# Court's Choice of Law Ruling Undermines Washington Community Property Law: A Critique of *Shanghai Commercial Bank v. Chang*

*Brian D. Hulse**

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* Brian D. Hulse is a partner with the Seattle office of Davis Wright Tremaine LLP. He focuses his practice on real estate finance, construction finance, commercial lending and transactions, loan workouts, and insolvency. He is a co-chair of the State Law Survey Task Force of the American Bar Association's Commercial Finance Committee, for which he acted as editor, and author of the Washington chapter, of the books COMMERCIAL LENDING LAW: A JURISDICTION-BY-JURISDICTION GUIDE TO U.S. AND CANADIAN LAW, and THE LAW OF GUARANTIES: A JURISDICTION-BY-JURISDICTION GUIDE TO U.S. AND CANADIAN LAW, both published by the ABA. He is also a fellow and former regent of the American College of Commercial Finance Lawyers, a fellow of the American College of Mortgage Attorneys, and a member of the Legal Opinions Committee of the Washington State Bar Association. He can be reached at brianhulse@dwt.com. The views expressed in this Article are solely those of the author and not necessarily those of his law firm or any of its clients.

## INTRODUCTION

This Article deals with the issues that arise when Washington courts face the following scenario. One spouse enters into a contract without the joinder (and perhaps without the knowledge) of the other spouse. Both spouses are domiciled in Washington.[1] The contract has contacts with one or more jurisdictions other than Washington and is generally governed as to validity and interpretation by the law of another jurisdiction. The contracting spouse defaults and the other party to the contract obtains a judgment on the contract. The court confronts a question about the property to which the plaintiff will have recourse to collect the judgment.

1. The common law concepts of "domicile" and "residence" are sometimes confused but are two distinct concepts. *In re* Estate of Tolson, 89 Wash. App. 21, 36, 947 P.2d 1242 (1997). The *Tolson* court, in describing the distinction, stated that "'[r]esidence' indicates where a person lives while 'domicile' signifies the place where a person intends a fixed and permanent home." *Id.*; *see also Ex parte* Mullins, 26 Wash. 2d 419, 445, 174 P.2d 790 (1946) ("Traditional formulas require conjunction of physical presence and intention to remain permanently in the new location to bring about a domiciliary change."). This Article generally uses the terms "domicile" and "residence" without distinguishing the concepts, but in both cases intending the technical meaning attached to the former term.

Specifically, the question is whether the plaintiff will have recourse only to the separate property of the contracting spouse or, in addition, recourse to the spouses' community property. This Article refers to this question as the "property recourse issue." The court must also decide whether the issue is governed by Washington law or by the law of the other relevant jurisdiction.

A court's resolution of the property recourse issue can have dire consequences for the parties. Many couples hold all or most of their property as community property. If a creditor has recourse to their community property for a large judgment, the effect can be financially ruinous to both spouses, not just the one who incurred the debt. If the creditor has recourse only to the incurring spouse's separate property, it may not be able to collect on its judgment.

Washington appellate courts have wrestled with the property recourse issue repeatedly over the past half century and reached largely consistent conclusions until the Washington Supreme Court's 2017 decision in *Shanghai Commercial Bank Limited v. Chang*.[2]

The facts in *Shanghai Commercial* are striking.[3] The spouses had lived in Washington since before they were married, a period of more than twenty years.[4] The husband and his father signed documents for a loan from a Chinese bank.[5] The father lived in China, received the loan documents in China, and mailed them to the husband in Washington for signature.[6] The wife did not sign any of the documents and was unaware that her husband entered into the loan.[7] The loan documents provided that they were to be governed by Hong Kong law.[8] After default on the loan, the bank obtained a multi-million-dollar judgment against the husband in a Hong Kong court.[9] The wife was not a party to the Hong Kong lawsuit.[10] The bank domesticated the judgment in Washington and sought to enforce it against the spouses' community property.[11] The spouses defended on the ground that the husband did not incur the debt for the benefit of the marital community and, therefore under Washington community property law, the judgment could not be enforced against their community property.[12] The

2. Shanghai Com. Bank Ltd. v. Chang, 189 Wash. 2d 474, 404 P.3d 62 (2017), *aff'g* 195 Wash. App. 896, 381 P.3d 212 (2016).

3. See Section IV.A for a more complete description of the facts of the case.

4. *Shanghai Com. Bank*, 189 Wash. 2d at 478 n.3.

5. *Id.* at 477.

6. *Id.* at 477–78.

7. *Id.* at 477.

8. *Id.* at 477.

9. *Id.* at 479.

10. *Id.* at 478.

11. *Id.*

12. *Id.*

court concluded, based on the documents' choice of law clause, that Hong Kong law governed both the interpretation of the contract and the property recourse issue.[13] It held that Hong Kong marital property law would allow recourse for the loan to all property that would be community property under Washington law.[14]

This Article will briefly describe the basics of Washington's community property laws as they relate to contract obligations incurred by one spouse without the joinder of the other. It will then survey Washington's choice of law rules generally and its earlier cases dealing with the choice of law for the property recourse issue. Finally, it will discuss and critique the *Shanghai Commercial* case in more detail. It respectfully concludes that *Shanghai Commercial* was wrongly decided both as a policy matter and in its application of prior Washington law and that the courts of Arizona, another community property state, have taken a better approach to the property recourse issue.

## I. WASHINGTON COMMUNITY PROPERTY LAW

Washington statutory law on community property is codified in Revised Code of Washington Chapter 26.16[15] and is elaborated in extensive case law. This Article includes only a basic outline of some major provisions of Washington's community property laws that are most relevant to the choice of law issues that are the focus of the Article.[16] It does not address the choice of law issues that arise when married couples move from state to state during their marriage or acquire assets in multiple states.

### *A. Distinguishing Community Property from Separate Property*

"Property and pecuniary rights owned by a spouse before marriage and that acquired by him or her afterwards by gift, bequest, devise, descent, or inheritance, with the rents, issues and profits thereof . . . ." are the separate property of the acquiring spouse.[17] All other property that either spouse acquires during the marriage, including his or her earnings,

13. *Id.* at 489.

14. *Id.*

15. The community property laws apply to registered domestic partners under Revised Code of Washington Chapter 26.60 as well as to spouses. For ease of reading, this Article will refer to spouses, but the concepts apply equally to registered domestic partners.

16. For a more complete treatment of the community property laws, see generally Harry M. Cross, *The Community Property Law in Washington*, 61 WASH. L. REV. 13 (1986) and WASHINGTON STATE BAR ASSOCIATION, WASHINGTON COMMUNITY PROPERTY DESKBOOK (4th ed. 2014).

17. WASH. REV. CODE §§ 26.16.010, .020.

is community property.[18] Income produced by substantial labor in managing separate assets is also community property.[19]

"Although all property acquired during marriage is presumptively community property, spouses may agree to change the character of their property from separate to community or vice versa."[20] The *Diafos* court elaborated on that rule, stating:

> Separate property agreements may be used to insulate one spouse from the other spouse's liabilities so long as the agreement does not derogate from the rights of creditors. Thus, those with an existing interest in property at the time a separate property agreement is executed may challenge its validity, but no such protection is available to postagreement creditors. . . . Separate property agreements are held to a higher standard than community property agreements because the law favors the creation of community property.[21]

Separate property can also be converted to community property by commingling. "Where separate funds have been so commingled with community funds that it is no longer possible to distinguish or apportion them, all of the commingled fund, or the property acquired thereby, is community property."[22]

### *B. Distinguishing Community Obligations from Separate Obligations*

The basic statutory rule about what constitutes a community liability as opposed to a separate liability of the spouse who incurs it, subject to limited exceptions, is that,

> Neither person in a marriage or state registered domestic partnership is liable for the debts or liabilities of the other incurred before marriage or state registered domestic partnership, nor for the separate debts of each other, nor is the rent or income of the separate property of either liable for the separate debts of the other.[23]

If there is "any expectation of benefit to the community" from a transaction at the time it is entered into, it is a community obligation, and

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18. *Id.* § 26.16.030.

19. *In re* Marriage of Bernard, 165 Wash. 2d 895, 904, 204 P.3d 907 (2009).

20. *In re* Diafos, 110 Wash. App. 758, 766, 37 P.3d 304 (2001) (citing WASH. REV. CODE § 26.16.120).

21. *Id.* at 766–67.

22. *In re* Witte's Estate, 21 Wash. 2d 112, 125, 150 P.2d 595 (1944), *quoted in* Schwarz v. Schwarz, 192 Wash. App. 180, 190 n.3, 368 P.3d 173 (2016).

23. WASH. REV. CODE § 26.16.200.

there is recourse to all the community property.[24] Community liability is presumed, and the burden is on the party seeking to rebut that presumption to produce evidence to do so.[25]

Washington's general rule is that if a contractual obligation is a separate obligation, the creditor does not have recourse to *any* of the community property.[26] Limited exceptions to this rule exist, including exceptions for certain pre-marriage obligations, alimony, and child support.[27]

Washington has an equal management community property system under which, subject to certain statutory exceptions, either spouse "acting alone, may manage and control community property, with a like power of disposition as the acting spouse or domestic partner has over his or her separate property."[28] The statutory exceptions include the following limitations on one spouse's ability, acting alone, to create community liability by contract:

- "Neither person shall give community property without the express or implied consent of the other."[29]
- "Neither person shall purchase or contract to purchase community real property without the other spouse or other domestic partner joining in the transaction of purchase or in the execution of the contract to purchase."[30]
- "Neither person shall acquire, purchase, sell, convey, or encumber the assets, including real estate, or the good will of a business where both spouses or both domestic partners participate in its management without the consent of the other."[31]

Each of these exceptions has a slightly different formulation of the participation required from the non-contracting spouse. The first requires

24. Beyers v. Moore, 45 Wash. 2d 68, 70, 272 P.2d 626 (1954); *see also* Trinity Universal Ins. Co. of Kan. v. Cook, 168 Wash. App. 431, 437, 276 P.3d 372 (2012) (quoting Sunkidd Venture, Inc. v. Snyder–Entel, 87 Wash. App. 211, 215, 941 P.2d 16 (1997)) ("The key test is whether, at the time the obligation was entered into, there was a reasonable expectation the community would receive a material benefit from it.").

