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No. 64826-8-I

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**COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON**

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**HILLCREST MEDIA, LLC,**

**Appellant,**

**v.**

**FISHER COMMUNICATIONS, INC., and  
FISHER BROADCASTING COMPANY,**

**Respondents.**

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**BRIEF OF RESPONDENTS**

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## I. INTRODUCTION

Hillcrest Media, LLC (“Hillcrest”) appeals the Superior Court’s dismissal of its complaint, with prejudice, for failure to state a claim. Hillcrest’s complaint seeks recovery of a broker fee commission in connection with an alleged fee agreement with Fisher Communications, Inc., and Fisher Broadcasting Company (collectively, “Fisher”) relating to Fisher’s June 2006 acquisition of Bellevue television station KWOG. Hillcrest concedes that neither it nor its agent, Larry Morton, was a licensed broker in Washington during the relevant period, as required under Washington law in order to bring an action for recovery of a fee commission in connection with the sale of a business opportunity.

Hillcrest contends that Arkansas law should apply to the claims in this action because it signed the alleged fee agreement in Arkansas and because Mr. Morton could have brokered and negotiated Fisher’s acquisition of KWOG through telephone calls placed, and communications sent, from Arkansas. The Superior Court, however, correctly applied Washington law after concluding that Washington has the most significant relationship to the claims in the action. This Court should affirm the judgment of the Superior Court. Washington law applies based on its strong policy interest in regulating business opportunity brokers and given the fact that the performance contemplated

under the alleged fee agreement involved the brokering, negotiation, and facilitation of a Washington corporation's purchase of the assets of another Washington corporation, where such assets were located in Washington and used in the operation of a Washington television station.

## **II. ISSUES PRESENTED**

1. Hillcrest concedes that if Washington law applies, Hillcrest cannot recover a broker's commission in connection with Fisher's acquisition of KWOG. Hillcrest contends that Arkansas law applies because it signed the alleged broker agreement there and could have negotiated the sale by placing telephone calls and sending correspondence from Arkansas. Did the Superior Court nevertheless correctly hold that Washington has the most significant relationship to the claims in the action, given that the transaction in question was a Washington corporation's acquisition of another Washington corporation, whose assets were located in Washington and used in the operation of a Washington television station?

2. Did the Superior Court commit reversible error when it took judicial notice of three documents, each of which Hillcrest had attached to its earlier-filed complaint in Arkansas, and when it refused Hillcrest's request for discovery, when the facts referenced in the documents are cumulative and additional discovery would not call into

question the undisputed and fundamental facts that compel application of Washington law?

### III. STATEMENT OF THE CASE

Hillcrest appeals the Superior Court's grant of Fisher's Motion for Judgment on the Pleadings. For purposes of the motion and this appeal, therefore, factual statements in Hillcrest's complaint are treated as if they are true. Bailey v. Town of Forks, 108 Wn.2d 262, 264 (1987).<sup>1</sup>

#### A. Facts Relevant to Appeal

Hillcrest is an Arkansas limited liability company, and its agent, Larry Morton, is an Arkansas resident and an Arkansas-licensed real estate broker and agent. CP 1-2, ¶¶ 3-4. During the period relevant to this action, neither Hillcrest nor Mr. Morton was licensed as a real estate broker in Washington. Br. at 9, 18-19. Fisher Communications and Fisher Broadcasting are Washington corporations whose principal places of business are in Washington. CP 1, ¶¶ 1-2.

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<sup>1</sup> Fisher vigorously denies Hillcrest's claims on numerous grounds. For example, Fisher denies that the alleged fee agreement is a final, enforceable agreement, denies that Hillcrest or Mr. Morton performed or satisfied the contractual condition that the acquisition be an asset purchase (if deemed an enforceable contract), and denies that Hillcrest was the "procuring cause" of Fisher's acquisition of KWOG (e.g., Fisher had already had discussions with KWOG's owner prior to Mr. Morton's raising the topic with Fisher). See CP 199-202, ¶¶ 6, 10, 16-22.

