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# Resolving Six Celebrated Conflicts Cases Through Statutory Choice-of-Law Rules

by Symeon C. Symeonides\*

I am truly honored to be asked to participate in a symposium hosted by Brainerd Currie's school and dedicated to him. Like the other participants in this symposium, I have studied Currie's insightful writings, I have learned immensely from them, and I have written about them.<sup>1</sup> Unlike most participants, however, I found myself in the position of being able to use some of Currie's ideas in the drafting of choice-of-law legislation. I had the undeserved good fortune of being asked to serve as the Reporter for the Louisiana State Law Institute in revising and codifying Louisiana's conflicts law. The result of that effort is a codification that became effective on January 1, 1992, as Book IV of the Louisiana Civil Code.<sup>2</sup> Good or bad, this is the only comprehensive

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1. See, e.g., SYMEON C. SYMEONIDES, AN OUTSIDER'S VIEW OF THE AMERICAN APPROACH TO CHOICE OF LAW: COMPARATIVE OBSERVATIONS ON CURRENT AMERICAN AND CONTINENTAL CONFLICTS DOCTRINE 16-38, *et passim* (1980); Symeon C. Symeonides, *Revolution and Counter-Revolution in American Conflicts Law: Is There a Middle Ground?* 46 OHIO ST. L.J. 549 (1985).

2. See LA. CIV. CODE ANN. arts. 3515-48 (West 1994). For a discussion of this codification, see, *inter alia*, Symeon C. Symeonides, *Private International Law Codification in a Mixed Jurisdiction: The Louisiana Experience*, 57 RABELS ZEITSCHRIFT FÜR AUSLANDISCHES UND INTERNATIONALES PRIVATRECHT, 460 (1993); Symeon C. Symeonides, *Les grands problèmes de droit international privé et la nouvelle codification de Louisiane*, 81 REVUE CRITIQUE DU DROIT INT'L PRIVÉ, 223 (1992). The provisions of the codification on tort conflicts are discussed in Symeonides, *Louisiana's New Law of Choice of Law for Tort Conflicts: An Exegesis*, 66 TUL. L. REV. 677 (1992) [hereinafter Symeonides, *Exegesis*];

choice-of-law legislation in the United States. I thought it might be interesting to the readers of this symposium to see how the six cases that are the object of this symposium would be resolved under this codification.<sup>3</sup> This is what I hope to demonstrate in this article.

It is, of course, well known that Brainerd Currie abhorred choice-of-law rules.<sup>4</sup> However, his famous aphorism that "[w]e would be better off without choice-of-law rules"<sup>5</sup> must be put in proper historical perspective. When Currie made this statement, he had good reasons to be skeptical of rules. The rules that prevailed at that time, that is, those of the *First Restatement*, were dogmatic, rigid and mechanical, if not downright silly. Currie had less of a good reason to condemn all future efforts to develop different choice-of-law rules. Perhaps he thought that it was impossible to develop rules that would be faithful to the teachings of his revolution without prematurely arresting the development of American conflicts law.

The question I would like to pose to the readers of this article is whether the Louisiana codification has come close to belying Currie's pessimism, if that is what it was, in formulating rules that are flexible and sensitive to the policies underlying the competing laws, faithful to the lessons of the conflicts revolution, and capable of producing functionally sound results.

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Symeon C. Symeonides, *Problems and Dilemmas in Codifying Choice of Law for Torts: The Louisiana Experience in a Comparative Perspective*, 38 AM. J. COMP. L. 431 (1990); and Symeon C. Symeonides, *La Nuova Normativa della Louisiana sul Diritto Internazionale Privato in Tema di Responsabilità Extracontrattuale*, 29 RIVISTA DI DIRITTO INTERNAZIONALE PRIVATO E PROCESSUALE 43 (1993). Cases decided under this codification are discussed in Symeon C. Symeonides, *Louisiana Conflicts Law: Two "Surprises,"* 54 LA. L. REV. 497 (1994).

3. For the reader's convenience, the pertinent articles of the codification are reproduced in an appendix accompanying this article.

4.

The rules [of the traditional theory] . . . have not worked and cannot be made to work . . . . But the root of the trouble goes deeper. In attempting to use rules we encounter difficulties that stem not from the fact that the particular rules are bad, . . . but rather from the fact that we have such rules at all . . . . We would be better off without choice-of-law rules.

BRAINERD CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* 180-83 (1963).

5. *Id.*

I. *GRANT V. MCAULIFFE*<sup>6</sup>A. *Defining the Issue*

Like all modern choice-of-law methodologies, the Louisiana codification requires an issue-by-issue analysis<sup>7</sup> because its choice-of-law rules are issue-oriented. Of relevance to this case are two sets of such rules,<sup>8</sup> those contained in Article 3543 which applies to "issues pertaining to standards of conduct and safety,"<sup>9</sup> and those contained in Article 3544 which applies to "issue[s] pertaining to loss distribution and financial protection."<sup>10</sup> In this case, the issue with regard to which a conflict is claimed to exist is whether a tort victim's cause of action against the tortfeasor dies with the tortfeasor, as provided by Arizona law, or whether the action can be maintained against the tortfeasor's estate, as provided by California law. The question is whether this issue falls within the scope of Article 3543 or 3544.

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6. The facts of this case can be found at Transcript, *Choice of Laws: How It Ought To Be*, 48 MERCER L. REV. 639, 658 (1997) and at *Grant v. McAuliffe*, 264 P.2d 944 (Cal. 1953). This and the other opinions that follow are written as if the forum state had adopted the Louisiana conflicts codification. The forum's substantive law remains the same as in the actual case.

7. See LA. CIV. CODE ANN. art. 3515, cmt. (d); art. 3542, cmt. (a); Symeonides, *Exegesis*, *supra* note 2, at 692-94.

8. The Title on torts or, in civilian terminology, "delictual and quasi-delictual obligations," begins with a general article, Article 3542, and then descends gradually to narrower specific rules for different categories of issues as follows: Article 3543 provides for "[i]ssues . . . of conduct and safety;" Article 3544 provides for "[i]ssues . . . [of] loss distribution and financial protection"; Article 3545 provides for certain products liability cases regardless of the type of issue involved; Article 3546 provides for punitive damages in cases other than the products cases covered by Article 3545; Article 3547 provides an "escape" from Articles 3543-3546; and, Article 3548 contains a special rule with regard to the domicile of some corporate tortfeasors. Article 3542 is both the general and the residual article of the torts title. It is the general article in the sense that it enunciates the general choice-of-law approach of the title, which is then implemented by specific articles directed to particular issues or cases. It is also the residual article in the sense that it applies to all issues and cases that are not covered by the specific articles. See LA. CIV. CODE ANN. art. 3542, cmt. (b).

9. LA. CIV. CODE ANN. art. 3543.

10. For the rationale, origin, and problems of the distinction between conduct-regulation and loss-distribution issues, see Symeon C. Symeonides, *Exegesis*, *supra* note 2, at 699-705.

*B. Classifying the Issue*

To answer this question, the court must begin with the law of the state where the injurious conduct occurred. If that state has a rule that purports to regulate that conduct, then the case raises an issue of conduct regulation and the applicable article is Article 3543. If the state of the conduct does not have a conduct-regulating rule that is implicated in the case, then the court should ask whether that state and the other involved state have conflicting loss-distribution rules that are implicated by the facts of the case. If the answer is yes, then the resulting conflict is one that raises an "issue pertaining to loss distribution and financial protection,"<sup>11</sup> which falls within the scope of Article 3544.

This is exactly the situation here. Arizona, the state where the injurious conduct occurred, does not have a rule that purports to regulate that conduct. The Arizona rule that provides that the tort victim's cause of action does not survive the death of the tortfeasor is not a rule purporting to regulate conduct. This is so even if this rule had a penal law rationale, such as a notion left from the days when penal law was not clearly separated from tort law, that a dead person cannot be punished. The presence of such a rule in Arizona has no bearing on how a potential tortfeasor, or for that matter a potential victim, would conduct themselves, in that it does not make them either more or less careful or risk averse. Whatever the original rationale behind this rule, it is more likely that today the rule functions as a mechanism for protecting the tortfeasor's heirs and pre-accident creditors against the claims of the tort victim. As such, the rule qualifies as a rule of post-accident loss distribution in that it immunizes the tortfeasor's estate and places the loss caused by the accident on the victims of the accident.