25. Bank of Wash. v. Hilltop Shakemill, Inc., 26 Wash. App. 943, 948, 614 P.2d 1319 (1980).

26. Pac. Gamble Robinson Co. v. Lapp, 95 Wash. 2d 341, 344, 622 P.2d 850 (1980).

27. *See* Cross, *supra* note 16, at 125–40. There is a different rule for tort liability that is separate rather than community in nature. *See generally* de Elche v. Jacobsen, 95 Wash. 2d 237, 622 P.2d 835 (1980) (establishing rule that separate property of tortfeasor spouse is primarily liable, but if it is insufficient, recourse can be had to the tortfeasor's half interest in community property); Nichols Hills Bank v. McCool, 104 Wash. 2d 78, 86–88, 701 P.2d 1114 (1985). The supreme court has declined to extend the *de Elche* rule to contract obligations.

28. WASH. REV. CODE § 26.16.030.

29. *Id.* § 26.16.030(2).

30. *Id.* § 26.16.030(4).

31. *Id.* § 26.16.030(6).

"express or implied consent." The second requires "joining in the transaction." The third requires "consent." Washington courts have held that the first exception applies where a spouse guarantees a loan or other obligation as a favor to a family member if there is no reasonable expectation of an economic benefit to the marital community.[32]

## II. WASHINGTON CHOICE OF LAW RULES

### *A. Adoption of Second Restatement Approach*

The Washington Supreme Court made a major change in its choice of law rules in the 1967 landmark decision *Baffin Land Corp. v. Monticello Motor Inn, Inc.*[33] Prior to *Baffin Land*, Washington followed "what was once considered the inexorable, but is now the largely discredited, theory of vested rights."[34] Under the vested rights theory, in the absence of a contractual choice of law by the parties, the rule of *lex loci contractus* applied, which provided that a contract was governed by the law of the jurisdiction where the "last act necessary to form a binding contract occurred."[35] The *Baffin Land* court overruled prior cases that followed the *lex loci contractus* approach and adopted the approach of the Restatement (Second) of Conflict of Laws[36] (the "Second Restatement"), which was then in tentative draft form. That draft provided that, in the absence of an effective contractual choice of law, "the law of the state with which the contract has the most significant relationship, except perhaps in the unusual case of usury, will govern the validity and effect of a contract."[37]

Since the *Baffin Land* decision, Washington courts have consistently looked to the Second Restatement for their choice of law rules in contract

32. *See*, *e.g.*, *Nichols Hills Bank*, 104 Wash. 2d at 81–86 (finding that neither assisting the signing spouse with typing a financial statement submitted to the lender nor failing to advise the lender of disapproval of the guaranty constituted implied consent of the non-signing spouse to the guaranty of a debt of the couple's son). *See also* Zarbell v. Mantas, 32 Wash. 2d 920, 924, 204 P.2d 203 (1949) ("It has long been well-settled law in this state that community property is liable for a suretyship debt of one of the parties only if the community has been benefited by the suretyship obligation.").

33. Baffin Land Corp. v. Monticello Mot. Inn, 70 Wash. 2d 893, 899, 425 P.2d 623 (1967).

34. *Id.* at 897.

35. *Id.* at 895.

36. *See generally* RESTATEMENT (SECOND) OF CONFLICT OF LAWS (1971). A third restatement of conflict of laws is currently being drafted but has not yet progressed beyond draft form. *See Restatement of the Law Third, Conflict of Laws: Status Details*, AM. L. INST., https://www.ali.org/projects/show/conflict-laws/ [https://perma.cc/SE79-PAY2].

37. *Baffin Land Corp.*, 70 Wash. 2d at 899 (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS (Tent. Draft No. 6), Introductory Note, § 2 (1961)). That rule is currently set forth in RESTATEMENT (SECOND) OF CONFLICT OF LAWS, § 188(1) (1971).

cases.[38] Because of the change made by *Baffin Land*, prior choice of law cases are not reliable guides to the Washington courts' current approach to choice of law issues.

### *B. Second Restatement Provisions*

The Second Restatement has three provisions that are particularly relevant to the subject of this Article. Section 6 addresses general choice of law principles. Section 187 deals with contracts in which the parties expressly choose a governing law.[39] Section 188 deals with contracts in which the parties do not expressly choose a governing law.[40]

#### 1. General Choice of Law Principles (§ 6)

Section 6 provides that, when there is no statutory directive of the governing law, a court should consider the following factors:

> (a) the needs of the interstate and international systems,
>
> (b) the relevant policies of the forum,
>
> (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
>
> (d) the protection of justified expectations,
>
> (e) the basic policies underlying the particular field of law,
>
> (f) certainty, predictability and uniformity of result, and
>
> (g) ease in the determination and application of the law to be applied.[41]

The comments to Section 6 say that in certain areas, "[a]t least some" of these factors "will point in different directions in all but the simplest case."[42] Furthermore, "[a]ll that can presently be done in these areas is to state a general principle, such as application of the local law 'of the state of most significant relationship,' which provides some clue to the correct approach but does not furnish precise answers."[43]

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38. *See*, *e.g.*, Shanghai Com. Bank v. Chang, 189 Wash. 2d 474, 482–86, 404 P.3d 62 (2017); Erwin v. Cotter Health Ctrs., 161 Wash. 2d 676, 693, 167 P.3d 1112 (2007); Pac. Gamble Robinson Co. v. Lapp, 95 Wash. 2d 341, 343–46, 622 P.2d 850 (1980).

39. RESTATEMENT (SECOND) OF CONFLICT OF LAWS, § 187 (1971).

40. *Id.* § 188.

41. *Id.* § 6(2).

42. *Id.* § 6(2) cmt. c.

43. *Id.*

2. Contracts with an Express Choice of Law (§ 187)

Section 187 provides:

> (1) The law of the state chosen by the parties to govern their contractual rights and duties will be applied if the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed to that issue.
>
> (2) The law of the state chosen by the parties to govern their contractual rights and duties will be applied, even if the particular issue is one which the parties could not have resolved by an explicit provision in their agreement directed to that issue, unless either
>
> (a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice, or
>
> (b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of § 188, would be the state of the applicable law in the absence of an effective choice of law by the parties.
>
> (3) In the absence of a contrary indication of intention, the reference is to the local law of the state of the chosen law.[44]

In summary, Section 187 provides that courts should respect express contractual choice of law provisions unless either: (a) the chosen jurisdiction has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the choice, or (b) the application of the chosen law would be contrary to a "fundamental policy" of another jurisdiction with a materially greater interest than the chosen state in the determination of the "particular issue"[45] and would be the governing law in the absence of an effective contractual choice of law.

3. Contracts without an Express Choice of Law (§ 188)

Section 188 deals with contracts where parties have not expressed a choice of governing law or where their expressed choice of law is not "effective" under Section 187.[46] It provides:

> (1) The rights and duties of the parties with respect to an issue in contract are determined by the local law of the state which, with

44. *Id.* § 187.

45. This issue-by-issue determination is important, and this Article addresses it in more detail in Section II.C.

46. *Id.*; *see id.* § 188.

> respect to that issue, has the most significant relationship to the transaction and the parties under the principles stated in § 6.
>
> (2) In the absence of an effective choice of law by the parties (see § 187), the contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:
>
> (a) the place of contracting,
>
> (b) the place of negotiation of the contract,
>
> (c) the place of performance,
>
> (d) the location of the subject matter of the contract, and
>
> (e) the domicil, residence, nationality, place of incorporation and place of business of the parties.
>
> These contacts are to be evaluated according to their relative importance with respect to the particular issue.
>
> (3) If the place of negotiating the contract and the place of performance are in the same state, the local law of this state will usually be applied, except as otherwise provided in §§ 189–199 and 203.[47]

Section 188 is the final version of the draft of the Second Restatement provision adopted in *Baffin Land* and sets out the "most significant relationship" test approved in that case.[48]

### *C. Issue-by-Issue Analysis*

An important aspect of the Second Restatement is its analysis of conflicts of law on an issue-by-issue basis so that different issues in the same case may be governed by the laws of different jurisdictions.[49] The comments to Section 188 state that "courts have long recognized that they are not bound to decide all issues under the local law of a single state."[50] They further state that "[e]ach issue is to receive separate consideration if it is one which would be resolved differently under the local law rule of two or more of the potentially interested states."[51]

Washington courts have expressly adopted this issue-by-issue approach and have decided different issues in the same case under the laws of more than one jurisdiction. The supreme court, in *Potlatch No. 1 Federal Credit Union v. Kennedy*, stated that "the interest of a state in

47. *Id.* § 188.

48. Baffin Land Corp. v. Monticello Mot. Inn, 70 Wash. 2d 893, 899, 425 P.2d 623 (1967).

49. See § 187's references to "the particular issue" and § 188's references to "an issue," "that issue," and "the particular issue."