As alleged by Hillcrest, in January 2006 Fisher Communications authorized Hillcrest to act on Fisher's behalf to arrange for Fisher's purchase of KWOG, a television station whose facilities are located in Bellevue, Washington. CP 2, ¶¶ 5-6; CP 35.<sup>2</sup> At the time, KWOG was owned by African-American Broadcasting of Bellevue, Inc. ("AAB"), a Washington corporation whose president and sole shareholder was Christopher Racine. CP 2, ¶¶ 5, 7; CP 35. On March 24, 2006, Fisher Communications entered into a written agreement with Equity Broadcasting Corporation ("March 2006 Letter"), which Hillcrest alleges obligated Fisher to pay Hillcrest a fee up to \$500,000 in the event that Fisher acquired KWOG. CP 2-3, ¶ 9; CP 75-76. As alleged by Hillcrest, "[t]he negotiations for and execution of the [March 2006 Letter] occurred, in *substantial part*, in the State of Arkansas," thus conceding that negotiations were not entirely conducted in Arkansas. CP 2-3, ¶ 9 (emphasis added). On March, 24, 2006, then-Fisher CFO, Robert Bateman, emailed Mr. Morton the March 2006 Letter, signed by Mr. Bateman. CP 74-76; CP 78, ¶ 4. The March 2006 Letter called for Hillcrest to purchase all AAB assets and then assign those purchase rights

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<sup>2</sup> In support of its motion, Fisher also submitted certain public documents and documents Hillcrest had attached to its earlier-filed complaint in Arkansas state court. The appropriateness of considering these documents is addressed below, in Part V.C.

to Fisher. CP 75-76.<sup>3</sup> Hillcrest failed, however, to enter into an agreement to acquire and then transfer AAB's assets.

Effective June 26, 2006, Fisher Broadcasting, AAB, and Mr. Racine entered into a stock purchase agreement whereby Fisher Broadcasting acquired from Mr. Racine all shares of stock in AAB ("Stock Purchase Agreement"). CP 3, ¶ 11; CP 35. Hillcrest subsequently asked Fisher to pay \$500,000 allegedly owed under the March 2006 Letter, but Fisher refused. CP 4, ¶ 14.

## **B. Procedural History**

### **1. Earlier-Filed Arkansas Action**

In January 2009, Hillcrest filed an action against Fisher Communications in Arkansas state court seeking recovery for alleged breach of the March 2006 Letter ("Arkansas Action"). CP 31, 82-83. Hillcrest's complaint in the Arkansas Action attached several documents, including the March 2006 Letter, the Stock Purchase Agreement, a January 2006 Letter of Intent between Hillcrest and AAB, and a draft asset purchase agreement provided by Fisher to Equity Broadcasting. CP 30-32; see Part V.C.

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<sup>3</sup> The March 2006 Letter refers to Equity Broadcasting Corporation "or affiliated entity." CP 75. Hillcrest's allegation that it is affiliated with Equity Broadcasting is taken as true for purposes of this appeal. CP 2, ¶ 3.

Fisher Communications removed the case to the United States District Court for the Eastern District of Arkansas, and on June 15, 2009, the court granted Fisher Communications' motion to dismiss for lack of personal jurisdiction. CP 87 (“Viewing the facts in the light most favorable to Hillcrest, the Court finds that Fisher’s contacts with Arkansas are insufficient to support specific jurisdiction.”).

## **2. King County Superior Court Action Below**

Hillcrest filed the instant action on July 24, 2009, asserting the following causes of action arising out of the March 2006 Letter and Fisher’s acquisition of KWOG: breach of contract, unjust enrichment, breach of the covenant of good faith, and violation of the Washington Consumer Protection Act. CP 4-6, ¶¶ 16-18, 20.<sup>4</sup> After answering the complaint, CP 198-204, Fisher moved for judgment on the pleadings for failure to state a claim for relief, CP 14-25. In support of its motion, Fisher requested that the court consider and take judicial notice of certain documents filed by *Hillcrest* in the Arkansas Action, including documents that Hillcrest referred to in, but did not attach to, its complaint in the

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<sup>4</sup> Hillcrest also seeks the following relief, labeled as “causes of action”: punitive damages, pre-judgment interest, and attorneys’ fees. CP 5-6, ¶¶ 19, 21-22.

instant action. CP 17, 176-77. The court below granted Fisher's motion on December 18, 2009. CP 191-92.

