of Laws Code.<sup>68</sup> Each of these cases identified the differences between the putatively applicable laws as the first step in the court's analysis. *Bauer v. Government Employees Ins. Co.*<sup>69</sup> and *Trautman v. Poor*<sup>70</sup> properly applied the Insurance Code choice-of-law provision for coverage of injuries caused by uninsured and underinsured motorists.<sup>71</sup> *Bauer* correctly noted that the Insurance Code provision does not control because the accident in Louisiana "did not involve a Louisiana resident."<sup>72</sup> The court then applied Article 3537 to deny coverage under the law of Mississippi, where the insured lived and where the policy was issued.<sup>73</sup> *Trautman* correctly noted that the Insurance Code provision controlled and applied Louisiana law to confer coverage despite the fact that there was no coverage under the law of Tennessee, where the insured lived and the policy was issued.<sup>74</sup>

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64. See *supra* note 45 and accompanying text.

65. See *supra* note 46 and accompanying text.

66. See *supra* text following note 19.

67. *Holcomb v. Universal Ins. Co.*, 640 So. 2d 718, 722 (La. App. 3d Cir. 1994).

68. *Roberts v. Energy Dev. Corp.*, 104 F.3d 782 (5th Cir. 1997); *Bauer v. Government Employees Ins. Co.*, 61 F. Supp. 2d 514 (E.D. La. 1999); *Ludwig v. Bottomly & Assocs., Inc.*, No. 95-3830, 1996 WL 426678 (E.D. La. July 26, 1996); *Shell Oil Co. v. Hollywood Marine, Inc.*, 701 So. 2d 1038 (La. App. 5th Cir. 1997); *Trautman v. Poor*, 685 So. 2d 516 (La. App. 3d Cir. 1996).

69. 61 F. Supp. 2d 514 (E.D. La. 1999).

70. 685 So. 2d 516 (La. App. 3d Cir. 1996).

71. See *supra* note 50 and accompanying text.

72. *Bauer*, 61 F. Supp. 2d at 517.

73. *Id.* at 516-17.

74. *Trautman*, 685 So. 2d at 519-20.

*Roberts v. Energy Development Corp.*<sup>75</sup> noted that an indemnity agreement which chose Texas law was valid under Texas law but not under Louisiana law.<sup>76</sup> Then, applying Article 3537, the court remanded the case directing the trial court to determine whether Louisiana law would apply in the absence of the choice-of-law clause and, if so, whether applying Texas law would contravene Louisiana policy.<sup>77</sup>

*Ludwig v. Bottomly & Associates, Inc.*<sup>78</sup> followed the choice-of-law clause in an employment contract to apply Georgia law, under which the oral agreement alleged by the Louisiana employee was invalid.<sup>79</sup> The court properly noted that when applying Article 3740, which permits the parties to choose the applicable law, the employee, as the party opposing the choice-of-law clause, "bears the burden of proving that [Georgia law] violates public policy."<sup>80</sup> The court then determined that the employee had not met this burden.<sup>81</sup>

*Shell Oil Co. v. Hollywood Marine, Inc.*<sup>82</sup> applied the law of Texas, where a liability policy was issued to a Texas company, and denied coverage that would attach under Louisiana law. The court found that no Louisiana "interest is sufficient to override the compelling interest Texas has in regulating insurance contracts written in Texas and issued to Texas companies."<sup>83</sup>

Perhaps *N.J. Collins, Inc. v. Pacific Leasing, Inc.*<sup>84</sup> should be included in the list of cases that got it right. The court noted that Guam, where the seller of two tugboats was headquartered, had enacted Article 2 of the Uniform Commercial Code (U.C.C.), while Louisiana, where the buyer was incorporated, had not.<sup>85</sup> The court then chose the law of Guam, based on the physical contacts with that island and to protect the seller's "justifiable expectation that Article 2 of the U.C.C. would govern the agreements at issue . . . ." <sup>86</sup> The opinion also stated that "the parties agree that Guam is the jurisdiction whose policies would be most seriously impaired if its laws were not applied."<sup>87</sup> The opinion, however, never indicated why the result might be different under Louisiana law. The court denied a motion for summary judgment because "issues of material fact exist" concerning the buyer's contention that the seller waived the buyer's failure to make payments required by the contract of sale.<sup>88</sup> It is likely that issues of fact would have prevented granting the motion no matter what law applied. Nevertheless, it is difficult to fault the court

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75. 104 F.3d 782 (5th Cir. 1997).

76. *Id.* at 783-84.

77. *Id.* at 786-87.

78. No. 95-3830, 1996 WL 426678 (E.D. La. July 26, 1996).

79. *Id.* at \*2-\*4.