50. RESTATEMENT (SECOND) OF CONFLICT OF LAWS, § 188 cmt. d (1971).

51. *Id.*

having its contract rule applied in the determination of *a particular issue* will depend upon the purpose sought to be achieved by that rule and upon the relation of the state to the transaction and the parties."[52] In *G.W. Equipment Leasing, Inc. v. Mt. McKinley Fence Co., Inc.*, the court of appeals, citing *Potlatch*, applied Arizona law to the property recourse issue in that case although the leasing contract involved provided that it would be governed by Washington law.[53] The court of appeals in *Colorado National Bank v. Merlino*[54] stated that *Potlatch* "provides the analytical framework for deciding whether Colorado or Washington law should apply to the question of whether the community is liable for a spouse's obligation to an out-of-state creditor."[55] The *Merlino* court ultimately applied Washington community property law to the property recourse issue in connection with a contract entered into by one spouse with a Colorado seller for the purchase of real property in Colorado.[56] This Article will discuss the *Potlatch*, *G.W. Equipment* and *Merlino* cases in greater detail in Part IV below.

## III. CASE LAW PRIOR TO *SHANGHAI COMMERCIAL*

Washington appellate courts published five significant opinions on the property recourse issue after *Baffin Land* and prior to *Shanghai Commercial*. Although the opinions are quite fact-specific, they illustrate the development of the law in the area and are, therefore, discussed in some detail and in chronological order in this section.

### *A.* Pacific States Cut Stone v. Goble

The supreme court decided *Pacific States Cut Stone Co. v. Goble*[57] the same day it decided *Baffin Land*.

The plaintiff, a Washington corporation, sold some quarry machinery located in Oregon to two men who, with their wives, were Washington residents.[58] The buyers immediately removed the equipment to Washington.[59] All parties executed the contract in Oregon.[60] The buyers defaulted on the deferred payments owed on the contract and the seller sued them, their wives, and their marital communities in a Washington

52. 76 Wash. 2d 806, 810–11, 459 P.2d 32 (1969) (emphasis added) (applying Second Restatement § 188).

53. 97 Wash. App. 191, 195–200, 982 P.2d 114 (1999).

54. 35 Wash. App. 610, 668 P.2d 1304 (1983), *cert. denied.*, 100 Wash. 2d 1032 (1983).

55. *Id.* at 620.

56. *Id.* at 621.

57. 70 Wash. 2d 907, 908, 425 P.2d 631 (1967).

58. *See id.*

59. *Id.*

60. *Id.*

court.[61] The trial court held that Oregon law applied to the contract, including the property recourse issue, under the *lex loci contractus* rule, which was later disavowed by the *Baffin Land* court.[62] It further held that, under Oregon law, neither the wives nor the marital communities were liable on the contract.[63]

The supreme court held that Oregon law would apply to the contract under the Second Restatement's most significant contacts test just as it did under the *lex loci contractus* rule.[64] It did not analyze the property recourse issue separately from the issue of the interpretation and validity of the contract itself. It ultimately held that, as to the property recourse issue, the result would be the same under either Oregon or Washington law and that, under either, all property of the spouses other than the separate property of the wives would be available to satisfy the buyers' obligations under the contract.[65] Implicit in this ruling is the conclusion that, under Washington law, the buyer's obligations would be a community liability of both couples, although the court did not actually analyze the issue and expressly come to that conclusion.

### *B.* Potlatch v. Kennedy

The supreme court next took up the property recourse issue in *Potlatch No. 1 Federal Credit Union v. Kennedy*,[66] which is a key case in the analysis presented in this Article.

In *Potlatch*, a credit union granted a consumer loan to its borrower on the condition that the borrower's brother co-sign the promissory note.[67] The borrower, a Washington resident, applied for the loan at the credit union's office in Idaho and was eligible to borrow from the credit union by virtue of his employment at Potlatch Forests, Inc. in Idaho.[68] The borrower took the note to his brother in Washington where his brother signed it without the knowledge of his wife.[69]

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61. *Id.*
62. *Id.*
63. *Id.*
64. *Id.* at 909.
65. *Id. Pacific States Cut Stone* has been criticized on the ground that the results would, in fact, be different under Washington and Oregon law on the property recourse issue and, therefore, the court incorrectly found a "false conflict" (i.e., a situation where the result is the same under the laws of both jurisdictions under consideration) on this point. *See* Philip A. Trautman, *Choice of Law in Washington—The Evolution Continues*, 63 WASH. L. REV. 69, 71–72 (1988). A court needs to engage in a choice of law analysis only when an actual, rather than a false, conflict exists between Washington law and the law of another state. Rice v. Dow Chem. Co., 124 Wash. 2d 205, 210, 875 P.2d 1213 (1994).
66. 76 Wash. 2d 806, 459 P.2d 32 (1969).
67. *Id.* at 807.
68. *Id.*
69. *Id.*

After the borrower defaulted, the credit union sued both brothers, their wives, and their marital communities in Washington.[70] The trial court found that the contract's most significant contacts were with Washington and applied Washington law to it.[71] It ruled that the brother's marital community received no benefit from the loan and, under Washington law, neither the brother's wife nor their marital community was liable on the note.[72]

On appeal, the supreme court recognized both the need for an issue-by-issue analysis of conflicts of law and the importance of the domicile of the parties where a rule is designed to protect a party against the unfair use of superior bargaining power by another party:

> The purpose sought to be achieved by the contract rules of the potentially interested states, and the relation of these states to the transaction and the parties, are important factors to be considered in determining the state of most significant relationship. This is because the interest of a state in having its contract rule applied in the ***determination of a particular issue*** will depend upon the purpose sought to be achieved by that rule and upon the relation of the state to the transaction and the parties. So ***the state where a party to the contract is domiciled has an obvious interest in the application of its contract rule designed to protect that party against the unfair use of superior bargaining power***. And a state where a contract provides that a given business practice is to be pursued has an obvious interest in the application of its rule designed to regulate or to deter that business practice. On the other hand, the purpose of a rule and the relation of a state to a transaction and the parties may indicate that the state has little or no interest in the application of that rule in the particular case. So a state may have little interest in the application of a rule designed to protect a party against the unfair use of superior bargaining power if the contract is to be performed in another state which is the domicil of the person seeking the rule's protection. And a state may have little interest in the application of a statute designed to regulate or to deter a certain business practice if the conduct complained of is to take place in another state.[73]

The court went on to say that the property recourse issue was the only issue in the case on which Washington and Idaho law differed: "This case presents a single issue on which the interests and policies of Idaho and Washington collide, and that is whether the community of a cosigner of a

70. *Id.*
71. *Id.* at 808.
72. *Id.*
73. *Id.* at 810–11 (emphasis added).

note may be held liable on the note although the community derived no benefit therefrom."[74]

Further, the court recognized the fundamental importance of Washington's community property laws:

> Washington has an equally vital interest in this transaction. It is the domicile of the community of [the cosigner brother and his wife]. The property which would be executed upon in the event of a judgment against the community is located in Washington. The development of the community property system in Washington was an outgrowth of a larger movement toward improvement of the property rights of married women. As it exists in this state, our system of community property is intricately tied to our system of family law, and constitutes the most important element of married women's property rights.[75]

On the same point, the court quoted with approval from a California Supreme Court case:

> We think that disabilities to sue and immunities from suit because of a family relationship are more properly determined by reference to the law of the state of the family domicile. That state has the primary responsibility for establishing and regulating the incidents of the family relationship and it is the only state in which the parties can, by participation in the legislative processes, effect a change in those incidents. Moreover, it is undesirable that the rights, duties, disabilities, and immunities conferred or imposed by the family relationship should constantly change as members of the family cross state boundaries during temporary absences from their home.[76]

Finally, the court summarized its conclusion that Washington law should govern the property recourse issue by stating:

> Turning to the expectations of the parties, it is difficult to determine which law [the borrower, his wife and his brother] would have believed they were operating under, even if we were to assume they had even considered the matter and had discovered the difference between Idaho and Washington law. However, the expectations of [the brother's wife] should also be considered. Under Washington law, she has a present undivided one-half interest in and to the community . . . . Although her husband is designated manager of this property by statute, his management power does not include the power to encumber community property for purposes not in the community interest. . . . [The brother's wife], if she had even known of the transaction, could not have expected that her husband at his

74. *Id.* at 811.

75. *Id.* at 812 (internal citation omitted).

76. *Id.* (quoting Emery v. Emery, 45 Cal. 2d 421, 428, 289 P.2d 218, 223 (1955)).

> place of employment in Clarkston, Washington, would suddenly become vested with a new power under Idaho law to override these Washington restrictions on his management power.
>
> Plaintiff credit union, on the other hand, was aware that it was dealing with Washington residents. It also knew that the property covered by the chattel mortgage executed by [the borrower] and his wife was located in Washington. It was also likely that most, if not all, of the community property of [the cosigner brother and his wife] would be situated in Washington. Therefore, if plaintiff had considered the matter, it would have been fairly certain that any execution of a judgment on the note or mortgage would have to be in Washington court.
>
> Courts have long recognized that they are not bound to decide all issues under the local law of a single state. See Restatement (Second), Conflict of Laws § 188, comment d (Proposed Official Draft, 1968). Therefore, with respect to the issue now before us of whether the community property of Washington residents is subject to the suretyship obligation of the husband entered into with an Idaho company with no benefit to the community, we hold that the law of Washington has the most significant relationship to that portion of the transaction.
>
> The wife's rights to her share of the community property, and the concurrent restrictions on the husband's power to manage that property, are basic to Washington law. We do not believe that the husband's power to manage this property should be varied by the laws of other states while the parties are resident in this state unless the wife has some reason to expect this variation. We have seriously considered the governmental interest of the state of Idaho in protecting its creditors, but do not believe they are paramount in this case.[77]

Although the *Shanghai Commercial* court cited to *Potlatch* and attempted to distinguish it, this Article will respectfully suggest that these cases cannot properly be distinguished, and that *Shanghai Commercial* should not be followed in future cases.