Hillcrest thereafter filed this appeal, contending that the Superior Court erred in holding that Washington, not Arkansas, law applies to this action. Hillcrest also contends that the court below erred in considering certain of the documents submitted in support of Fisher's motion or, in the alternative, for failing to permit Hillcrest the opportunity to take discovery concerning the evidence and to file a supplemental response.

#### **IV. SUMMARY OF THE ARGUMENT**

The dispositive question for this appeal is whether Washington law or Arkansas law applies to Hillcrest's claims. Hillcrest asks this Court to reach the remarkable conclusion that Arkansas law applies because Hillcrest's agent signed the March 2006 Letter while in Arkansas and could have remotely brokered Fisher's acquisition of KWOG while in Arkansas, despite the fact that (1) such broker communications would have been directed to Washington corporations; (2) the deal to be consummated was a Washington corporation's acquisition of all assets of another Washington corporation; (3) such assets were located in Washington and used in the operation of a Washington-licensed television station; and (4) enforcement of Hillcrest's claim would contravene Washington's strong policy interest in regulating unlicensed brokers.

As Hillcrest concedes, if Washington law applies, it cannot recover on its claims for a fee commission because neither Hillcrest nor its agent was licensed in Washington as a real estate and business opportunity broker. Washington has a strong policy interest in the regulation of unlicensed brokers, and acting as a broker without a license constitutes a gross misdemeanor. To determine whether Washington or Arkansas law applies requires this Court to engage in a conflict of laws analysis (as did the court below).

On conflict of laws questions, Washington has adopted the Restatement (Second) of Conflict of Laws and its “most significant relationship” test. Here, Washington has the most significant relationship to the claims and parties in the action given its strong policy interest in regulating unlicensed brokers and the fact that the most significant contacts strongly favor application of Washington law (i.e., the transaction at issue involved the brokering, negotiation, and facilitation of a sale of one Washington corporation to another, involving assets located in Washington). Hillcrest’s insistence that Arkansas law applies relies on an incomplete and improper formalistic analysis. Namely, Hillcrest attaches great weight to the fact that Mr. Morton signed the March 2006 Letter in Arkansas and performed (or could have performed) his broker activities by placing telephone calls and sending correspondence from Arkansas.

These secondary factors are far outweighed by the factors calling for application of Washington law.

Hillcrest also erroneously contends that the Superior Court erred in taking judicial notice of three documents filed in support of Fisher's Motion for Judgment on the Pleadings or, alternatively, that Hillcrest should have been afforded the opportunity for discovery. Judicial notice was appropriate for the documents, each of which was attached to Hillcrest's complaint in the Arkansas Action. Yet even if the court below committed error, it was harmless. The facts referenced in the documents are cumulative and additional discovery would be futile, because the undisputed and fundamental facts compel the conclusion that Washington law applies.

## V. ARGUMENT

### A. Standard Of Review

This Court reviews de novo an order granting a motion for judgment on the pleadings, applying the same standards as the Superior Court. N. Coast Enters., Inc. v. Factoria P'ship, 94 Wn. App. 855, 858-59 (1999). A party is entitled to judgment under CR 12(c) where, upon examination of the pleadings, the court determines that the opposing party cannot prove any set of facts, consistent with the complaint, that would entitle it to relief. Id. at 859; see also Gaspar v. Peshastin Hi-Up Growers,

131 Wn. App. 630, 634-35 (2006) (indicating that Rule 12(c) motions are subject to the same review standards as Rule 12(b)(6) motions). Although the moving party is deemed to admit the nonmoving party's well-pleaded allegations for purposes of a Rule 12(c) motion, the moving party is not deemed to admit mere conclusions or the nonmoving party's interpretation of a statute or construction of the subject matter of the action. See Pearson v. Vandermay, 67 Wn.2d 222, 230 (1965); Hodgson v. Bicknell, 49 Wn.2d 130, 136 (1956). The court need not accept as true a complaint's legal conclusions. Haberman v. Wash. Pub. Power Supply Sys., 109 Wn.2d 107, 120 (1987) (motion to dismiss).