Similarly, the California rule which allows the action to proceed against the tortfeasor's estate is a rule of post-accident loss distribution. It is premised on the notion that the function of tort law is to compensate rather than to punish and that such compensation must be extracted from the tortfeasor's assets, be he alive or dead, before his heirs or pre-accident creditors can assert their claims against the estate. The rule places the loss resulting from the accident on the tortfeasor's estate rather than on the victim. Even if the California rule somehow had a conduct-regulating function, for example, to encourage drivers to drive more carefully, that function would not be relevant in this case which involves driving in another state.

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11. LA. CIV. CODE ANN. art. 3544.

C. *The Applicable Choice-of-Law Rule and the Governing Law*

Because both conflicting rules are loss-distribution rules, the conflict between them falls within the scope of Article 3544, rather than Article 3543. Because both the injured person and the person who caused the injury are domiciled in the same state, the pertinent part of Article 3544 is subparagraph (1) which provides that “[i]f, at the time of the injury, the injured person and the person who caused the injury were domiciled in the same state,” then “[i]ssues pertaining to loss distribution and financial protection are governed . . . by the law [of that state].”<sup>12</sup> Thus, California law applies. The action survives the death of the tortfeasor and should be allowed to proceed against his estate.

D. *Defending the Result*

The application of the law of the parties' common domicile in this case finds ample support in the American conflicts experience of the last four decades<sup>13</sup> and is in keeping with the general principles of the Louisiana conflicts codification which have been drawn from that experience. These principles call for the application of “the law of the state whose policies would be most seriously impaired if its law were not applied”<sup>14</sup> to the particular issue. Here there is little doubt that California, not Arizona, would be the state whose policies would be most seriously impaired if its law were not applied to this loss-distribution conflict. As its name suggests, a loss-distribution rule reflects a society's judgment about which classes of people should bear post-accident losses and which classes should not. This judgment is arrived at by assessing and evaluating competing social policies with a view towards attaining an equilibrium between or among them. When, as in this case, both sides of this equilibrium are situated in the same state, i.e., when both parties are domiciled in the same state, one of them being a member of the class to whom the rule imposes the loss and the other being a member of the class that benefits from this loss-allocation, the application of the rule effectuates its underlying policy without impairing the policies of any

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12. *Id.*

13. For authority and discussion, see Symeonides, *Exegesis*, *supra* note 2, at 715-21. See also LA. CIV. CODE ANN. art. 3544, cmt. (e).

14. LA. CIV. CODE ANN. art. 3542. Despite an acoustical resemblance with Professor Baxter's comparative impairment approach (see William F. Baxter, *Choice of Law and the Federal System*, 16 STAN. L. REV. 1 (1963)), the quoted language was not intended to adopt Professor Baxter's approach. See LA. CIV. CODE ANN. art. 3515, cmt. (b); Symeonides, *Exegesis*, *supra* note 2, at 691-92.

other state.<sup>15</sup> This is the reason for which the Louisiana conflicts codification has adopted the common-domicile rule. Although this rule is subject to exceptions or "escapes,"<sup>16</sup> there is no reason to invoke any exceptions in a case like this one in which California's loss-distribution rule allows a California tort victim to recover from the estate of a California tortfeasor.

## II. *BABCOCK V. JACKSON*<sup>17</sup>

### A. *Defining the Issue*

In this case, the issue with regard to which a conflict is claimed to exist is whether an injured guest-passenger's action against the host-driver (and his insurer) for injury caused by the latter to the former should be allowed to proceed on the merits, as provided by New York law, or whether the action should be barred because of the passenger's status as a gratuitous guest of the driver, as provided by the Ontario guest statute.

Again, the question is whether this issue is one "pertaining to conduct and safety"<sup>18</sup> or one "pertaining to loss distribution."<sup>19</sup> Because the injurious conduct occurred in Ontario, and none of Ontario's conduct-regulating rules is invoked here, this issue cannot be one pertaining to conduct regulation. The only Ontario rule that is invoked in this case is the Ontario guest statute. However, it is clear that, at least in the form it existed at the time of the accident, this statute was not a conduct-regulating rule because it had no bearing on the way drivers or their passengers conducted themselves. The existence of that statute would not tempt a person driving in Ontario to drive more carelessly because, if he were to cause an accident and survive it, he would not be accountable to his guest-passengers, although he would be accountable

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15. See *Collins v. Trius, Inc.*, 663 A.2d 570, 573 (Me. 1995), where the court stated:

The superiority of the common domicile as the source of law governing loss-distribution issues is evident. At its core is the notion of a social contract, whereby a resident assents to casting her lot with others in accepting burdens as well as benefits of identification with a particular community, and ceding to its lawmaking agencies the authority to make judgments striking the balance between her private substantive interests and competing ones of other members of the community.

16. See, e.g., LA. CIV. CODE ANN. art. 3547 and other exceptions, discussed at text accompanying note 33 (discussion of *Schultz*).

17. For the facts of this case, see Transcript, *supra* note 6, at 667 and *Babcock v. Jackson*, 191 N.E.2d 279 (N.Y. 1963).

18. LA. CIV. CODE ANN. art. 3543.

19. *Id.* art. 3544.

to everybody else who might be injured. Regardless of the statute's original purpose, which might well have been to protect good samaritans and punish ungratefulness, the fact remains that *today* the Ontario guest statute functions as a rule of loss distribution in that it places the post-accident loss on the injured guest passenger, rather than on the driver and his insurer.

Similarly, the New York rule which allows the action to proceed against the driver functions as a loss-distribution rule in that it places the post-accident loss on the driver and his insurer rather than on the injured passenger. Even if this rule had a conduct-regulating function in encouraging drivers to drive more carefully, that function would not be relevant in this case which involves driving in another state.

### *B. The Applicable Choice-of-Law Rule and the Governing Law*

Consequently, as both the Ontario rule and the New York rule are loss-distribution rules, the conflict between them is one "pertaining to loss distribution" and thus is governed by Article 3544. Because both the injured person and the person who caused the injury are domiciled in the same state, the case falls within the scope of the common-domicile rule of that article. Thus, New York law applies and the action should be allowed to proceed against the driver and his insurer.

### *C. Defending the Result*

Again, the application of the law of the common domicile to this loss-distribution conflict is perfectly appropriate and in keeping with the general principles of the Louisiana conflicts codification which calls for the application of "the law of the state whose policies would be most seriously impaired if its law were not applied"<sup>20</sup> to the particular issue. There is no reason to invoke any of the exceptions to the common-domicile rule.

## III. *ERWIN V. THOMAS*<sup>21</sup>

### *A. Defining the Issue*

As in the previous two cases, the issue here is clearly an issue of loss-distribution. Neither the Washington rule, which does not recognize an action for loss of consortium, nor the Oregon rule, which allows such an action, have any bearing on the way potential tortfeasors or potential

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20. *Id.* art. 3542.

21. For the facts of this case, see Transcript, *supra* note 6, at 714 and *Erwin v. Thomas*, 506 P.2d 494 (1973).



victims conduct themselves. The existence of the Washington rule would not tempt a person acting in Washington to act any less carefully, because if he were to cause an injury, he would only have to compensate the victim, but not the victim's spouse. Both the Washington rule and the Oregon rule are rules of loss distribution in that they define what losses are compensable and who should bear them. The Washington rule is based on the premise that when a person is injured, that person's spouse does not suffer a loss or if the spouse does suffer a loss, it is a loss that should not be borne by the tortfeasor. The Oregon rule is based on the opposite premise.

*B. The Applicable Choice-of-Law Rule*

Because the rules of both states are loss-distribution rules, the conflict between them falls within the scope of Article 3544. Because the parties are not domiciled in the same state nor in states whose law is identical, the pertinent part of Article 3544 is clause (a) of subparagraph (2) which provides that when both the injurious conduct and the resulting injury occurred in the same state and that state is also the state in which either the tortfeasor or the injured person was domiciled, the law of that state applies, regardless of whether it provides for a higher or a lower standard of financial protection than the law of the domicile of the other party.

*C. The Governing Law*

Here, the injured person, the wife,<sup>22</sup> is domiciled in Washington, and she was injured in that state as a result of conduct undertaken in that state. Consequently, the law of Washington governs and plaintiff may not recover.

*D. Defending the Result*

Despite arguments to the contrary, the application of Washington law is appropriate and there is no reason to utilize any of the escapes in an effort to avoid it. From the perspective of plaintiff, there is nothing unfair in subjecting her to the law of the place of conduct and injury when that place is in her home state.<sup>23</sup> Indeed, nothing entitles plaintiff to invoke the benefit of Oregon law, because, although

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22. See LA. CIV. CODE ANN. art. 3544, cmt. (b) (stating that in a loss-of-consortium action the "injured person" is the person for whose benefit the action is provided).