### *C.* Pacific Gamble Robinson v. Lapp

*Pacific Gamble Robinson Co. v. Lapp* presented a variation on the property recourse issue.[78] There, the Lapps were married in Colorado in

77. *Id.* at 812–14 (some citations omitted). The *Potlatch* case was prior to the statutory change to give the spouses co-equal management power over community property.

78. 95 Wash. 2d 341, 622 P.2d 850 (1980).

1975.[79] At the time of the marriage, the husband had owned a Colorado corporation since 1962 and the stock in the corporation remained his separate property.[80] In April 1977, while the corporation was in "severe financial difficulty," the husband and the corporation cosigned a promissory note in which the husband would be personally liable along with the corporation in favor of the petitioner, a supplier of goods, continuing to supply produce to the corporation to enable the corporation to remain in business.[81] The wife did not sign the note.[82] In July 1977, the makers of the note defaulted on it; in September of that year the Lapps moved to Washington, and in January 1978 the supplier sued the corporation, the husband, and the marital community in a Washington court.[83] The trial court entered a judgment against the corporation and the husband, but not against the marital community.[84] The supplier appealed the portion of the judgment dismissing the marital community and the court of appeals affirmed.[85]

The supreme court explained that, if Colorado marital property law applied, the supplier would be entitled to recourse only against the husband's property including his earnings.[86] However, if Washington community property law applied, depending on whether the note was a community obligation, the supplier would be entitled to recourse against the community property wages and earnings either of both spouses or of neither.[87]

The court then reviewed the various contacts with each state and concluded that they all weighed in favor of applying Colorado law to the property recourse issue except for the Lapps' recent and post-default move to Washington and it applied Colorado marital property law.[88] In doing so, it stated:

> What is Washington's interest in the note at issue? Clearly, Washington has a general interest in protection of marital communities from the entirely separate debts of one spouse. But Washington had no connection whatever with the present transaction until the Lapps established their domicile here just 2 months after the note went into default. While the record demonstrates no cause-and-

79. *Id.* at 342.
80. *Id.*
81. *Id.* at 342–43.
82. *Id.* at 343.
83. *Id.*
84. *Id.*
85. *Id.*
86. *Id.* at 344.
87. *Id.*
88. *Id.* at 346–48.

> effect relationship between the default and the parties' move to Washington, we may safely assume that this state has no policy interest in maintaining within its borders a sanctuary for fleeing debtors.
>
> Turning to the expectations of the parties, we think that both spouses could reasonably expect at the time the note was executed that the transaction would be governed by Colorado law. Since the Lapps had long been domiciled in Colorado, and remained there some months after the note was signed, they could not justifiably believe that the obligation could be fairly avoided by the device of removing to a state where a husband's wages would not be subject to the debt.[89]

The *Shanghai Commercial* case picked up on *Pacific Gamble*'s reference to "a sanctuary for fleeing debtors" in a very different context and one in which this Article will argue it should not apply.[90]

In a strong dissent from the majority opinion in *Pacific Gamble*, Justice Horowitz, joined by Justice Utter, argued that the court should have explicitly made the "distinction between choice of law in contractual validity and in contractual damage recovery."[91] The dissent argued for the application of Washington law to the property recourse issue notwithstanding the post-default timing of the spouses' move, stating, "Washington's community property scheme reflects a policy which should not be subjected to the vagaries of out-of-state debt accrual; all marital communities in this state are afforded the protection and predictability of our community property provisions."[92]

*Pacific Gamble* was the last time the supreme court took up the property recourse issue before *Shanghai Commercial*, but in the intervening twenty-seven years, Division One of the Court of Appeals addressed it in two cases.

### *D.* Colorado National Bank v. Merlino

*Colorado National Bank v. Merlino* involved spouses who had lived in Washington throughout their marriage and all of whose property was community property.[93] The husband, without the knowledge of his wife, executed an agreement to buy land in Colorado and a note secured by a deed of trust on the land for a portion of the purchase price.[94] He signed

89. *Id.* at 347–48 (citations omitted).

90. *See infra* Section IV.B.7.

91. 95 Wash. 2d at 354.

92. *Id.* at 355; *see also* Joseph William Singer, *Property Law Conflicts*, 54 WASHBURN L.J. 129 (2014). Singer discusses *Pacific Gamble* and its dissent in some detail. *See generally id.*

93. 35 Wash. App. 610, 611, 668 P.2d 1304 (1983).

94. *Id.* at 611–12.

the documents in Washington and the seller executed the deed in Colorado.[95] After the husband defaulted on the note, the assignee of the note obtained a default judgment against him in a Colorado court and filed it for execution in a Washington superior court, which concluded that, under Washington community property law, the marital community was not liable on the note and that the only assets the plaintiff could reach to satisfy its judgment were the husband's separate assets.[96]

On appeal, the court of appeals looked to *Potlatch* as providing the analytical framework for deciding whether Colorado or Washington law should apply to the property recourse issue.[97] It then affirmed the lower court's holding that Washington community property law applied.[98] It distinguished *Pacific Gamble* on the basis that the entire transaction in that case took place in Colorado while the spouses lived in Colorado and that Colorado had the most significant relationship to the property recourse issue in that case, whereas in *Merlino*, Washington law had the most significant relationship to that issue.[99]

### *E.* G.W. Equipment v. Mt. McKinley Fence

In *G.W. Equipment Leasing, Inc. v. Mt. McKinley Fence Co., Inc.*, a husband signed a guaranty of a leasing agreement.[100] The guaranty reflected that the husband signed it in Arizona and his wife witnessed it in Arizona, where they lived.[101] The leasing company sued on the guaranty in a Washington court and the court held that Washington law governed the guaranty that Washington had jurisdiction over the marital community.[102]

The spouses appealed, arguing that Arizona community property law should govern the property recourse issue.[103] The court of appeals again looked to *Potlatch* as precedent and quoted *Potlatch*'s statements that Washington's community property system "constitutes the most important element of married women's property rights" and that "[t]he wife's rights to her share of the community property, and the concurrent restrictions on the husband's power to manage that property, are basic to Washington law."[104] It noted that Arizona community property law required that both

95. *Id.* at 612.
96. *Id.* at 612–13.
97. *Id.* at 620.
98. *Id.* at 621.
99. *Id.* at 620–21.
100. 97 Wash. App. 191, 193, 982 P.2d 114 (1999).
101. *Id.*
102. *Id.* at 193–94.
103. *Id.* at 194.
104. *Id.* at 196.

spouses sign a guaranty in order to bind their community property.[105] The court stated that *Merlino* held that Washington's community property laws' protections "do not evaporate when a spouse crosses the border into another state."[106] It continued at some length on this theme:

> As evidenced by *Potlatch* and *Merlino*, Washington courts apply Washington law to determine the rights and authority of Washington spouses to enter into contracts affecting their community property. For Washington courts to conclude that residents of other community property states are bound by Washington community property law as well, rather than the law of their own state, would be illogical and unjust. The Arizona Legislature has enacted a statute which prohibits one spouse from entering into guaranty contracts without the other spouse's consent. Arizona spouses, therefore, may not alter the rights and liabilities of their marital communities, irrespective of the protective policies of their domiciliary states, by choosing to contract in another forum and contractually consenting to the application of that forum's laws.
>
> Although not controlling here, Arizona courts have adopted this approach. In *Lorenz–Auxier Financial Group, Inc. v. Bidewell*, the Arizona Court of Appeals considered the question of whether an Oregon husband's separate debt in Arizona could be charged to his marital community when Oregon law does not permit community obligation on separate debt. After observing that "the property rights of a husband and wife are governed by the law of the couple's matrimonial domicile at the time of the acquisition of the property[,]" the court held that Oregon law should apply. It found "no authority in Arizona or Oregon that permits one spouse, acting extraterritorially without the other spouse's consent, to enlarge his dispositional power over the other spouse's property beyond the limits imposed by the law of the domiciliary state." It added that the noncontracting spouse "obtained a measure of protection through these statutes that her husband could not unilaterally sign away." Although "[h]er husband may have agreed that he would be bound by Arizona law,[ ] he did not thereby bind his wife." The court went on to speculate about the issue presented in this case, noting that if the reverse conclusion were true, one spouse "could defeat Arizona's protective requirement that both spouses must consent when binding community property to guarantee a third party's obligation, [ARIZ. REV. STAT.] § 25–214(C)(2)."[107]

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105. *Id.* at 194–95.

106. *Id.* at 197.

107. *Id.* at 197–99 (footnotes omitted). For a discussion of *Lorenz–Auxier* and other Arizona cases on the property recourse issue, see *infra* Part VII.

In the unreported decision in *Pacific Nutritional, Inc. v. Shannon*, the Arizona Court of Appeals addressed facts substantially similar to those in *G.W. Equipment* involving a married couple who lived in Arizona both at the time the husband guaranteed a debt to a Washington corporation and at the time the creditor got a judgment on that guaranty in a Washington court and sought to enforce it in Arizona.[108] The Arizona court came to the same conclusion as the *G.W. Equipment* court and held that Arizona's rule requiring both spouses to join in a guaranty in order to create community liability controlled the property recourse issue.[109]

With the ruling in *G.W. Equipment*, Washington courts continued their unbroken record of holding that the law of the domicile of spouses at the time a contract is entered into determines the nature of their liability on that contract.[110] Unfortunately, that changed when the supreme court took up *Shanghai Commercial* in 2017.