**B. The Superior Court Correctly Determined that Washington Law Applies and that Therefore Hillcrest Fails to State a Claim Upon Which Relief Can Be Granted**

**1. As Hillcrest Concedes, if Washington Law Applies, Hillcrest Would Be Barred from Recovering the Commission It Seeks**

Hillcrest concedes that if Washington law applies, its claims are barred under Washington's statute regulating real estate and business opportunity brokers. Ch. 18.85 RCW;<sup>5</sup> see Br. at 9, 17-18; CP 153.

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<sup>5</sup> Chapter 18.85 RCW was amended in the 2008 legislative session, but its amended provisions were not effective until July 1, 2010. 2008 Wash. Sess. Laws 246. Statutory references in this brief are to the prior version of Chapter 18.85 RCW, which governs this action.

Washington law requires that a “real estate broker” be licensed with the state. RCW 18.85.100.<sup>6</sup> A “real estate broker” is defined as

*a person, while acting for another for commissions or other compensation or the promise thereof, . . . who:*

(a) *Sells or offers for sale, . . . buys or offers to buy real estate or business opportunities, or any interest there, for others;*

(b) *Negotiates or offers to negotiate, either directly or indirectly, the purchase, sale, exchange, lease, or rental of real estate or business opportunities, or any interest therein, for others . . . .*

RCW 18.85.010(1) (emphasis added).<sup>7</sup> Under the statute, a “[b]usiness opportunity’ shall mean and include business, business opportunity and good will of an existing business or any one or combination thereof.”

RCW 18.85.010(5). The activities of Hillcrest and Mr. Morton upon which Hillcrest bases its claims (and Hillcrest’s performance contemplated in the March 2006 Letter) squarely fall within the regulated activity under Chapter 18.85 RCW. That is, Hillcrest and Mr. Morton qualify as real

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<sup>6</sup> It is not enough that a broker is licensed in another state, as Hillcrest concedes. See Br. at 9, 18; In re Stoddard’s Estate, 60 Wn.2d 263 (1962) (engaging in analysis whether Washington law applies in case with Oregon-licensed broker); see also Erwin v. Cotter Health Centers, 161 Wn.2d 676 (2007) (engaging in conflict of laws analysis to determine whether California law would apply and bar fee recovery sought by Washington-licensed broker).

<sup>7</sup> As defined in the act, a “person” includes a limited liability company, such as Hillcrest. See RCW 18.85.010(4).

estate brokers because they seek compensation for offering to buy, or negotiating the purchase of, a business opportunity for Fisher (i.e., the acquisition of KWOG).

Acting as a real estate or business opportunity broker without a license is a gross misdemeanor in Washington. RCW 18.85.340.

Because Chapter 18.85 RCW “is penal in nature . . . , it must be strictly construed.” Springer v. Rosauer, 31 Wn. App. 418, 421 (1982), review denied, 97 Wn.2d 1024. The act expressly bars suits by an unlicensed broker seeking compensation:

No suit or action shall be brought for the collection of compensation as a real estate broker . . . without alleging and proving that the plaintiff was a duly licensed real estate broker . . . prior to the time of offering to perform any such act or service or procuring any promise or contract for the payment of compensation for any such contemplated act or service.

RCW 18.85.100.<sup>8</sup> The bar on suits by brokers unlicensed in Washington applies to the sale of stock in a corporation. Springer, 31 Wn. App. at 422; Schmitt v. Coad, 24 Wn. App. 661, 665 (1979), review denied, 93 Wn.2d 1016 (1980).

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<sup>8</sup> The analogous provision in the amended statute is substantively unchanged (effective July 1, 2010). RCW 18.85.331.

The holdings in Schmitt and Springer compel the conclusion reached by the court below: Hillcrest fails to state a claim upon which relief can be granted. Thus, the Superior Court properly granted Fisher's motion and dismissed Hillcrest's complaint, with prejudice.