23. See LA. CIV. CODE ANN. art. 3544, cmt. (g) ("When a person is injured in his home state by conduct in that state, his rights should be determined by the law of that state, even if the person who caused the injury happened to be from another state. The law of the latter state should not be interjected to the victim's detriment or benefit.").

defendant was a domiciliary of that state, nothing pertinent to plaintiff's injury had occurred in Oregon. "Being injured in h[er] home state by conduct in that state, that person should not be allowed to invoke the protection of that state's law 'and at the same time claim exception from its burdens.'"<sup>24</sup>

#### IV. *ROSENTHAL V. WARREN*<sup>25</sup>

This case presents the reverse pattern of that in *Erwin v. Thomas*.<sup>26</sup> Here the defendant doctor is acting within his home state whose law protects him but causes injury to a person domiciled in another state whose law protects the injured person. Because the issue in question is one pertaining to loss-distribution,<sup>27</sup> this split-domicile conflict falls within the scope of subparagraph (2) of Article 3544. However, whether the conflict falls within the scope of clause (a) or rather clause (b) of that subparagraph depends on who is the "injured person" and where did that person sustain the injury.

##### A. *The Decedent's Survival Action*

If the injured person is deemed to be the deceased patient, then that person was injured in Massachusetts. This would render applicable clause (a) of subparagraph (2) which calls for the application of the law of Massachusetts because both the conduct and the injury occurred in that state and the tortfeasor is also domiciled there. This result would be consistent with the spirit of that provision. As stated in the Reporter's comments,

when a person acting within his home state causes injury in that state, he should be held accountable according to the law of that state, even if the injured person happened to be from another state. The law of

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24. Symeonides, *Exegesis*, *supra* note 2, at 729 (quoting DAVID F. CAVERS, *THE CHOICE-OF-LAW PROCESS*, 141 (1965)).

25. For the facts of this case, see Transcript, *supra* note 6, at 700 and *Rosenthal v. Warren*, 475 F.2d 438 (2d Cir.), *cert. denied*, 414 U.S. 856 (1973).

26. 506 P.2d 494 (1973).

27. This is so because both conflicting rules are loss-distribution rules. The Massachusetts limitation-of-liability rule is designed to limit the financial exposure of doctors rather than to excuse them for being careless. Similarly, New York's contrary rule is primarily designed to compensate victims. Even if this rule was intended to make doctors more careful, this conduct-regulating function would, in principle, not be pertinent with regard to conduct outside New York.

the latter state should not be interjected to the tortfeasor's detriment or benefit.<sup>28</sup>

As explained by the drafter of Article 3544,

when . . . a person engages in his home state in activity that causes injury in that state, the application of that state's law would not only preserve the loss-distribution equilibrium established by that state's law, but would also be consistent with that person's decision "to accept both the benefits and the burdens of identifying with that jurisdiction and to submit . . . to its authority." In the absence of special circumstances, the fact that the injured person is domiciled in another state is simply not a good enough reason to change the equation.<sup>29</sup>

### B. *The Survivors' Wrongful Death Action*

A wrongful death gives rise to two distinct causes of action. The first action, usually called the "survival action," is designed to compensate the decedent for his loss. The second action, the wrongful-death-action proper, is designed to compensate the decedent's survivors for their own losses. If New York tort law recognizes this distinction, then New York recognizes that in a wrongful death situation there are two or more "injured persons," the decedent and his survivors, all of whom must be compensated. Taking account of this distinction, the Louisiana conflicts codification provides that "the 'injured person' in a survival action is the deceased victim . . . [while] in a wrongful death action . . . the 'injured persons' are [his surviving beneficiaries]."<sup>30</sup> The codification also provides that "[w]hen one tortfeasor causes injury to more than one person, the applicable law should be determined separately with regard to each victim."<sup>31</sup>

Under this distinction, the decedent's survival action will be governed by Massachusetts law as explained above. However, the survivors' wrongful death action may or may not be governed by Massachusetts law. Because the survivors are domiciled in New York, it is clear that they sustained their injury in that state. This factor renders inapplicable clause (a) of subparagraph (2) of Article 3544, and it potentially renders applicable clause (b) of the same subparagraph. That clause calls for the application of the law of the place of injury, here New York, if:

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28. LA. CIV. CODE ANN. art. 3544, cmt. (g) (citing D. CAVERS, *THE CHOICE OF LAW PROCESS* (1965)).

29. Symeonides, *Exegesis*, *supra* note 2, at 728 (internal quotations are from *Schultz v. Boy Scouts of America, Inc.*, 480 N.E.2d 679, 685 (N.Y. 1985)).

30. LA. CIV. CODE ANN. art. 3544, cmt. (b).

31. *Id.*

(i) the injured person was domiciled in that state, (ii) the person who caused the injury should have foreseen its occurrence in that state, and (iii) the law of that state provided for a higher standard of financial protection for the injured person than did the law of the state in which the injurious conduct occurred.<sup>32</sup>

This case clearly meets requirements (i) and (iii). The question is whether the case also meets requirement (ii). A good argument can be made in favor of an affirmative answer. Besides the hospital's fundraising activities in New York and the likelihood of some solicitation of business from that state, it is clear that the hospital was aware of the fact that many of its patients, including the deceased, were New York domiciliaries. That being the case, the hospital should have foreseen that, if any one of those patients were to be injured or die as a result of a medical malpractice committed by one of the hospital's doctors, the consequences of that malpractice would be felt in the state in which the patient and his family lived.<sup>33</sup>

Thus, under this analysis, New York law would apply to the survivor's wrongful death action, while Massachusetts law would apply to the victim's survival action. This appears to be a fair compromise between the competing interests of the two states.

#### V. *SCHULTZ V. BOY SCOUTS OF AMERICA, INC.*<sup>34</sup>

This case involves two corporate defendants, Boys Scouts, a corporation which at the time of the injury had its headquarters in New Jersey but has since moved its headquarters to Texas, and the Franciscan Brothers, a corporation incorporated and domiciled in Ohio. Because the cases against the two defendants raise slightly different choice-of-law issues, the discussion is divided into two parts, one for each defendant, respectively.<sup>35</sup>

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32. *Id.* art. 3544(2)(b).

33. *Id.* art. 3544, cmt. (h) defines "foreseeability" through a cross-reference to comment (g) under art. 3543, which provides as follows:

[T]his foreseeability should be understood in a "spatial" sense and should not be confused with the foreseeability of substantive tort law. The pertinent question here is not whether the tortfeasor should have foreseen the occurrence of the injury, but whether he should have foreseen that the injury would have occurred in the particular state in which the injury did occur.

*Id.* art. 3543 cmt. (g).

34. For the facts of this case, see Transcript, *supra* note 6, at 674 and *Schultz v. Boy Scouts of America, Inc.*, 480 N.E.2d 679 (N.Y. 1985).

35. This separate treatment is also consistent with the Louisiana codification which provides that "[w]hen one person is injured by more than one tort-feasor, the latter's obliga-

A. *Schultz v. Boys Scouts of America, Inc.*

**1. The Common-Domicile Rule**

With regard to defendant Boy Scouts, the conflicts issue is whether defendant should be amenable to suit for a tort committed by one of its servants, as provided by New York law, or whether defendant should be immune from suit because of defendant's status as a charitable corporation, as provided by New Jersey law.

New Jersey's charitable immunity rule is clearly a loss-distribution rule. If New York's nonimmunity rule is also characterized as a loss-distribution rule, then the case will fall within the scope of Article 3544. Because both parties were domiciled in the same state, the case will fall within the scope of the common-domicile rule of that article which, like the first *Neumeier* rule,<sup>36</sup> applies not only to cases like *Babcock* in which the common domicile is in the pro-recovery state, but also in cases like this one in which the common domicile is in the state that denies recovery. Thus, this case will be governed by New Jersey's immunity rule and plaintiffs will be denied any recovery.

If this result is deemed acceptable, the matter will end here. However, many observers may find this result problematic, either in terms of "conflicts justice" or in terms of "substantive justice." For those who do, it should be said that, unlike the *Neumeier* rules which do not allow a way out of the common-domicile rule,<sup>37</sup> the Louisiana conflicts codification provides several means which, alternatively or cumulatively, can remove this case from the scope of this rule and subject it to New York law. The decision of whether to utilize any of these means rests with the court's discretion. The following discussion explains these means without prejudging whether a court should use them.