## IV. THE *SHANGHAI COMMERCIAL* CASE

### *A. Factual and Procedural Background*

The facts of *Shanghai Commercial Bank v. Chang* are set out, although somewhat differently, in the court of appeals opinion and in the supreme court opinion affirming it.[111]

Shanghai Commercial Bank is a large international bank based in Hong Kong.[112] Kung Da Chang and Michelle Chen were husband and wife and had resided in Washington since before they were married in 1994.[113] In 2008, the husband entered into a credit facility agreement with the bank by executing five agreements.[114] The agreements contained a governing law clause providing: "The validity, construction, interpretation, *and enforcement* of the Agreement and/or the Relevant Terms and Conditions

108. No. 1 CA–CV 06–0627, 2010 WL 1609874 (Ariz. Ct. App. Apr. 20, 2010).

109. *Id.* at *5.

110. Admittedly, *Pacific States Cut Stone* purported to apply Oregon law after erroneously finding a false conflict and incorrectly applying Oregon marital property law. In doing so, it gave the spouses' community property the same protection it would have had under the law of their domicile, Washington.

111. 189 Wash. 2d 474, 404 P.3d 62 (2017), *aff'g* 195 Wash. App. 896 (2016).

112. *See* ABOUT US: PROFILE, SHANGHAI COM. BANK, https://www.shacombank.com.hk/eng/about/profile.jsp [https://perma.cc/DZ9W-W27D]. According to its website:

> Incorporated in November 1950, Shanghai Commercial Bank Limited ("the Bank") has been one of the most distinguished local Chinese banks in Hong Kong. At present, we have over 50 branches across Hong Kong, mainland China and overseas, with a business network reaching the United Kingdom, the United States of America, Shanghai and Shenzhen, to offer our customers comprehensive banking services with convenience.

*Id.*

113. *Shanghai Com. Bank*, 189 Wash. 2d at 478 n.3.

114. *Id.* at 477.

shall be governed by the laws of HKSAR [Hong Kong Special Administrative Region]."[115] Shortly before the bank prepared the agreements, the husband and his father were in Hong Kong "meeting with a bank executive and investment adviser about moving millions of dollars of investment accounts to [the bank]."[116]

The bank delivered the loan document for the husband's signature "to an address in Shanghai that was actually [the father's] residence."[117] The father sent the documents to the husband in Seattle, where the husband signed and returned them to his father in Shanghai, and the father forwarded them to the bank in Hong Kong.[118] In describing this process, the court stated that "[t]here is no indication in the record that at this time [the bank] knew that it was dealing with a person residing in Seattle."[119] Apparently, the record also did not provide evidence suggesting that the bank did not know the husband's residence.[120]

The court of appeals noted that the wife did not sign any of the loan documents, was not aware that the husband entered into the transaction, and was not a party to the Hong Kong lawsuit.[121] The supreme court did not mention those facts in its opinion.[122]

After default on the loan, the bank secured a $9 million judgment against the husband in an action brought in a Hong Kong court.[123] The Washington trial court ruled on summary judgment that the Hong Kong judgment was enforceable in Washington and that Hong Kong law applied to the property recourse issue.[124] "Hong Kong is a separate property jurisdiction" with no concept of community property and, under Hong Kong law, the judgment would be enforceable against all the husband's assets including those that would be community property under Washington law.[125] The court of appeals affirmed the trial court's ruling.[126]

115. *Id.*
116. *Id.* at 488.
117. *Id.* at 477–78.
118. *Id.* at 478.
119. *Id.*
120. *Id.* at 488.
121. Shanghai Com. Bank Ltd. v. Chang, 195 Wash. App. 896, 900, 381 P.3d 212 (2016).
122. *See generally Shanghai Com. Bank*, 189 Wash. 2d 474.
123. *Id.* at 478.
124. *Id.* at 478–79.
125. *Id.* at 478 n.4.
126. *Shanghai Com. Bank*, 195 Wash. App. at 907.

### *B. The Court's Ruling and Reasoning and Some Critiques Thereof*

#### 1. Issue-by-Issue Conflicts Analysis

The supreme court began by analyzing whether the case presented an actual conflict rather than a false conflict.[127] It stated, "[i]f the result *for a particular issue* 'is different under the law of the two states, there is a "real" conflict.'"[128] The court determined that there was "an actual conflict between Hong Kong law and Washington law on the issue of whether Chang and his wife's community property is reachable for satisfaction of the [Hong Kong] judgment."[129]

Despite the quoted language referring to "the result for a particular issue," the court did not discuss the possibility that it would be appropriate to apply Hong Kong law, the chosen law of the contract, to the interpretation of the contract and to apply Washington law to the property recourse issue.[130]

#### 2. Comparison of Washington and Hong Kong Marital Property Laws

The court quoted *Potlatch* for the proposition that "[u]nder the law of this state [(Washington)], community property is liable for the suretyship debt of one of the parties only if the community has been benefited by the obligation."[131] It noted that the arrangement with the bank "provided moneys for [the father's] investment activities in Hong Kong and for servicing [the father's] investment debts at another Hong Kong bank" and that the marital "community received no money (benefits)."[132] Therefore, if Washington law applied to the property recourse issue, the bank would have no recourse to the spouses' community property because, as discussed above, a gift of community property by one spouse, including a suretyship obligation without economic benefit to the community, requires the "express or implied consent" of the other spouse.[133]

#### 3. Relevant Provisions of Second Restatement

The court cited subsection 1 of § 187 of the Second Restatement for the proposition that "[t]he law of the state chosen by the parties to govern their contractual rights and duties will be applied if the particular issue is

127. *Shanghai Com. Bank*, 189 Wash. 2d at 480–81.

128. *Id.* at 481 (emphasis added) (quoting Erwin v. Cotter Health Ctrs., 161 Wash. 2d 676, 692, 167 P.3d 1112 (2007)).

129. *Id.*

130. *See generally id.*

131. *Id.* at 481.

132. *Id.* at 482 n.6.

133. *See supra* text accompanying note 22.

one which the parties could have resolved by an explicit provision in their agreement directed to that issue."[134] It went on to hold the following:

> Here, subsection (1) applies. The parties could have (and did) expressly provide in their agreement that "[t]he validity, construction, interpretation *and enforcement*" of their agreement "shall be governed by [Hong Kong law]." CP at 172 (emphasis added). The specific inclusion of *enforcement* in context fulfills the specificity requirement of subsection (1), encompassing the enforcement action here and thereby making the parties' choice of law selection effective under subsection (1).[135]

Here, the court seems to have made a serious error. The portion of the Second Restatement cited by the court applies only "if the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed to that issue."[136] However, the parties to the loan documents could not have validly agreed that the bank would have recourse to the spouses' community property for the simple reason that the wife was not a party to the loan documents and was not even aware that her husband was entering into them and, therefore could not have provided her express or implied consent to the transaction.[137] The court appeared to ignore the fact that § 187 deals only with a choice of law made by the parties to the contract.[138] Other courts have focused on this point and have held that a choice of law clause does not control where the rights of third parties are implicated.[139]

The court next turned to § 188 of the Second Restatement to conclude that, even if the loan documents had not contained a contractual choice of law, Hong Kong law would apply under the most significant relationship test.[140] In its discussion on this point, the court seemed to look only at the relationship of the contract itself to the relevant jurisdictions, which would be fine if the court were selecting the appropriate governing law for the interpretation and validity of the contract itself.[141] However, the particular issue actually in question was what property the bank could

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134. *Shanghai Com. Bank*, 189 Wash. 2d at 483 (quoting RESTATEMENT (SECOND) CONFLICT OF LAWS, § 187(1) (1971)).

135. *Id.* at 483–84.

136. RESTATEMENT (SECOND) CONFLICT OF LAWS, § 187(1) (1971).

137. *See* Shanghai Com. Bank Ltd. v. Chang, 195 Wash. App. 896, 900, 381 P.3d 212 (2016).

138. *See* RESTATEMENT (SECOND) CONFLICT OF LAWS, § 187(1) (1971).

139. See for example, First-Citizens Bank & Trust Co. v. Morari, 242 Ariz. 562, 567, 399 P.3d 109 (Ariz. App. 2017) ("Restatement § 187 does not apply to a spouse that did not execute a guaranty contract and is not party to that contract."), discussed in greater detail in *infra* Part VII; Carlson v. Tandy Comput. Leasing, 803 F.2d 391, 393–94 (8th Cir. 1986) (dealing with issue of whether a putative lease was actually an installment sale contract).

140. *Shanghai Com. Bank*, 189 Wash. 2d at 484–88.

141. *See id.*

have recourse to for a breach of the contract.[142] As to that issue, the wife's interests were vitally implicated and the wife was not a party to the contract.[143] Therefore, looking at the Second Restatement's provisions about what law applies to a contract was inappropriate or at least insufficient.

The court should have analyzed the conflict issue under § 6 of the Second Restatement, which provides general choice of law principles where no statutory directive or more specific provision of the Second Restatement applies.[144] In similar contract cases, the Arizona courts have analyzed the property recourse issue under § 6 and have declined to do so under §§ 187 or 188.[145] A review of the seven § 6 factors leads to a conclusion that the Washington court should have applied Washington law to that issue in *Shanghai Commercial*:

(a) *The needs of the interstate and international systems*.[146] The principal interest of these systems seems to be in having a predictable system of selecting the applicable law so that, in making their credit decisions, creditors can assess what jurisdiction's law will apply to the property recourse issue and, therefore, to what assets they will have recourse.