In Schmitt, the court dismissed plaintiff's complaint, which sought payment of a commission in connection with the sale of stock in two newspaper corporations. 24 Wn. App. at 662-65. The court held that Chapter 18.85 RCW applied to the sale of stock in a corporation, so plaintiff's claim was barred because he was not a Washington-licensed broker. Id. at 665, 667. Similarly, in Springer, the court held that because plaintiff failed to allege he was a duly licensed broker, defendants were entitled to judgment on the pleadings and dismissal of plaintiff's claims seeking compensation in connection with the sale of stock in a corporation owning supermarkets. 31 Wn. App. at 419-23. For the same reason, Hillcrest's action is barred because neither Hillcrest nor Mr. Morton was a duly licensed real estate broker in Washington. Br. 9, 18-19; see also CP 2, ¶ 4 (alleging that Mr. Morton is a licensed broker in Arkansas, but not alleging that he was licensed in Washington).<sup>9</sup>

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<sup>9</sup> The court below properly concluded that all of Hillcrest's claims fail if Washington law applies, as it so held. Hillcrest did not argue below that any of its claims survive if Washington law applies, CP 169-70; nor has Hillcrest raised such an argument on appeal.

**2. RCW 18.85.100 Bars Hillcrest's Claim Even if It Could Have Brokered the Deal While in Arkansas**

Despite elsewhere conceding that Hillcrest is not entitled to the requested fee commission if Washington law applies, Br. at 9, 17-18; CP 153, Hillcrest tries to avoid that outcome by claiming that Hillcrest conducted no broker services in Washington and that, therefore, RCW 18.85.100 does not bar Hillcrest's claims. Br. at 19-23. In doing so, Hillcrest cites cases easily distinguishable from this action and relies on an incomplete and formalistic characterization of its activities, insisting that negotiations and communications with Washington residents to effectuate Fisher's acquisition of KWOG would not constitute broker activities conducted in Washington, because Hillcrest could have sent such correspondence or placed such telephone calls from Arkansas. Id.

None of the cases cited by Hillcrest support that narrow and formalistic position. In re Stoddard's Estate, 60 Wn.2d 263 (1962), is the only Washington case applying RCW 18.85.100 that Hillcrest cites in support. There, the court conducted a conflict of laws analysis and held that Oregon law applied, not Washington law, and therefore RCW 18.85.100 had no application. Id. at 264-66.<sup>10</sup> Although the real estate

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<sup>10</sup> It bears noting that In re Stoddard's Estate predated Washington's adoption of the Restatement (Second) of Conflict of Laws. See Baffin Land Corp. v. Monticello Motor Inn, Inc., 70 Wn.2d 893 (1967).

was located in Washington, the contract was executed in Oregon, the buyer was located in Oregon, and all of the broker's relevant acts took place in Oregon, including its negotiations with the buyer. Id. at 264, 267. Based on the record, the court concluded that it was a "fair inference . . . that neither the [broker] nor its customer [the buyer] nor any representative of either was . . . in Washington" after the commission agreement was executed. Id. at 265. The facts in the instant action are far different and a conflict of laws analysis requires application of Washington law. See Part V.B.3 (discussing, for example, the fact that buyer, seller, and assets being acquired were all located in Washington).

Other cases cited by Hillcrest are also inapposite. In Consul Ltd. v. Solide Enterprises, Inc., 802 F.2d 1143, 1148-1150 (9th Cir. 1986), the Ninth Circuit based its holding on a textual analysis of a California statute regulating broker activities "within this State" (RCW 18.85.100 does not have comparable language) and the fact that nothing in the complaint indicated that plaintiff broker performed regulated acts in California. (Emphasis omitted.)<sup>11</sup> The opinion provides no detail about the acts

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<sup>11</sup> Consul Ltd., 802 F.2d at 1150, incorrectly characterizes In re Stoddard's Estate as basing its decision on substantive, not conflict of laws, grounds. See Stoddard's Estate, 60 Wn.2d at 265 ("This appeal presents a problem in conflicts of law . . ."). In any event, whether its analysis was based on conflict of laws or substantive grounds, the facts in In re Stoddard's Estate bear no resemblance to the facts in the instant action.

performed by the broker, including whether there were any communications with California residents, and thus the case lends no support to Hillcrest in this action. Similarly, the unpublished decision in All-Pro Reps, Inc. v. Lukenbill, Nos. 90-16397, 90-16430, 1992 WL 84295, at \*3 (9th Cir. Apr. 22, 1992), does not support Hillcrest's position, as it simply states that the broker's services were performed outside California, without providing detail.