80. *Id.* at \*2.

81. *Id.*

82. 701 So. 2d 1038 (La. App. 5th Cir. 1997).

83. *Id.* at 1041.

84. No. 97-2379, 1997 WL 786239 (E.D. La. Dec. 19, 1997).

85. *Id.* at \*4.

86. *Id.*

87. *Id.*

88. *Id.* at \*5.

for simply analyzing the issues under the U.C.C., rather than comparing U.C.C. and Louisiana treatments of the waiver issue.

Three of the cases, *Woodfield v. Bowman*,<sup>89</sup> *R-Square Investments, Inc. v. Teledyne Industries*,<sup>90</sup> and *Levy v. Jackson*,<sup>91</sup> might receive honorable mention. They start off on the right foot by specifying what difference it makes what law applies, but then trip on some aspect of applying the provisions of the Conflict of Laws Code. *Woodfield* followed *Holcomb v. Universal Insurance Co.*,<sup>92</sup> which did not apply the special Insurance Code provision on choice of law,<sup>93</sup> when *Woodfield* should have followed *Trautman v. Poor*,<sup>94</sup> which did.<sup>95</sup> *R-Square Investments* did a fine job of applying Article 3537 to determine contractual liability for a defective product,<sup>96</sup> but did not apply the foreseeability rule of Article 3545<sup>97</sup> to determine whether Louisiana law applies to tort liability.<sup>98</sup> *Levy v. Jackson*<sup>99</sup> properly decided that under the common domicile rule of Article 3544,<sup>100</sup> the Alabama guest statute applied to prevent recovery for ordinary negligence.<sup>101</sup> The court then, however, declared that "this conflict of law problem is foremost and principally an issue of insurance coverage, and therefore one of contract" and applied Article 3537.<sup>102</sup> Fortunately it decided that Article 3537 also requires application of Alabama law.<sup>103</sup>

### III. CONCLUSION

It is a sad spectacle when members of a learned profession make fundamental mistakes in the process for applying the Louisiana Conflict of Laws Code. One might have thought that Professor Symeonides' article explaining the Code<sup>104</sup> and the carefully drafted comments that follow each of its provisions would have prevented these errors. The conflict of laws is crucial to any lawyer who advises clients engaged in interstate or international transactions or who assists in resolving disputes arising from those transactions. When bar examiners took the subject off the bar examinations, attendance in the course plummeted. Louisiana's experience

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89. 193 F.3d 354 (5th Cir. 1999).

90. No. 96-2978, 1997 WL 436245 (E.D. La. July 31, 1997).

91. 612 So. 2d 894 (La. App. 4th Cir. 1993).

92. 640 So. 2d 718 (La. App. 3d Cir. 1994).

93. See *supra* notes 48-51, 66 and accompanying text.

94. 685 So. 2d 516 (La. App. 3d Cir. 1996).

95. See *supra* note 74 and accompanying text.

96. *R-Square Invs.*, No. 96-2978, 1997 WL 436245, at \*3-\*5.

97. La. Civ. Code art. 3545 (applying Louisiana law to determine liability for damage caused in Louisiana by a defective product if "defendant's products of the same type were made available in this state through ordinary commercial channels").

98. *R-Square Invs.*, No. 96-2978, 1997 WL 436245, at \*6-\*7 (stating that Louisiana law permits recovery in tort for injury to the product itself but applying Article 3537 rather than Article 3545).

99. 612 So. 2d 894 (La. App. 4th Cir. 1993).

100. La. Civ. Code art. 3544(1) (governing "[i]ssues of loss distribution and financial protection").

101. *Levy*, 612 So.2d at 896.

102. *Id.* at 897.

103. *Id.*

104. See Symeonides, *supra* note 12.

with its Conflict of Laws Code is not unique. All over the country, state and federal courts that purport to be following one of the new choice-of-law methods list territorial contacts and select law without knowing whether it matters what law applies.<sup>105</sup> It may help to greatly increase the number of hours devoted to choice of law in continuing legal education programs. Today, facility in choice-of-law theory is likely to give a lawyer a substantial advantage over opposing counsel. Maybe conveying that message to law students is a way to get them to take the Conflicts course without putting it back on the bar examination.

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105. See, e.g., *Scheerer v. Hardee's Food Sys., Inc.*, 92 F.3d 702, 708 (8th Cir. 1996) (purporting to apply the "most significant relationship" test, but choosing law by counting physical contacts); *Minnesota Mining & Mfg. Co. v. Nishika Ltd.*, 953 S.W.2d 733, 735-37 (Tex. 1997) (choosing Minnesota law by counting physical contacts although Minnesota law is the same as that in all the other states involved). 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").