(b) *The relevant policies of the forum*.[147] Washington has a strong policy of requiring the participation of both spouses in certain transactions in order to create community liability.[148]

(c) *The relevant policies of other interested states and the relative interests of those states in the determination of the particular issue*.[149] The interest of the domiciliary state in protecting its residents should predominate over the interest of other jurisdictions in enhancing the ability of creditors to collect judgments from residents of the domiciliary state. This is especially true when a non-contracting spouse has no control over the contract creating the debt. As the *Potlatch* court stated, "[a]s it exists in this state, our system of community property is intricately tied to our system of family law, and constitutes the most important element of married women's property rights."[150]

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142. *See id.* at 480.

143. *See id.* at 477–79.

144. *See* RESTATEMENT (SECOND), CONFLICT OF LAWS, § 6(2) (1971). The Washington Supreme Court did a detailed analysis of the § 6 factors in a community property case not involving the property recourse issue in Seizer v. Sessions, 132 Wash. 2d 642, 652–56, 940 P.2d 261 (1997).

145. See *infra* Part VII for a discussion of the Arizona cases.

146. RESTATEMENT (SECOND) CONFLICT OF LAWS, § 6(2)(a) (1971).

147. *Id.* § 6(2)(b).

148. *See* discussion *infra* Section IV.B.7.

149. RESTATEMENT (SECOND) CONFLICT OF LAWS, § 6(2)(c) (1971).

150. Potlatch No. 1 Fed. Credit Union v. Kennedy, 76 Wash. 2d 806, 812, 459 P.2d 32 (1969).

(d) *The protection of justified expectations*.[151] The *Shanghai Commercial* opinion gave little to no attention to the justified expectations of the non-contracting spouse. Those expectations seem far more important than the expectation, if any, on the part of a foreign creditor about being able to impose its local marital property system on a non-contracting spouse in another jurisdiction without their knowledge or consent.

(e) *The basic policies underlying the particular field of law*.[152] As noted above, a basic policy of Washington's community property law is to protect Washington residents' community property from debts incurred by one spouse where no expectation exists of a benefit to the marital community.

(f) *Certainty, predictability and uniformity of result*.[153] Applying the marital property law of the spouses' domicile at the time the debt is contracted creates more certainty and predictability than applying the law of whatever jurisdiction may be provided for in a contract entered into by only one of the spouses. It also enhances uniformity of result by treating all the spouses' creditors the same way on the property recourse issue regardless of the law governing their various underlying debts. Further, for bankruptcy courts adjusting the rights of multiple creditors to a limited pool of assets, applying the law of the spouses' domicile treats all creditors equally rather than enhancing the recovery of a creditor whose contract provides for governing law of a jurisdiction with marital property laws more favorable to the creditor.

(g) *Ease in the determination and application of the law to be applied*.[154] A court will certainly find it easier to determine and apply its own laws than the laws of another jurisdiction, which may not even be in the United States and whose laws may not be in English.[155]

### 4. Expectations of the Parties

The supreme court in *Shanghai Commercial* quoted prior Washington Supreme Court authority to the effect that "the expectations *of the parties to the contract* may significantly tip the scales in favor of one jurisdiction's laws being applied over another's."[156] However, the court did not address that the wife was not a party to the contract and did

151. RESTATEMENT (SECOND) CONFLICT OF LAWS, § 6(2)(d) (1971).

152. *Id.* § 6(2)(e).

153. *Id.* § 6(2)(f).

154. *Id.* § 6(2)(g).

155. Notably, in determining what Hong Kong law provided, the court in *Shanghai Commercial* relied on "a declaration from a purported expert regarding Hong Kong law." 189 Wash. 2d at 478 n.4.

156. *Id.* at 486 (quoting Mulcahy v. Farmers Ins. Co. of Wash., 152 Wash. 2d 92, 101, 95 P.3d 313 (2004)) (emphasis added).

not even know that her husband entered into it.[157] It completely ignored her reasonable expectations.

The court discussed the *Pacific Gamble* case in some detail and noted that in *Pacific Gamble*, the spouses had no connection with Washington until they moved to the state a few months after the note in issue went into default.[158] It quoted *Pacific Gamble*'s statement that "this state has no policy interest in maintaining within its borders a sanctuary for fleeing debtors."[159] In discussing the question of the expectations of the parties in *Pacific Gamble*, the *Shanghai Commercial* court stated that "[t]he husband and wife could reasonably expect at the time the note was executed that the transaction would be governed by Colorado law since they had long been domiciled in Colorado, and remained there for a time after the note was signed."[160] The facts in *Shanghai Commercial* are starkly different from those in *Pacific Gamble* because the spouses in *Shanghai Commercial* had been domiciled in Washington their entire married lives, a period of more than twenty years, whereas the spouses in *Pacific Gamble* did not move to Washington until shortly after the relevant contract was in default.[161] Unlike the spouses in *Pacific Gamble*, the spouses in *Shanghai Commercial* could hardly be characterized as "fleeing debtors."[162] The wife could not have had a reasonable expectation that her husband could engage in a transaction in a foreign country that would allow a foreign creditor to have recourse to all the spouses' community property when a local creditor in a transaction governed by Washington law would have recourse to none of it.

### 5. *Potlatch*

The court discussed the *Potlatch* case and distinguished it on the basis that:

> Key to the result in *Potlatch* was the fact that the Idaho creditor *knew* it was dealing with Washington residents and *knew* that the property covered in the chattel mortgage at issue was located in Washington, and that it was likely that the debtors' community property would be situated in Washington.[163]

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157. *Compare id.* at 488, *with* Shanghai Com. Bank v. Chang, 195 Wash. App. 896, 904–07, 381 P.3d 212 (2016).

158. *Shanghai Com. Bank*, 189 Wash. 2d at 487 (discussing Pac. Gamble Robinson Co. v. Lapp, 95 Wash. 2d 341, 347, 622 P.2d 850 (1980)).

159. *Id.* (quoting *Pac. Gamble*, 95 Wash. 2d at 347).

160. *Id.*

161. *Compare id.* at 478 n.3, *with Pac. Gamble*, 95 Wash. 2d at 347.

162. *Shanghai Com. Bank*, 189 Wash. 2d at 487.

163. *Id.* at 488 (distinguishing Potlach No. 1 Fed. Credit Union v. Kennedy, 76 Wash. 2d 806, 813, 459 P.2d 32 (1969).

The court reiterated that there was no evidence in the record that the bank knew that it was dealing with a Washington resident.[164] This statement implies that the record also contained no evidence that the bank did *not* know it was dealing with a Washington resident. Further, the court did not discuss whether the bank should be the one to bear the consequences if it relies on the credit of an individual without taking the basic credit underwriting steps of determining where that person lives, what his or her marital status is, what assets may be available to pay his or her obligations, where those assets are located, and what legal principles apply in that location.

### 6. Other Case Law

The court did not discuss or cite to *Colorado National Bank v. Merlino* or *G.W. Equipment Leasing, Inc. v. Mt. McKinley Fence Co., Inc.*[165] In both of those cases, the court of appeals applied the law of the spouses' domicile to the property recourse issue.[166] In the former, that led to the application of Washington law and in the latter, it led to the application of Arizona law.[167] In both, it led to the result that the creditor did not have recourse to the spouses' community property.[168]

### 7. Public Policy

The *Shanghai Commercial* court appeared to give short shrift to the policies behind Washington's community property laws. To the extent, if any, that § 187 of the Second Restatement applies, those policies should be considered a "fundamental policy" of the state within the meaning of § 187(2)(b), which should lead to choosing Washington law to govern the property recourse issue as to spouses domiciled in Washington notwithstanding a contrary contractual choice of law, especially where one of the two spouses was not a party to the contract.

The court briefly addressed the interests and policies of the two jurisdictions:

> Hong Kong has an interest in ensuring the predictability of business relations, including the payment of debt obligations. *See Pac. Gamble*, 95 Wash.2d at 346–47, 622 P.2d 850. And while

164. *Id.*

165. Colo. Nat'l Bank of Denv. V. Merlino, 35 Wash. App. 610, 688 P.2d 1304 (1983); G.W. Equip. Leasing, Inc. v. Mt. McKinley Fence Co., 97 Wash. App. 191, 982 P.2d 114 (1999).

166. *See Colo. Nat'l Bank*, 35 Wash. App. at 611, 621; *G.W. Equip. Leasing, Inc.*, 97 Wash. App. at 193, 199.

167. *Colo. Nat'l Bank*, 35 Wash. App. at 621; *G.W. Equip. Leasing, Inc.*, 97 Wash. App. at 199.

168. *See Colo. Nat'l Bank*, 35 Wash. App. at 617; *G.W. Equip. Leasing, Inc.*, 97 Wash. App. at 199–200.

> Washington has an interest in generally protecting the welfare of community property interests of its residents, it would not serve those interests to permit debtors to hide behind or misuse community property status as a blanket protection of assets from legitimate foreign debt collection in all circumstances.[169]

The court ignored the interest of the non-contracting wife in this discussion. In what sense can she be said to "hide behind or misuse community property status"? Had her husband and his father entered into an identical credit transaction governed by Washington law with a local lender in Washington, the lender would have had no recourse to community property.