Erwin v. Cotter Health Centers, 161 Wn.2d 676 (2007), is distinguishable not only because the forum state (Washington) was considering whether to apply the licensing statute of another state (California), but also because the contract included a Washington choice of law clause. The court held that it would give effect to the parties' choice of Washington law and not bar recovery based on California's broker-licensing law. Hillcrest also cites Paulson v. Shapiro, 490 F.2d 1, 4 (7th Cir. 1973), a Seventh Circuit case that also offers no support. There, the court held that Wisconsin law did not apply because all negotiations over a lease of Wisconsin property were conducted in meetings in Illinois and Tennessee.

Thus, none of the cases cited by Hillcrest lends support to the formalistic position it advances: that it did not perform broker acts in Washington because Mr. Morton was (or could have been) in Arkansas

when communicating by telephone, mail, and email to negotiate and facilitate the KWOG acquisition from AAB. In advancing this argument, Hillcrest fails to acknowledge the multistate nature of its performance. After all, it's not as if Hillcrest was tasked with manufacturing a widget in a Little Rock factory. Rather, no matter where Mr. Morton was (or could have been) located when engaged in the relevant communications, he was (or would have been) communicating with Washington corporations to effectuate the transfer of assets located in Washington from one Washington corporation to another Washington corporation.<sup>12</sup>

Other courts have rejected the type of formalistic argument advanced by Hillcrest. See, e.g., Meteor Motors, Inc. v. Thompson Halbach & Assocs., 914 So. 2d 479, 483 (Fla. Dist. Ct. App. 2005) (Arizona broker's solicitation of potential Florida purchasers of Florida business via telephone, fax, and email constituted broker activities in Florida); Klein v. Antebi, 832 N.Y.S.2d 904 (N.Y. Sup. Ct. 2007) (rejecting argument that negotiations did not occur in Pennsylvania in light of New York brokers' multiple telephone calls to Pennsylvania seller)

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<sup>12</sup> Hillcrest's actual performance included negotiations with AAB through communications sent to Washington (not to mention Hillcrest's contemplated and actual communications with defendants relating to the potential transfer of KWOG assets to defendants via Hillcrest). CP 2, ¶ 7; CP 186 (the referenced Letter of Intent between Hillcrest and AAB was addressed to AAB's president in SeaTac, Washington).

aff'd, 861 N.Y.S. 2d 143 (N.Y. App. Div. 2008). Washington's broker-licensing regime reflects the state's interest in protecting Washington residents, and that interest is hardly lessened simply because a broker may be based elsewhere when communicating with a Washington resident in connection with a sale.

Finally, Hillcrest's one-sided focus on where Mr. Morton was (or could have been) located when picking up the telephone or sending an email represents a formalism that was rejected by the Restatement (Second) of Conflict of Laws ("Restatement"). The Restatement took "full account of the enormous change in dominant judicial thought respecting conflicts problems . . . [,] [t]he essence of . . . [which was] the jettisoning of a multiplicity of rigid rules in favor of standards of greater flexibility . . . ." Restatement, Introduction. Washington's adoption of the Restatement was motivated in part by this very concern. In Baffin Land, 70 Wn.2d at 897-98, the court rejected the traditional rule of *lex loci contractus*, commenting that "[t]he absurdity of placing the choice of law necessarily on one fortuitous event—the place of execution—seems to be patent." In support of its adoption of the Restatement, the court stated that "[t]he rule we adopt is more flexible and thus better adapted to deal with the contracts with multistate aspects which are becoming the rule today and making commonplace choice of law problems such as this one." Id. at

899, 902 (applying Washington law, notwithstanding the fact that the contract was executed in New York). In asking this Court to focus narrowly on where Mr. Morton was (or could have been) located when communicating with Washington residents, Hillcrest invites this Court to return to the type of formalism rejected by Washington courts more than forty years ago.