**2. Judicial Discretion in Avoiding the Common-Domicile Rule**

(a) *Characterizing the Issue as One Pertaining to Conduct.* One way in which the common-domicile rule may be held inapplicable is if the issue in question is characterized as an issue "pertaining to standards of conduct and safety,"<sup>38</sup> rather than an issue "pertaining to loss distri-

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tions vis-a-vis the victim and the law governing these obligations should be determined separately with regard to each tortfeasor." LA. CIV. CODE ANN. art. 3544, cmt. (b).

36. See *Neumeier v. Kuehner*, 286 N.E.2d 454 (N.Y. 1972).

37. See *Neumeier* Rule #1 in *Neumeier*, 286 N.E.2d 454.

38. LA. CIV. CODE ANN. art. 3543.

bution and financial protection."<sup>39</sup> If such a characterization is appropriate, then this case would fall within the scope of Article 3543, rather than Article 3544. Article 3543 provides in pertinent part that, regardless of the domicile of the parties, "[i]ssues pertaining to standards of conduct and safety are governed by the law of the state in which the conduct that caused the injury occurred, if the injury occurred in that state or in another state whose law did not provide for a higher standard of conduct."<sup>40</sup> Here, if the conduct that caused the injury is brother Coakeley's molesting of the children, that conduct occurred primarily<sup>41</sup> in New York. Consequently, even if the injury occurred in New Jersey, the law of New York would apply because New Jersey did not provide for a higher standard of conduct than did New York.

The question, therefore, is whether this issue can be appropriately characterized as an issue "pertaining to standards of conduct and safety."<sup>42</sup> As said in discussing *Grant*, in characterizing an issue for purposes of determining the applicable article of the Louisiana codification, the court should begin with the state in which the injurious conduct occurred. If that state has a rule that purports to regulate that conduct and that rule has been violated, then the case raises an issue of conduct regulation and the applicable article is Article 3543. Article 3544 becomes applicable only if the state of conduct does not have a conduct-regulating rule that is implicated in the case. In this case, at least part of the injurious conduct occurred in New York and has violated a New York rule which, at least in part, is a conduct-regulating rule. Indeed, it could be argued that, to the extent it imposes liability, the New York rule has a deterrence function, in addition to its loss-distribution function. If it is determined that the deterrence function predominates,

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39. *Id.* art. 3544.

40. *Id.* art. 3543. For the rationale of this rule, see Symeonides, *Exegesis*, *supra* note 2, at 705-10.

41. The Reporter's Comments provide that "[c]ases in which the injurious conduct occurs in more than one state should be approached under the principles of causation of the law of the forum. Ordinarily, these principles will make it possible to determine which particular conduct was, legally speaking, the principal cause of the injury." LA. CIV. CODE ANN. art. 3543, cmt. (h). The Comments also provide that

[i]n all cases in which the principles of causation would not yield a clear answer, the applicable law will be determined in accordance with Article 3542. It is also possible that the fact that the injurious conduct was not localized in any single state could, in appropriate circumstances, evoke the escape clause of Article 3547, even without resorting to the principles of causation.

*Id.*

42. LA. CIV. CODE ANN. art. 3543.

then the rule could well be characterized as a rule of conduct regulation.<sup>43</sup> If such characterization is appropriate,<sup>44</sup> then the conflict will be between New York's primarily conduct-regulating rule and New Jersey's loss-distribution rule. Does such a conflict raise an issue "pertaining to conduct and safety" in which case Article 3543 applies, or does the conflict raise an issue "pertaining to loss distribution and financial protection" in which case Article 3544 applies? As said at the beginning, as long as the state of conduct has a conduct-regulating rule that is being violated, the case should be governed by Article 3543, and Article 3544 does not come into play. Even if Article 3544 comes into play, a good argument can be made that in this case the "conflict" between the two articles should be resolved in favor of Article 3543 because the state whose conduct-regulating rule has been violated by conduct in that state has a stronger interest in applying its rule than another state might have in shielding the defendant from the consequences of its conduct.<sup>45</sup>

The above arguments are plausible, but they can be met with good counter-arguments. Obviously, this matter exposes the practical difficulties in implementing the distinction between conduct-regulation and loss-distribution which has plagued New York courts.<sup>46</sup> As the drafter of the Louisiana codification has acknowledged, "[t]he line between conduct-regulating rules and rules of loss-distribution may not always be as clear as one would like. For instance, a given rule of law may at the same time regulate safety and (or through) loss distribution."<sup>47</sup> The New York no-immunity rule in this case is a good example in that it is a rule that may seek to regulate conduct through loss-distribution means. In full awareness of these difficulties, the drafters of the codification decided to adopt the above distinction for all its other

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43. See *Padula v. Lilarn Properties Corp.*, 644 N.E.2d 1001, 1003 (N.Y. 1994) (holding that §§ 240-41 of New York's Labor Law, were "primarily conduct-regulating rules," although they "embody both conduct-regulating and loss-allocating functions").

44. Professor Weintraub, who expresses serious misgivings about the practicality of the distinction between conduct-regulation and loss-distribution, suggests that conduct-regulation rules "should be limited to directory rules intended to regulate conduct in the strictest sense." Russell Weintraub, *The Contributions of Symeonides and Kozyris in Making Choice of Law Predictable and Just: An Appreciation and Critique*, 38 AM. J. COMP. L. 511, 515 (1990).

45. Professor Baxter would perhaps resolve the conflict in the opposite way by giving preference to the loss-distribution rule of the common domicile because the conduct-state's regulatory interest will "not be impaired significantly if it is subordinated in the comparatively rare instances involving two nonresidents." Baxter, *supra* note 14, at 13.

46. See Symeonides, *Choice of Law in the American Courts in 1994: A View "From the Trenches,"* 43 AM. J. COMP. L. 1, 17-18 (1995).

47. Symeonides, *Exegesis*, *supra* note 2, at 704 (footnotes referring to *Schultz* and other New York cases omitted).

advantages and in hopes that the ambiguity inherent in this distinction "might just provide the right dosage of needed flexibility in a court's decision to choose between Article 3543 and 3544."<sup>48</sup> It was also thought that "the availability of the escape clause of Article 3547 was a sufficient guarantee that this distinction would not become a straight jacket,"<sup>49</sup> and that "when the particular issue belongs to both categories, the case will probably be exceptional enough to invoke the escape clause of Article 3547, which will refer the case to Article 3542."<sup>50</sup>

In conclusion, therefore, rather than subjecting this case to Article 3543, it may be preferable to take the position that, although this case falls in principle within the scope of Article 3544, it is nevertheless an exceptional case so as to evoke the escape clause of Article 3547. The case may qualify as exceptional because:

(a) the case is not confined *exclusively* to loss-distribution issues and thus does not fit squarely within the scope of Article 3544;

(b) if the case does in principle fall within the scope of Article 3544, the case does not fall within the scope of the common-domicile rule of that article because: (i) Boy Scouts is *now* domiciled in Texas rather than New Jersey; or (ii) because, under Article 3548, the court has the discretion to treat Boys Scouts as a New York "domiciliary"; or

(c) if the case does fit within the common-domicile rule, that rule produces a result that is incompatible with the general objective of Article 3542, which is to apply "the law of the state whose policies would be most seriously impaired if its law were not applied."<sup>51</sup> Point (a) has been discussed above. Points (b)-(c) are discussed below.

(b) *Treating Boy Scouts as a Texas Domiciliary.* At the time of the injury, Boy Scouts was a New Jersey domiciliary but has since become a Texas domiciliary. Although Article 3544 refers to the domicile of a party "at the time of the injury," the Official Comments accompanying that article remind the court that "[w]hen the domiciliary bond is attenuated for whatever reason, . . . [the] case may be a good candidate for invoking the 'escape clause' of Article 3547,"<sup>52</sup> and that "a post-injury change of domicile may well be pertinent for the purposes of Article 3542."<sup>53</sup> As the drafter of the codification explains:

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48. *Id.* at 705.

49. *Id.*

50. *Id.* at 704-05 n.147. But see *id.* (expressing doubts as to whether "the final language, as opposed to the spirit, of Article 3547 supports [this] proposition (b)").

51. LA. CIV. CODE ANN. art. 3542. See also *id.* cmt. (b); *id.* art. 3547.

52. *Id.* art. 3544, cmt. (d).