The court did not address its prior statements about the importance of the community property laws. The supreme court stated in *Van Dyke v. Thompson*[170] that "[i]t has been a basic principle of our community property law that community assets are not liable for the separate debts of a spouse."[171] In a somewhat different context, it had also noted that a creditor's "interpretation would enable one spouse to give away an entire estate in derogation of the interest of the nonacting spouse who knew of but felt powerless to halt the transfer."[172] In *Shanghai Commercial*, the non-contracting spouse did not even know of the existence of the transaction.[173]

Washington law treats certain other debtor protection laws as fundamental policies for conflict of laws purposes even where they do not implicate the interests of non-contracting parties.[174] For example, the supreme court, in *Detonics ".45" Associates v. The Bank of California*,[175] stated that "[u]sury statutes and the allowance of attorney fees in usury cases represent a 'fundamental policy' of this state."[176] If Washington's usury statutes otherwise apply, they cannot be avoided based on the location of the lender or a choice of law clause choosing the law of another state.[177]

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169. *Shanghai Com. Bank*, 189 Wash. 2d at 488–89.

170. 95 Wash. 2d 726, 630 P.2d 420 (1981).

171. *Id.* at 730.

172. Nichols Hills Bank v. McCool, 104 Wash. 2d 78, 82–83, 701 P.2d 1114 (1985).

173. 195 Wash. App. 896, 900, 381 P.3d 212 (2016).

174. *See* Detonics .45 Assocs. v. Bank of Cal., 97 Wash. 2d 351, 354, 644 P.2d 1170 (1982).

175. *Id.*

176. *Id.* (citing O'Brien v. Shearson Hayden Stone, Inc., 90 Wash. 2d 680, 685–86, 586 P.2d 830 (1978); WASH. REV. CODE § 19.52.005).

177. Whitaker v. Spiegel Inc., 95 Wash. 2d 408, 623 P.2d 1147, 1151 (1981), *amended*, 95 Wash. 2d 661, 637 P.2d 235 (1981) ("The legislative mandate is clear: In an interstate loan transaction, the Washington courts are not free to engage in conflict of law analysis to determine whether or not the

The Washington legislature has made a long-standing policy judgment that, for the mutual protection of spouses, if one spouse takes on a suretyship obligation that does not benefit the community without the express or implied consent of the other, that obligation will be binding only on the contracting spouse's separate property and not on any of the community property. Why should the law make it easy to evade that restriction and destroy the protection given to the non-contracting spouse by the simple expedient of having the loan documents governed by the law of another jurisdiction? In the modern interconnected world, parties commonly enter into financial arrangements with parties in other states or countries, often governed by the laws of the lender's home jurisdiction. The *Shanghai Commercial* ruling makes it possible for lenders and other parties from outside the state to avoid this important protection provided by Washington law to Washington domiciled spouses. Further, it gives unfair preference to such out-of-state parties over local creditors whose transactions have no significant contacts with any other jurisdiction and, therefore, are bound to be governed by Washington law.

A more just rule would hold that the property recourse issue is governed by the law of the spouses' domicile except in the situation, such as that in *Pacific Gamble*, where the spouses take on the debt while domiciled in another state and then move to Washington and try to use Washington's community property law to excuse themselves from the liability they had in the state where they lived when they incurred the debt.

## V. DEVELOPMENTS AFTER *SHANGHAI COMMERCIAL*—*IN RE* HALES

Little development of the law has occurred in the five years since the supreme court decided *Shanghai Commercial*. The case's outcome has been questioned in commentary,[178] but there has been little additional case law.

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parties' own choice of law provision should apply."). This rule may be subject to the qualification of RESTATEMENT (SECOND), CONFLICT OF LAWS § 203 (1971), which provides:

> The validity of a contract will be sustained against the charge of usury if it provides for a rate of interest that is permissible in a state to which the contract has a substantial relationship and is not greatly in excess of the rate permitted by the general usury law of the state of the otherwise applicable law under the rule of § 188.

*See generally* O'Brien v. Shearson Hayden Stone, Inc., 93 Wash. 2d 51, 605 P.2d 779 (1980). However, the *O'Brien* case did not cite to or consider the effect of WASH. REV. CODE § 19.52.034, which provides as follows:

> Whenever a loan or forbearance is made outside Washington state to a person then residing in this state the usury laws found in chapter 19.52 RCW, as now or hereafter amended, shall be applicable in all courts of this state to the same extent such usury laws would be applicable if the loan or forbearance was made in this state.

178. *See* James P. George, *Facilitating Money Judgment Enforcement Between Canada and the United States*, 72 HASTINGS L.J. 99, 151 (2020).

In an unreported 2019 case, *In re Hales*,[179] the Bankruptcy Court for the Western District of Washington rendered a lengthy and thoughtful opinion on the property recourse issue. It did not directly criticize *Shanghai Commercial*, but also did not appear to follow its lead.

The debtor in *Hales* was a wife whose husband had a tort judgment entered against him arising out of his management of his father's estate in Oregon.[180] Nothing in the court's opinion indicated that the spouses had ever lived in Oregon during their marriage. The judgment creditor argued that, because the judgment was obtained under Oregon law, the assets available to satisfy it should also be determined under Oregon law.[181] The court concluded that an actual conflict existed and that Washington law should apply to the issue of what property was available to satisfy the judgment.[182]

In applying the Second Restatement's tests, the *Hales* court recognized that different states' laws can be applied to different issues in the same case:

> Different issues in a case can require different determinations about what jurisdiction's law applies. In this case, the fact that Oregon law determines the existence and elements of a tort does not mean that it applies to the question of what property of the tortfeasor is subject to recovery of the Judgment. "These contacts are to be evaluated according to their relative importance with respect to the particular issue." *Id.* "The courts have long recognized that they are not bound to decide all issues under the local law of a single state." *Id.* § 145 cmt. d; see also *Potlach No. 1 Fed. Credit Union v. Kennedy*, 76 Wn.2d 806, 813, 459 P.2d 32 (1969) (citing Restatement (Second) of Conflict of Laws § 188 cmt. d (Proposed Official Draft, 1968)). "Each issue is to receive separate consideration if it is one which would be resolved differently under the local law rule of two or more of the potentially interested states." Restatement (Second) of Conflict of Laws § 145 cmt. d.[183]

After citing most of Washington's post-*Baffin Land* cases involving the property recourse issue, including *Shanghai Commercial*, the *Hales* court was careful to note that "[e]ach such choice of law determination is fact intensive and unique."[184] It then stated as follows:

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179. 18–40351–BDL, 2019 WL 1077271 (Bankr. W.D. Wash. Mar. 6, 2019).

180. *Id.* at *1–2.

181. *Id.* at *3.

182. *Id.* at *3–4.

183. *Id.* at *5. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145, cited by the *Hales* court, deals with choice of law with respect to issues in tort.

184. *Id.*

> In this case, the Court concludes that Washington has the most significant relationship to the issue of what property is subject to recovery to enforce the Judgment. First, the relevant policies of Washington weigh in favor of applying Washington law. Washington's case law on community property liability expresses policy preferences for what assets of a tortfeasor, the tortfeasor's spouse, and their marital community can be reached to satisfy a judgment under certain circumstances. As the Washington Supreme Court expressed,
>
> > We think that disabilities to sue and immunities from suit because of a family relationship are more properly determined by reference to the law of the state of the family domicile. That state has the primary responsibility for establishing and regulating the incidents of the family relationship and it is the only state in which the parties can, by participation in the legislative processes, effect a change in those incidents. Moreover, it is undesirable that the rights, duties, disabilities, and immunities conferred or imposed by the family relationship should constantly change as members of the family cross state boundaries during temporary absences from their home.
>
> *Potlach No. 1 Fed. Credit Union*, 76 Wn.2d at 36 (quoting *Emery v. Emery*, 45 Cal.2d 421, 428, 289 P.2d 218 (1955)). Because the community's potential liability arises from the family relationship and Washington is and at all relevant times was the family's domicile, Washington has a strong policy interest in determining the enforceability of the Judgment consistently with its precedents.
>
> The relevant policies of the other interested state, Oregon, and the states' relative interests in determination of this particular issue also weigh in favor of applying Washington law. Oregon does not have a strong policy interest with respect to the specific issue before the Court. While Oregon likely has a policy interest in its judgments being enforceable in Washington, general enforceability is not an issue in this case. . . . The determination of what property can be reached to satisfy the Judgment implicates greater policy concerns for Washington, with its case law reflecting policy preferences on community property, than Oregon, whose interests primarily extend to the general enforceability of its judgments.[185]

The *Hales* court distinguished *Pacific Gamble* on the basis that the husband in that case incurred the debt in question while the spouses lived in Colorado:

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185. *Id.* at *5–6.

> This is not a case like *Pacific Gamble Robinson Co.* where a debtor and spouse moved to a community property state to seek immunity from a judgment. It is more similar to *Merlino*, where the married couple were Washington residents and owned property as community property, but one of the spouses incurred a liability in a common law state. And like the Washington Court of Appeals in *Merlino*, this Court concludes that Washington has the most significant relationship to the issue of what law to apply to determine whether Creditor can enforce the Judgment against community property.[186]

The key facts in *Hales* are similar to those in *Shanghai Commercial*. In both cases, the debt was incurred outside Washington by one of two spouses domiciled in Washington, the debt itself was governed by the law of another jurisdiction, the debt was reduced to judgment in the other jurisdiction, and the creditor sought to enforce the judgment against community property in Washington.[187] The *Hales* court identified the need to evaluate the issue of what law would govern the property recourse issue separately from the issue of what law would govern the liability of the acting spouse for the underlying debt.[188] The *Shanghai Commercial* court did not appear to make that distinction.