**3. Washington Law, Not Arkansas Law, Governs Hillcrest's Claims for a Fee**

**a. An Actual Conflict Exists, so a Conflict of Laws Analysis Is Necessary**

Washington law applies to the claims in this action, notwithstanding Hillcrest's conclusory appeal for the application of Arkansas law. In its complaint, Hillcrest alleges that "Arkansas has the most substantial relationship to the [March 2006 Letter, so] Arkansas law should apply to determine the rights, obligations, and remedies due under the [March 2006 Letter]." CP 4, ¶ 15. That allegation is an unsupported conclusion of law, and thus this Court need not afford it any weight. See Haberman, 109 Wn.2d at 120; Pearson, 67 Wn.2d at 230. Application of this state's conflict of laws principles instead leads to the unmistakable conclusion that the law of Washington, not Arkansas, applies to this action.

On choice of law issues, Washington follows the Restatement and applies the “most significant relationship” test. McKee v. AT & T Corp., 164 Wn.2d 372, 384 (2008). For cases involving contracts without choice of law provisions, as here, the general rule is found in Restatement § 188, which incorporates principles of Restatement § 6. See Fluke Corp. v. Hartford Accident & Indem. Co., 145 Wn.2d 137, 149 (2001). In its brief, Hillcrest correctly notes that an actual conflict exists between Washington law and Arkansas law in this case, and thus this Court must engage in a conflict of laws analysis, as did the Superior Court. Br. at 24; see Cox v. Lewiston Grain Growers, Inc., 86 Wn. App. 357, 364-65 (1997).

**b. Washington Law Applies Based on Its Policy Interest and the Fact that the Major Portion of Performance Was to Be Rendered in Washington**

Contracts involving brokers typically are analyzed under Restatement § 196, which applies to “Contracts for the Rendition Of Services.” See Restatement § 196 cmt. a. The validity of, and rights created under, a services contract are determined “by the local law of the state where the contract requires that the services, or a major portion of the services, be rendered, unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 to the transaction and the parties . . . .” Id. § 196 .

Here, the performance contemplated under the alleged contract involved the brokering and facilitation of a *Washington* corporation's (Fisher's) acquisition of the assets of another *Washington* corporation (AAB)—assets located in *Washington* and used in the operation of a *Washington* television station (KWOG).<sup>13</sup> Thus, even if all of Hillcrest's or Mr. Morton's efforts were (or could have been) undertaken in Arkansas—e.g., telephone calls placed from Arkansas and mail or email sent from Arkansas—those secondary factors can hardly outweigh the fact that buyer, seller, and assets were all located in Washington (i.e., the recipients and the subject matter of such telephone calls or correspondence were located in Washington).

Not only is Washington the location where the significant portion of the services was to be rendered, Washington's policy interest also demands application of Washington law. See Restatement § 196 cmt. c (“The state where the services are to be rendered will also have a natural interest in them and indeed may have an overriding interest in the application to them of certain of its regulatory rules.”). Restatement § 202 governs questions regarding illegality of a contract: “When performance is

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<sup>13</sup> The transaction that ultimately closed was a Washington corporation's (Fisher's) acquisition of all shares of stock in a Washington corporation, whose assets were located in Washington (AAB) and which engaged in the business of television broadcasting in Washington (KWOG).

illegal in the place of performance, the contract will usually be denied enforcement.” Id. § 202(2).

Washington has a strong policy interest in regulating real estate and business opportunity brokers, including its absolute bar on suits for commissions by unlicensed brokers. As discussed above, violation of the statute is a gross misdemeanor, and its provisions must be strictly construed. RCW 18.85.340; Springer, 31 Wn. App. at 421. Its absolute bar on suits for commissions by unlicensed brokers serves as an important deterrent to protect the public from fraud and misrepresentation from dishonest brokers. See Springer, 31 Wn. App. at 421; Schmitt, 24 Wn. App. at 665.

As it must, Hillcrest concedes that, “[w]ithout question, Washington has an interest in regulating the conduct of brokers that perform services in Washington state.” CP 167. Hillcrest nevertheless tries to downplay Washington’s policy interest in regulating unlicensed brokers, even going so far as to contend that Arkansas’ policy interest is as great (or greater). Br. at 38-39. In support, Hillcrest relies on its claim that negotiation and performance of the March 2006 Letter occurred in Arkansas (both incorrect). Id. at 39; see discussion in Parts V.B.2, V.B.3.b, V.B.3.c(ii), and V.B.3.c(iii). Hillcrest also relies on the general principle favoring the upholding of parties’ “justified expectations.” Br. at

27-29, 38. But that principle has limited relevance where, as here, a contract's illegality is at issue. Restatement § 202 cmt. e (“[R]ules on illegality . . . are likely to represent strongly-felt policies of the states involved. A court will be reluctant to subordinate such a policy of the state having the dominant interest in the issue to be decided to the choice-of-law policy favoring the protection of the justified expectations of the parties.”).