53. *Id.*



[A]rticle 3542, which refers to the "the domicile, habitual residence, or place of business of the parties" without assigning any time dimension to them, allows consideration of a party's domicile at both the time of the critical event and the time of litigation. Thus, in determining whether a case falls within the common-domicile rule or any other rule of Article 3544, the court should focus on the domicile of the parties at the time of the injury. However, in deciding whether such a case is exceptional enough to come under the escape clause of Article 3547, which operates in conjunction with Article 3542, or in deciding cases falling directly under Article 3542, the court should consider the parties' domicile at both the time of the injury and the time of litigation. For example, a post-injury change of domicile by the victim usually brings into play the pertinent compensatory policies of his new domicile, in the same way as a post-injury change of domicile by the tortfeasor will bring into play the new domicile's policy of deterring or protecting tortfeasors. Since the court's decision will inevitably have an impact on these states, the change of domicile cannot be dismissed as irrelevant, provided of course that it is bona fide.<sup>54</sup>

Thus, Boy Scouts' post-injury change of domicile from New Jersey to Texas is a factor that militates in favor of the argument that this case should not be decided under the common-domicile rule of Article 3544.

(c) *Treating Boys Scouts as a New York "Domiciliary"*. Another vehicle for removing this conflict from the scope of the common-domicile rule of Article 3544 is Article 3548, which applies to certain corporate tortfeasors. This article provides that a "juridical person," for example, a corporation like Boy Scouts,<sup>55</sup> "that is domiciled outside this [forum]

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54. Symeonides, *Exegesis*, *supra* note 2, at 722 (citing *Allstate Insurance Co. v. Hague*, 449 U.S. 302 (1981), *reh'g denied*, 450 U.S. 971 (1981) (holding that plaintiff's post-accident acquisition, in good faith, of a new domicile in Minnesota was sufficient to trigger that state's interest in protecting her)).

55. An additional device for avoiding the application of the common-domicile rule might be provided by Article 3518, which provides that a corporation may be treated as a domiciliary of either the state of incorporation or the state of its principal place of business "whichever is most pertinent to the particular issue." LA. CIV. CODE ANN. art. 3518. Here, it must be admitted that the state of Boy Scouts' incorporation is not pertinent and that its principal place of business is most pertinent to this tort issue which involves the corporation's external affairs. Thus, Boy Scouts should be treated as a domiciliary of the state in which it has its principal place of business. However, unlike Article 3544 which refers to the domicile of the parties "at the time of the injury," Article 3518 (as well as the general Articles 3515 and 3542) does not contain such time limitation. Consequently, under Article 3518, a court may decide to treat Boy Scouts as a domiciliary of Texas, its new and current principal place of business, rather than New Jersey, if the court determines that the current domicile is most pertinent to this issue of loss distribution which will have a bearing on the financial well-being of this corporation.

state, but which transacts business in this state and incurs a delictual [tort] or quasi-delictual obligation arising from activity within this state, shall be treated as a domiciliary of this state,"<sup>56</sup> if such treatment is "appropriate under the principles of Article 3542."<sup>57</sup>

In this case, Boy Scouts is a foreign corporation that transacted business in New York and incurred a tort liability as a result of its activity within New York. Thus, under Article 3548, the court has the discretion to treat Boy Scouts as a New York "domiciliary," if such treatment is appropriate under the principles of Article 3542, including especially the principles of "detering wrongful conduct and . . . repairing the consequences of injurious acts."<sup>58</sup> The result of such treatment would be that the injured person and the person who caused the injury would no longer be considered as being domiciled in the same state and hence the common-domicile rule of Article 3544 would not be applicable.

The case will then either fall within another part of Article 3544, or it will fall within the scope of the residual article, Article 3542.<sup>59</sup> The case will remain within the scope of Article 3544 only if the court were to conclude that not only Boy Scouts' conduct, but also the resulting injury, had occurred in New York. In such a case, the law of New York will govern under clause (a) of subparagraph (2) of Article 3544 which provides that if both the conduct and the injury occur in the state in which either the tortfeasor or the victim is domiciled, the law of that state applies. If the court determines that the injury occurred in New Jersey, then the case will fall outside the scope of Article 3544.<sup>60</sup> Consequently, the case will fall within the scope of Article 3542, which is the residual article for tort conflicts that are not provided for in Articles 3543-46. That article is discussed below.

(d) *The Escape Hatch of Article 3547.* Finally, another, and more direct, way of removing this case from the scope of the common-domicile

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56. LA. CIV. CODE ANN. art. 3548.

57. *Id.*

58. *Id.* art. 3542.

59. Article 3542 is the residual article of the torts Title of the Louisiana codification in that it applies "[e]xcept as otherwise provided in [that] Title." See *id.* art. 3544, cmt. (b).

60. The remaining clause of Article 3544, clause (b) of subparagraph (2) will be inapplicable. That clause provides that if the injury, but not the conduct, occurs at the domicile of the victim, here New Jersey, the law of that state applies but only if that state provides "for a higher standard of financial protection for the injured person than did the law of the state in which the injurious conduct occurred." *Id.* art. 3544(2)(b). Because New Jersey provided a lower standard of financial protection than did New York, this clause would not apply and thus the case would fall within the scope of Article 3542, the residual article for tort conflicts that are not provided for in Articles 3543-46.

rule is to utilize the escape clause provided by Article 3547. This article provides that

[t]he law applicable under Articles 3543-3546 shall not apply if, from the totality of the circumstances of an exceptional case, it is clearly evident under the principles of Article 3542, that the policies of another state would be more seriously impaired if its law were not applied to the particular issue.<sup>61</sup>

As explained by the drafter of Article 3547, the word "exceptional" which appears in that article "need not be confined to extraordinary or statistically rare cases. 'Exceptional' might be any case in which most reasonable people would agree that the policies of one state will be significantly more impaired than those of the state whose law is designated as applicable by Articles 3543-3546."<sup>62</sup> Thus, "what is 'exceptional' remains very much a judicial determination,"<sup>63</sup> which is to be made on a case by case basis.

In this case, a court may decide that, although New Jersey law might be applicable under the common-domicile rule of Article 3544, nevertheless, "under the principles of Article 3542,"<sup>64</sup> especially the principle of causing the least impairment to state interests, New York's policies of "detering wrongful conduct and . . . repairing the consequences of injurious acts"<sup>65</sup> would be more seriously impaired if its law were not applied to the particular issue. In such a case, the court is authorized to apply New York law. Whether the principles of Article 3542 would support this conclusion will be discussed later, after discussing the case against the Franciscan Brothers, which, as explained below, will also be governed by Article 3542.

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61. *Id.* art. 3547. The rationale of this article is explained as follows by its drafter: The underlying purpose [of Articles 3543-3546] was to effectuate the principles of Article 3542 and to render concrete the idea of causing the least possible impairment to state interests. This is accomplished by identifying the state whose policies would be most impaired if its law were not applied and calling for the application of that law. By expressly designating the applicable law, these [articles] provide the desired measure of legal certainty and predictability while also alleviating the court's choice-of-law burden. Article 3547 is a recognition of the fact that, while important, certainty and predictability are not the only goals. Ensuring that laws are applied in light of their purpose is even more important. Article 3547 is a legislative authorization and a reminder to the court to scrutinize the application of Articles 3543-3546 so as to ensure that such application will not be inconsistent with the purpose underlying these articles.

Symeonides, *Exegesis*, *supra* note 2, at 764-65.

62. *Id.* at 766.

63. *Id.*

64. LA. CIV. CODE ANN. art. 3547.

65. *Id.* art. 3542.

*B. Schultz v. Franciscan Brothers*

In plaintiff's action against the Franciscan Brothers, the parties are not now and never have been domiciled in the same state. Consequently, the common-domicile rule of Article 3544 is inapplicable. The Franciscans are domiciled in Ohio. Although at the time of the injury Ohio law provided for charitable immunity, that immunity is no longer available to defendant.

If the issue in question is characterized as one "pertaining to standards of conduct and safety,"<sup>66</sup> then, as with Boy Scouts, the applicable choice-of-law rule will be the first paragraph of Article 3543, which provides that the law of New York governs. If the issue in question is characterized as one "pertaining to loss distribution and financial protection,"<sup>67</sup> then the applicable article would not be Article 3544, which normally applies to such issues, because the law-fact pattern involved in this case does not fall within the patterns covered by that article, either in subparagraph (1)<sup>68</sup> or in subparagraph (2).<sup>69</sup> Thus, the case will fall within the residual article, Article 3542. This Article will enable the judge to reach the same result with regard to Franciscan Brothers as with regard to Boy Scouts.

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66. *Id.* art. 3543.

67. *Id.* art. 3544.