## VI. FURTHER IMPLICATIONS IF *SHANGHAI COMMERCIAL* IS FOLLOWED

If the *Shanghai Commercial* rule prevails, one must wonder how far it reaches. What other protections Washington law provides to debtors domiciled in the state could fall before the collection efforts of an out-of-state creditor whose underlying contract is governed by the law of another jurisdiction? Unless the courts treat other-debtor protections as more fundamental policies of Washington law than the *Shanghai Commercial* court treated the community property laws, they could also be imperiled.

The *Shanghai Commercial* court focused on the fact that the choice of law clause in the agreements before it specified that their "validity, construction, interpretation, *and enforcement*" would be governed by Hong Kong law.[189] Would the court consider that clause to allow the bank to avoid Washington's relatively generous homestead exemption[190] and its personal property exemptions from execution,[191] and instead apply

186. *Id.* at *7 (citations omitted). Ultimately, the *Hales* court concluded that the torts committed by the husband in that case benefitted the marital community and allowed recourse to all the community property under Washington's community property laws. *Id.* at *3.

187. *Compare id.* at *1–3, *with* Shanghai Com. Bank Ltd. v. Chang, 189 Wash. 2d 474, 476–78, 404 P.3d 62 (2017).

188. *Hales*, 2019 WL 1077271, at *5.

189. *Shanghai Com. Bank*, 189 Wash. 2d at 477.

190. See generally WASH. REV. CODE ch. 6.13 and specifically WASH. REV. CODE § 6.13.030.

191. WASH. REV. CODE ch. 6.15.

whatever exemptions, if any, are afforded under the laws of the applicable foreign jurisdiction? Would the court allow a choice of law clause to avoid application of the Washington Consumer Protection Act?[192]

## VII. ARIZONA'S APPROACH

The Arizona courts' approach to the property recourse issue is more aligned with the position taken in this Article than is *Shanghai Commercial*'s approach. As between the law of the spouses' domicile and the law generally applicable to the contract, Arizona applies the law that is most favorable to the non-contracting spouse.[193]

In *Lorenz-Auxier Financial Group, Inc. v. Bidewell*,[194] the Arizona Court of Appeals dealt with a situation in which a husband entered into equipment leases in Arizona with a leasing company having its principal place of business in Arizona.[195] His wife did not execute any of the leases and did not approve them in any way.[196] The spouses "were never domiciled in Arizona, but resided, at all times relevant to these transactions, in Oregon, a non-community property state."[197] Paragraph 21 of the leases contained the parties' submission to Arizona's jurisdiction and their choice of Arizona law to govern the interpretation of the documents.[198] The court found that, if Arizona law applied, the debt would be considered a community obligation.[199] The wife argued that Oregon law should apply to the property recourse issue.[200] The court cogently disposed of the leasing company's contention that the governing law clause of the leases controlled that issue:

> Lorenz–Auxier's reliance on Paragraph 21 is misguided. It is undisputed that the *parties to the leases* made a choice of law pursuant to their contract and that they chose Arizona law. Mrs. Bidewell correctly argues, however, that this provision does not bind her, as she was not a party to the leases, made no personal choice of law, and could not be bound by the terms, including the choice of law terms, of contracts she did not sign.
>
> We find no authority in Arizona or Oregon that permits one spouse, acting extraterritorially without the other spouse's consent, to enlarge

192. WASH. REV. CODE ch. 19.86.

193. *See* Lorenz-Auxier Fin. Grp., Inc. v. Bidewell, 160 Ariz. 218, 219–20, 772 P.2d 41 (Ariz. Ct. App. 1989).

194. *Id.*

195. *Id.* at 219.

196. *Id.*

197. *Id.* at 220.

198. *Id.* at 219.

199. *Id.* at 220.

200. *Id.*

> his dispositional power over the other spouse's property beyond the limits imposed by the law of the domiciliary state. O.R.S. § 108.020 states that spouses "are not liable for the separate debts of each other." O.R.S. § 108.050 states that none of the wife's "real or personal property acquired by her own labor during coverture, shall . . . be subject to the debts or contracts of her husband." Mrs. Bidewell obtained a measure of protection through these statutes that her husband could not unilaterally sign away. Her husband may have agreed that *he* would be bound by Arizona law, but he did not thereby bind his wife.
>
> Were we to accept Lorenz–Auxier's position, one spouse could alter the rights and liabilities of his marital community, irrespective of the protective policies of the state of domicile, by simply choosing to contract in another forum and by contractually consenting to the application of that forum's laws. One spouse, for example, could defeat Arizona's protective requirement that both spouses must consent when binding community property to guarantee a third party's obligation, A.R.S. § 25–214(C)(2); the would-be guarantor would need only to transact a guarantee in a state that lacked such protection and to include a "Paragraph 21" submitting to the latter state's laws.
>
> Lorenz–Auxier knew or should have known that it was dealing with Oregon residents not subject to Arizona community property law. If Lorenz–Auxier had intended to bind the Bidewell's marital unit or Mrs. Bidewell individually to Paragraph 21, it should have obtained Mrs. Bidewell's signature.[201]

Consistent with *Lorenz-Auxier*, the Arizona courts have held that, where a creditor obtains a judgment against Arizona-domiciled spouses in another state, Arizona law on the property recourse issue applies to its enforcement of that judgment in Arizona.[202]

The Arizona courts further refined their position in *Phoenix Arbor Plaza, Ltd. v. Dauderman*[203] and *First-Citizens Bank & Trust Co. v. Morarari*.[204]

*Dauderman*, which was decided several months after *Lorenz-Auxier*, involved an issue about recourse to the community property of California-domiciled spouses where only the husband signed a guaranty "executed in

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201. *Id.* at 221.

202. *See, e.g.*, Rackmaster Sys., Inc. v. Maderia, 219 Ariz. 60, 64–65, 193 P.3d 314 (2008) ("[A]llowing the enforcement of a guaranty signed only by Patrick would render ineffective and useless the explicit prohibition of A.R.S. § 25–214(C)(2)," which "the legislature clearly intended" would "protect the substantive rights of the non-signing spouse, we conclude that it is a substantive law that bars collection of the guaranteed debt from the community's property.").

203. 163 Ariz. 27, 785 P.2d 1215 (1989).

204. 242 Ariz. 562, 399 P.3d 109 (2017).

Arizona securing the performance of the terms of an Arizona lease of Arizona property."[205] If Arizona law applied to the property recourse issue, the marital community would not be liable on the guaranty, but if California law applied, it would.[206] Unlike many of these cases, in *Dauderman* the *creditor* argued that the law of the spouses' domicile should govern the property recourse issue and "that when dealing with community property in one state involving a transaction conducted in another state the courts uniformly apply the law of the marital domicile."[207] It argued that *Lorenz-Auxier* was dispositive.[208] The court, however, distinguished *Lorenz-Auxier* by pointing out that "[a]ll that *Lorenz–Auxier* did was to refuse to enforce a unilateral promise by the husband to bind his wife to a promise which would jeopardize property rights provided by her state of domicile," whereas in the case before it the wife's "California community property rights were not *restricted, reduced, or jeopardized* by her husband's unilateral guarantee."[209] In a footnote, it explained that "[i]t makes no sense to allow a spouse to jeopardize the other spouse's property rights by going to another state and making a unilateral guarantee affecting that property."[210]

In *Morari*, the Arizona court dealt with a situation substantially identical to that in *Dauderman*. One spouse of each of three California-domiciled married couples signed a guaranty of a loan to purchase property in Arizona.[211] As in *Dauderman*, if Arizona law applied to the property recourse issue, the marital community would not be liable on the guaranty, but if California law applied, it would.[212] The court held that Arizona law applied to the guaranties generally.[213] It held that Second Restatement § 187 was irrelevant because that section "does not apply to a spouse that did not execute a guaranty contract and is not party to that contract."[214] It further stated that, under both *Lorenz-Auxier* and *Dauderman*, "the spouses could not be bound by guaranty contracts they had not signed, including any choice of law provisions therein."[215]

Under the Arizona cases, a non-contracting spouse is entitled to the protection of the marital property laws of the spouses' domicile; provided, however, that if the law of the jurisdiction governing the contracting

205. *Dauderman*, 163 Ariz. at 27–28.
206. *Id.* at 28.
207. *Id.* at 30.
208. *Id.*
209. *Id.* at 31.
210. *Id.* at 31 n.1.
211. First-Citizens Bank & Tr. Co. v. Morari, 242 Ariz. 562, 564, 399 P.3d 109 (2017).
212. *See id.* at 563–64.
213. *Id.* at 566.
214. *Id.* at 567.
215. *Id.* at 568.

spouse's obligation is more protective of the non-contracting spouse, they will be entitled to those greater protections.

## CONCLUSION

The *Shanghai Commercial* decision seems to have erred in several important respects and, in doing so, it undermined some of the fundamental protection given to Washington residents under the state's community property laws. First, the court did not appear to recognize that it should analyze the choice of law for the property recourse issue separately from that for the interpretation and validity of the contract generally. Second, the court did not recognize that §§ 187 and 188 of the Second Restatement relate only to selecting the applicable law as it affects the parties to a contract and do not govern choice of law as to issues that affect third parties. Third, the court denied the non-contracting spouse the protection against separate debts of the contracting spouse by means of a contract to which she was not a party, to which she did not consent, and of which she was not even aware.

The author respectfully submits that the *Shanghai Commercial* case was wrongly decided and that the supreme court should overrule it at its first opportunity. A better rule would hold that the property recourse issue is governed by the law of the spouses' domicile except where the spouses take on the debt while domiciled in another state and then move to Washington and try to use Washington's community property law to avoid the liability they had when they incurred the debt. The author takes no position on whether the Washington courts should adopt Arizona's exception for situations where the law governing the contract generally is more favorable to the non-contracting spouse than Washington law.