68. The first clause of subparagraph (1) does not apply because the parties are not domiciled in the same state. The second clause of subparagraph (1) which contains the so-called "fictitious common-domicile" rule (*see* Symeonides, *Exegesis, supra* note 2, at 723-25) also should not apply. That clause provides that "[p]ersons domiciled in states whose law on the particular issue is substantially identical shall be treated as if domiciled in the same state." *Id.* art. 3544(1) (emphasis added). The use of the present tense in this clause, especially in comparison with the use of the past tense in the preceding clause, as well as the whole rationale behind the fictitious common-domicile rule (*see* Symeonides, *Exegesis, supra* note 2, at 721-25) supports the argument that the fictitious common-domicile rule should not apply in this case because, although at the time of the injury Ohio and New Jersey immunity law were substantially identical, *now* these laws are different. If this argument does not prevail, then the case will technically fall within the scope of the fictitious common-domicile rule and the Franciscan Brothers will be immune from suit. A judge who does not like this result may use the same devices to avoid it as those discussed above in the case against the Boy Scouts.

69. As with regard to Boy Scouts, clause (a) of subparagraph (2) (which provides that if both the conduct and the injury occur in the domicile of either the tortfeasor or the victim the law of that state governs) will be applicable only if the court determines that both the conduct and the injury had occurred in New Jersey. Otherwise this clause will remain inapplicable. Similarly, clause (b) of subparagraph (2) will be inapplicable, because even if the injury occurred in New Jersey, the law of that state does not provide "for a higher standard of financial protection for the injured person than did the law of the state in which the injurious conduct occurred." *Id.* art. 3544(2)(b)(iii).

C. *Resolving the Two Conflicts through Article 3542*

Thus, the resolution of the conflict involving both Boy Scouts and Franciscan Brothers ultimately is based on Article 3542. In the case against the Franciscans, Article 3542 applies because the case does not fall within the scope of any of the more specific articles. The case against the Boy Scouts does fall within the scope of the specific articles but, because the result produced by those articles in this case might be found to be contrary to the principles of Article 3542, the court is authorized to avoid that result. How then should the court resolve these conflicts under Article 3542?

Article 3542 provides all the flexibility for concluding that the law of New York, rather than New Jersey, should apply with regard to both defendants. The article provides that a tort issue is to be governed by "the law of the state whose policies would be most seriously impaired if its law were not applied to that issue."<sup>70</sup> The article further provides that this state, whose law will govern, 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 events giving rise to the dispute, including the place of conduct and injury, the domicile, habitual residence, or place of business of the parties, and the state in which the relationship, if any, between the parties was centered; and (2) the policies referred to in Article 3515,<sup>71</sup> as well as the policies of deterring wrongful conduct and of repairing the consequences of injurious acts.<sup>72</sup>

The involved states are New York, New Jersey, Ohio, and Texas. The pertinent contacts of these states are as follows: New Jersey is the domicile of plaintiffs, the domicile of defendant Boy Scouts at the time of the injury, the place where much of the relationship between the parties was centered and the place where at least part of the injury occurred. New York is the place where much of the injurious conduct occurred and perhaps part of the injury. Ohio is the domicile of defendant Franciscans, and Texas is the current domicile of defendant Boy Scouts. As noted above, unlike Article 3544 which confines the inquiry to the domicile of the parties "at the time of the injury," Article

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70. *Id.* art. 3542.

71. *Id.* Article 3515 calls for consideration of, inter alia, "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." *Id.* art. 3515.

72. *Id.* art. 3542.

3542 deliberately avoids this time limitation.<sup>73</sup> Consequently, under Article 3542, a court is free to take into account not only the defendant's domicile at the time of the injury, but also the defendant's domicile at the time of the judicial decision, that is, at the time the defendant will feel the financial consequences of its conduct.

If Article 3544 called for a grouping of contacts analysis, it might be easy to conclude that New Jersey has the most, or perhaps even the most significant, contacts. However, Article 3544 does not endorse such an analysis and the accompanying Official Comments specifically disapprove of it:

The listing of contacts is neither exhaustive nor hierarchical, and is intended to discourage a mechanistic counting of contacts as a means of selecting the applicable law. The fact that one state has more contacts with the dispute than other states does not necessarily mean that the law of the first state should be applied to any or all issues of the dispute, unless such contacts are of the kind that bring into play policies of that state which "would be most seriously impaired if its law were not applied to the particular issue . . . ." [T]he evaluation of factual contacts should be qualitative rather than quantitative and should be made in the light of the policies of each contact-state that are pertinent to the particular issue in dispute.<sup>74</sup>

The pertinent policies of the involved states are: New York's policy of deterring conduct within its territory, New Jersey's policy of immunizing charitable corporations, and Texas's and Ohio's policy of not availing such corporations of statutory immunity. In assessing the strength and pertinence of these policies, one should keep in mind that New Jersey's charitable immunity rule is an exception from that state's general policy of providing compensation for tort victims. This factor, coupled with the fact that Boys Scouts is no longer, and Franciscan Brothers never has been, a domiciliary of New Jersey suggest that New Jersey may have much less of a reason to insist on the application of its charitable immunity exception. True enough, New Jersey has an interest in extending to foreign corporations the protection of its charitable immunity rule to encourage them to engage in charitable activities in that state. However, that interest is less strong in the case of foreign corporations than it would be with regard to New Jersey corporations. In light of the fact that the states of the current domicile of these corporations do not extend to them similar protection, and the fact that New York, in whose territory the atrocious conduct occurred, has an

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73. See *supra* text at note 53.

74. LA. CIV. CODE ANN. art. 3542, cmt. (a).

interest in deterring such conduct, one could conclude that New Jersey's interest in protecting these corporations would not be seriously impaired if New Jersey law were not applied to this issue. This conclusion would free the court to apply New York law, which is substantially identical with the law of Ohio and Texas.

## VII. *LILIENTHAL V. KAUFMAN*<sup>75</sup>

### A. *Defining the Issue*

In this case the issue with regard to which the laws of Oregon and California conflict is an issue of capacity to contract. Thus, the applicable article of the Louisiana codification is Article 3539 which provides as follows: "A person is capable of contracting if he possesses that capacity under the law of either the state in which he is domiciled at the time of making the contract or the state whose law is applicable to the contract under Article 3537."<sup>76</sup>

Because in this case one of the parties, Mr. Kaufman, lacked capacity to enter into this contract under the law of his domicile, Oregon, the analysis should proceed to Article 3537 to determine whether under that Article the law of California, under which Mr. Kaufman is considered capable of contracting, would be applicable to this issue.

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75. For the facts of this case, see Transcript, *supra* note 6, at 688 and *Lilienthal v. Kaufman*, 395 P.2d 543 (Or. 1964).

76. LA. CIV. CODE ANN. art. 3539. As explained by the Reporter's Comments accompanying this article,

Article [3539] provides in effect that the search for the law applicable to capacity should begin by looking first to the law of the state that presumptively has the greatest interest in determining the issue, that is, the domicile of each contracting party. If all parties are considered capable of contracting under the laws of their respective domiciles, this will normally put an end to the matter. However, if one party is incapable of contracting under the law of his domicile, then the court should return to Article 3537, *supra*, with two questions in mind. The first question is whether the law of a state other than that of the domicile of the incapable party would be applicable to this particular issue of capacity under the principles of Article 3537, including especially the individualized issue-by-issue analysis that is built into that Article. If the answer to this question is negative, that is, if the law of the domicile of the incapable party is also the *lex causae*, then the contract is to be considered invalid. If the answer is affirmative, that is, if the *lex causae* is the law of a state other than that of the domicile of the incapable party, the court will ask the second question, namely, whether under the *lex causae* that party would be considered capable of contracting. If the answer to this question is yes, the contract will be considered valid, otherwise invalid.

*Id.* art. 3539 cmt. (b).

It is important to note at the outset that the very fact that Article 3539 calls for the application of whichever of the two state's law would validate the contract and rejects the automatic application of the law of the domicile of the incapable party, even when that domicile is in the forum state, negates any inference that we should approach this case with any presumption in favor of Oregon law. Rather, we should approach this case with an open mind guided by the flexible and non-parochial approach prescribed in Article 3537.

*B. Identifying the Pertinent State Policies*

Article 3537 provides that the law applicable to a particular issue is "the law of the state whose policies would be most seriously impaired if its law were not applied to that issue,"<sup>77</sup> or, as stated by the Reporter's Comments, "the state that, in light of its connection to the parties and the transaction and its interests implicated in the conflict, would bear the most serious legal, social, economic, and other consequences 'if its law were not applied' to the issue at hand."<sup>78</sup> To select the applicable law, the court must first identify "the relevant policies of the involved states"<sup>79</sup> by focusing on the specific rules of substantive contract law whose applicability is being urged in the particular case; and then "evaluat[e] the strength and pertinence of [these] relevant policies"<sup>80</sup> in the light of the three sets of factors listed in the second paragraph of Article 3537.

Here, the contract rules of the involved states,<sup>81</sup> the application of which is being urged by the respective parties, are Oregon's so-called spendthrift rule, which would make the contract voidable because of defendant's status as a spendthrift, and California's rule which would consider this contract to be valid. The California rule reflects the general policy of enforcing contracts and protecting party expectations. The Oregon rule subordinates this general and otherwise important

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77. *Id.* art. 3537.

78. *Id.* art. 3537 cmt. (c). The Comments also warn that:  
the search for the applicable law should not be a mechanical, quantitative process, but should be based on an objective and impartial evaluation of the consequences of the choice-of-law decision on each of the involved states with a view towards accommodating their respective interests rather than selfishly promoting the interests of one state at the expense of the others.

*Id.*

79. *Id.* art. 3537.

80. *Id.*

81. Obviously both Oregon and California are "involved states," Oregon being the domicile of one party and California being the domicile of the other party as well as the state of the negotiation, formation and performance of the contract.



policy to the more specific policy of protecting the spendthrift's family and ultimately Oregon's public assistance funds.

*C. Evaluating the Strength and Pertinence of the Conflicting Policies*

To determine which state's policy would be most impaired by the nonapplication of its law, the court must evaluate the strength and pertinence of these policies in light of: (a) the factual contacts of each state to the parties and the transaction;<sup>82</sup> (b) the "nature, type and purpose of the contract;"<sup>83</sup> (c) the multistate policies that are incorporated by the cross-reference to Article 3515, namely "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;"<sup>84</sup> and (d) the policies that are *ex hypothesi* relevant in all contract conflicts, namely "facilitating the orderly planning of transactions, of promoting multistate commercial intercourse, and of protecting one party from undue imposition by the other."<sup>85</sup>

Following this analysis, we conclude that the general policy of enforcing contracts and protecting party expectations, which is embodied in California's rule but also permeates Oregon's general contract law, would be more seriously impaired if we were to invalidate this contract than the specific policy embodied in Oregon's unique spendthrift rule would be impaired if we were to validate the contract. Our conclusion is based on the following reasons.

*D. The Pertinence of the Conflicting Policies in Light of Each State's Contacts*

**1. Domicile of the Incapable Party.** Mr. Kaufman's domicile in Oregon is an important contact because it renders pertinent the policy of this state in protecting his family. Indeed, as stated by the Reporter's Comments:

The rules of substantive law on capacity are essentially a priori societal judgments about the maturity, soundness of mind, and need of protection of various classes of persons. They are also conscious legis-

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82. See LA. CIV. CODE ANN. art. 3537. See also *id.* cmt. (e) which warns against "a mechanistic counting of contacts" and calls for consideration of the contacts that "bring into play policies of that state that 'would be most seriously impaired if its law were not applied' to the issue at hand."

83. *Id.* art. 3537.

84. *Id.* art. 3515.

85. *Id.* art. 3537.

lative determinations that the need of protecting particular classes of persons and their families is strong enough to override the general policy of promoting the security of transactions. In delineating the scope of operation of these rules, the conflicts legislator must begin with the premise that they have been enacted with a view toward protecting people domiciled in the enacting state rather than with the idea of affecting contracts made therein by people domiciled elsewhere. Consequently, that state has an interest in applying these rules in every contract which, whether made within or without its territory, involves one of its domiciliaries whom it considers in need of protection.<sup>86</sup>

However, as the Comments also state,

[this] interest will not of course always prevail . . . . [T]he interest of one state in protecting the incapable party may often run contrary to the interest that another—and *sometimes of the same*—state may have in, for instance, promoting the justified expectations of the other party and the security of transactions in general.<sup>87</sup>

The very fact that Article 3539 does not call for the automatic application of the law of the domicile of the incapable party even when the domicile is in this state indicates that our legislature subscribes to the view that, even when our substantive law imposes a rule of incapacity for the benefit of our citizens, that law should not automatically prevail over the law of another state that does not impose such incapacity. If anything, Article 3539 is a choice-of-law rule tilted in favor of validating, rather than invalidating, the contract.<sup>88</sup>

In this case, Oregon's specific interest in protecting the family of the incapable party runs contrary not only to California's interest in

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86. *Id.* art. 3539, cmt. (c).

87. *Id.* (emphasis added).

88. *See id.* art. 3539 cmt. (c).

The objective of this Article is to attain an appropriate equilibrium between two often competing policies. The first is the policy of protecting security of transactions and commercial expectations. This policy would be served by a choice-of-law rule that favors validation. The second is the policy of protecting parties whom the law considers to be in need of protection. This policy would have been served by an unqualified application of the law of the domicile of the incapable party. Because it authorizes the application of whichever of the two laws (the *lex domicilii* or the *lex causae*) validates the contract, this Article would seem to favor the former policy too much at the expense of the latter. However, despite a tilt towards validation, this Article neither compels nor guarantees validation a priori but instead makes it dependent on the highly flexible and individualized approach of selecting the applicable law for the particular issue under Article 3537.

*Id.*

enforcing the contract, but also contrary to Oregon's general interest in enforcing contracts and encouraging out-of-state financiers to extend credit to Oregonians.

**2. Place of Contract Negotiation, Formation and Performance.** The fact that Mr. Kaufman went to California and there negotiated and concluded this contract with a domiciliary of that state has a bearing on the expectations of the parties and the interests of their respective states in protecting those expectations. Although Mr. Lilienthal knew that Mr. Kaufman was an Oregon domiciliary, Mr. Lilienthal had no reason to suspect that Oregon, or for that matter any state of the United States, would have such an obscure rule that considers an adult person without any visible physical or mental infirmities to be incapable of contracting. Hence, Mr. Lilienthal would have been justified to expect that the contract would be enforceable.<sup>89</sup> As for Mr. Kaufman, we can only speculate on what his expectations might have been and, in any event, it is somewhat anomalous to speak of the expectations of a person who is deemed to be incapable of contracting. Be that as it may, if Mr. Kaufman had any expectation that he could carry Oregon's spendthrift rule to California and there inflict it on Mr. Lilienthal, this would be an expectation that the legal order should not sanction. Even assuming that it would be more appropriate to focus on the expectations of the spendthrift's guardian or family, it is hard to argue that, having allowed Mr. Kaufman to entrap an Oregon creditor, Mr. Olsen, that they should also expect that the same trap would work against an out-of-state creditor.

**3. The Pertinence of the Conflicting Policies in Light of the "Nature, Type and Purpose of the Contract."** Similarly, regarding the "nature, type and purpose of the contract," it is significant that, although this was a small-scale, one-time contract, it was not a "consumer contract." The fact that it was not a consumer contract renders less pertinent the policy of protecting the "weak party." The fact

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89. Cf. art. 11 Convention on the Law Applicable to Contractual Obligations, [EEC Treaty] opened for signature June 19, 1980, which provides that

[i]n a contract concluded between persons who are in the same country, a natural person who would have capacity under the law of that country may invoke his incapacity resulting from another law only if the other party to the contract was aware of this incapacity at the time of the conclusion of the contract or was not aware thereof as a result of negligence.

See also Art. 2 of Benelux Treaty on Private International Law (1969), which provides that "a person declared incapable by his law may not invoke his incapacity against one who . . . has in good faith and in conformity with the law of the place of the act considered him to be capable."

that it was a small-scale, one-time contract explains why Mr. Lilienthal should not be expected to consult legal counsel or research Oregon law.

**4. The Pertinence of the Conflicting Policies in the Context of the General Policies of Contract Law.** Article 3537 lists three general policies of contract law in light of which to evaluate the policies embodied in the conflicting rules of the two states. The first is the policy of "upholding the justified expectations of parties"<sup>90</sup> which is incorporated by the cross-reference to Article 3515. As explained above, this policy supports the application of California law. The same is true of the policies of "facilitating the orderly planning of transactions, of promoting multistate commercial intercourse."<sup>91</sup> The third policy is the policy of "protecting one party from undue imposition by the other."<sup>92</sup> This policy is relevant in consumer contracts and other similar contracts in which one party is likely to be in a weaker bargaining position. However, not only was this not a consumer contract, but there is no evidence that Mr. Kaufman was in a weak bargaining position or that Mr. Lilienthal was guilty of any "undue imposition" on Mr. Kaufman. Thus, even this policy does not militate in favor of the application of the Oregon rule.

**5. The Pertinence of the Conflicting Policies in the Context of Multistate Considerations.** Through the cross-reference to Article 3515, Article 3537 reminds us that, in making choice of law decisions, we must be mindful of "the policies and needs of the interstate and international systems, including the policies of . . . minimizing the adverse consequences that might follow from subjecting a party to the law of more than one state."<sup>93</sup> Again, these considerations support the application of California law.

In addition, these considerations render pertinent Oregon's general policy of enforcing contracts. True enough, that policy has been subordinated to the specific need of protecting the spendthrift's family when the Oregon legislature decided to enact the spendthrift rule. As an Oregon court, we are bound to respect that legislatively-established balance between the two conflicting policies. In cases like *Olshen v. Kaufman*<sup>94</sup> which do not contain any foreign elements, that balance must be observed and the spendthrift rule must be applied. However, in multistate cases like the one at hand, the same legislature that

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90. LA. CIV. CODE ANN. art. 3537.

91. *Id.*

92. *Id.*

93. *Id.* art. 3515.

94. 385 P.2d 161 (Or. 1963).

enacted the spendthrift rule has also entrusted us with the task of determining, through the choice-of-law process, the appropriate territorial reach of that rule. In making that determination we are specifically instructed to consider the multistate nature of the particular case and the impact of our decision on the "policies and needs of the interstate and international systems."<sup>95</sup> These considerations convince us that the scope of Oregon's unique spendthrift rule does not and should not encompass this multistate case. The presence of multistate elements in this case either alters or renders inapplicable the legislatively established balance between the general Oregon policy of enforcing contracts and the specific policy of protecting the spendthrift's family. These elements add strength to the general policy and detract strength from the specific policy. The latter policy should not be extended against unsuspecting citizens of other states who had no reason to be aware of it. As a trading member of the interstate union and the international community, Oregon has every reason not to discourage foreign creditors from extending credit to Oregonians.

**6. Selecting the Applicable Law.** In light of the above, in evaluating the "strength and pertinence" of the conflicting policies of the two states as we are required to do under Article 3537, we conclude that Oregon's policy embodied in its spendthrift rule is not only less strong and less pertinent than California's policy but is also less strong and less pertinent in this multistate contract than it was in the fully domestic contract involved in *Olshen v. Kaufman*.<sup>96</sup> Consequently, the spendthrift rule should not be applied in this case and California law should be applied.

Returning to Article 3539, we conclude that this contract is valid because, although Mr. Kaufman did not possess contractual capacity under the law of the state in which he was domiciled, he possessed such capacity under the law of California which is applicable to this issue under Article 3537.

#### VIII. CONCLUSIONS

The above discussion has demonstrated how a court applying the Louisiana conflicts codification would or could resolve six different but equally celebrated conflicts cases.

In a symposium devoted to Brainerd Currie, it might be appropriate to ask whether the solutions described in this discussion are consistent with the basic tenets of his *analysis*. I would argue that they are.

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95. LA. CIV. CODE ANN. art. 3515.

96. 385 P.2d 161 (Or. 1963).

Whether Currie would have reached the *same solutions* as the ones described above is a different question, the answer to which enters the realm of speculation. Currie's notion that the law of the forum should apply in all true conflicts and unprovided-for cases suggests that he would probably disapprove of the application of nonforum law in the true conflicts involved in *Rosenthal* and *Lilienthal* and in the unprovided-for case involved in *Erwin*. If so, this would be an expected and acceptable disagreement because the Louisiana codification has deliberately rejected Currie's forum-bias,<sup>97</sup> as it has rejected his antirule bias. Then again, Currie's late call for an "enlightened and restrained interpretation"<sup>98</sup> might lead him to support the application of nonforum law in the above cases. Be that as it may, I would argue that the Louisiana codification has elevated the principle of a "restrained interpretation" of state interests into a primary consideration in the choice-of-law process. Whether this has caused the process to be more "enlightened" is for others to judge.

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97. See *id.* art. 3515, cmt. (b); Symeonides, *Exegesis*, *supra* note 2, at 690.

98. Brainerd Currie, *The Disinterested Third State*, 28 LAW & CONTEMP. PROBS. 754, 757 (1963).

**A P P E N D I X**  
**Excerpts**  
**From The Louisiana Conflicts Codification**  
**Louisiana Civil Code, Book IV**

TITLE I: GENERAL PROVISIONS

*Article 3515. Determination of the applicable law; general and residual rule.* Except as otherwise provided in this Book, an issue in a case involving 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.

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TITLE VI. CONVENTIONAL OBLIGATIONS

*Article 3537. General rule.* 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.

*Article 3538. Form.* A contract is valid as to form if made in conformity with: (1) the law of the state of making; (2) the law of the state of performance to the extent that performance is to be rendered in that state; (3) the law of the state of common domicile or place of business of the parties; or (4) the law governing the substance of the contract under Articles 3537 or 3540.

Nevertheless, when for reasons of public policy the law governing the substance of the contract under Article 3537 requires a certain form, there must be compliance with that form.

*Article 3539. Capacity.* A person is capable of contracting if he possesses that capacity under the law of either the state in which he is domiciled at the time of making the contract or the state whose law is applicable to the contract under Article 3537.

*Article 3540. Party autonomy.* 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.

*Article 3541. Other juridical acts and quasi-contractual obligations.* Unless otherwise provided by the law of this state, the law applicable to juridical acts other than contracts and to quasi-contractual obligations is determined in accordance with the principles of this Title.

#### TITLE VII: DELICTUAL AND QUASI-DELICTUAL OBLIGATIONS

*Article 3542. General rule.* Except as otherwise provided in this Title, an issue of delictual or quasi-delictual 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 events giving rise to the dispute, including the place of conduct and injury, the domicile, habitual residence, or place of business of the parties, and the state in which the relationship, if any, between the parties was centered; and (2) the policies referred to in Article 3515, as well as the policies of deterring wrongful conduct and of repairing the consequences of injurious acts.

*Article 3543. Issues of conduct and safety.* Issues pertaining to standards of conduct and safety are governed by the law of the state in which the conduct that caused the injury occurred, if the injury occurred in that state or in another state whose law did not provide for a higher standard of conduct.

In all other cases, those issues are governed by the law of the state in which the injury occurred, provided that the person whose conduct caused the injury should have foreseen its occurrence in that state.

The preceding paragraph does not apply to cases in which the conduct that caused the injury occurred in this state and was caused by a person who was domiciled in, or had another significant connection with, this state. These cases are governed by the law of this state.



*Article 3544. Issues of loss distribution and financial protection.* Issues pertaining to loss distribution and financial protection are governed, as between a person injured by an offense or quasi-offense and the person who caused the injury, by the law designated in the following order: (1) If, at the time of the injury, the injured person and the person who caused the injury were domiciled in the same state, by the law of that state. Persons domiciled in states whose law on the particular issue is substantially identical shall be treated as if domiciled in the same state. (2) If, at the time of the injury, the injured person and the person who caused the injury were domiciled in different states: (a) when both the injury and the conduct that caused it occurred in one of those states, by the law of that state; and (b) when the injury and the conduct that caused it occurred in different states, by the law of the state in which the injury occurred, provided that (i) the injured person was domiciled in that state, (ii) the person who caused the injury should have foreseen its occurrence in that state, and (iii) the law of that state provided for a higher standard of financial protection for the injured person than did the law of the state in which the injurious conduct occurred.

*Article 3545. Products liability.* Delictual and quasi-delictual liability for injury caused by a product, as well as damages, whether compensatory, special, or punitive, are governed by the law of this state: (1) when the injury was sustained in this state by a person domiciled or residing in this state; or (2) when the product was manufactured, produced, or acquired in this state and caused injury either in this state or in another state to a person domiciled in this state.

The preceding paragraph does not apply if neither the product that caused the injury nor any of the defendant's products of the same type were made available in this state through ordinary commercial channels.

All cases not disposed of by the preceding paragraphs are governed by the other Articles of this Title.

*Article 3546. Punitive damages.* Punitive damages may not be awarded by a court of this state unless authorized:

(1) By the law of the state where the injurious conduct occurred and by either the law of the state where the resulting injury occurred or the law of the place where the person whose conduct caused the injury was domiciled; or (2) By the law of the state in which the injury occurred and by the law of the state where the person whose conduct caused the injury was domiciled.

*Article 3547. Exceptional cases.* The law applicable under Articles 3543-3546 shall not apply if, from the totality of the circumstances of an exceptional case, it is clearly evident under the principles of Article 3542, that the policies of another state would be more seriously impaired

if its law were not applied to the particular issue. In such event the law of the other state shall apply.

*Article 3548. Domicile of juridical persons.* For the purposes of this Title, and provided it is appropriate under the principles of Article 3542, a juridical person that is domiciled outside this state, but which transacts business in this state and incurs a delictual or quasi-delictual obligation arising from activity within this state, shall be treated as a domiciliary of this state.