The Restatement, in fact, includes an illustration closely on point that calls for application of Washington law:

In state X [Arkansas], A [“Fisher-Arkansas”] and B [Hillcrest], who are domiciled in that state, enter into a contract in which A [“Fisher-Arkansas”] employs B [Hillcrest] to act as a broker in selling land owned by A [“Fisher-Arkansas”] in state Y [Washington]. . . . B [Hillcrest] finds a purchaser for the land and now brings suit for his commissions in state Z. The contract is void under Y [Washington] local law because B [Hillcrest] lacked a proper license; it is valid under X [Arkansas] local law. Among the questions for the Z court to decide are whether Y’s [Washington’s] interest in the application of its rule of invalidity is so overriding as to require the application of the rule in the present case. . . . [I]f the contract required B [Hillcrest] to render his services in Y [Washington], and B [Hillcrest] found the purchaser in Y [Washington] . . . [,] Y [Washington] would presumably have such an overriding interest that its rule of invalidity should be applied.

Restatement § 196 cmt. d, illus. 2. Here, the rationale for application of Washington law is even stronger: (1) there is no “Fisher-Arkansas”—instead, the Fisher defendants are Washington corporations (vs. A and B both domiciled in state X [Arkansas]); and (2) the action is brought in a Washington court, which is tasked with deciding whether to apply Washington’s law barring the action (vs. a suit in state Z). Thus, Washington’s policy interest overrides Hillcrest’s appeal to the general principle of justified expectations of the parties.

To support its contrary position, Hillcrest cites Nelson v. Kaanapali Props., 19 Wn. App. 893 (1978), but this case is distinguishable in important ways. The Nelson court held that the *forum’s* law should apply and noted that the dispute was primarily between Washington residents. Id. at 899 (“While Hawaii can control access to its courts, it should not as a matter of policy be able to control access to Washington courts, which have jurisdiction, for resolution of a dispute primarily between Washington domiciliaries.”). The plaintiff contractor, one of the two defendant corporations forming a joint venture, and the owner who controlled both joint venture companies were all domiciled in Washington. Id. at 894, 899. In addition, Nelson involved potential application of Hawaii’s *contractor* licensing statute, and in holding that Hawaii’s interest did not warrant application of its bar on recovery, the court considered

Washington's analogous law. Id. at 899. But violation of Washington's contractor licensing law constituted a misdemeanor,<sup>14</sup> whereas violation of Chapter 18.85 RCW constitutes a gross misdemeanor and the broker licensing regime "must be strictly construed." Springer, 31 Wn. App. at 421; see also RCW 18.85.340.

In contrast to Nelson, an apt example is Cox v. Lewiston Grain Growers, Inc., 86 Wn. App. 357 (1997). In Cox, despite the fact that Idaho was the place of performance, the place of contracting, and where the seller resided, the court held that Washington law applied. Id. at 366-67. After noting that Washington also had significant contacts with the transaction (e.g., place of negotiation, buyer's location), the court held that Washington law applied because of Washington's strong policy interest in regulating corporations authorized to do business in the state and in regulating agricultural business in Washington. Id. Here too, Washington's policy interest in regulating real estate and business

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<sup>14</sup> See RCW 18.27.020(2) (1976). The law was amended in 2007 to make violation a gross misdemeanor. 2007 Wash. Sess. Laws 2015. An unlicensed contractor who performed work in violation of the Hawaii licensing law in effect at the time could have been subject to a fine, but it would not have been a misdemeanor or gross misdemeanor. Compare Haw. Rev. Stat. § 444-23 (1976) (fine), with id. § 444-9.3 (aiding and abetting an unlicensed contractor, such as allowing one's license to be used by an unlicensed contractor, shall be a misdemeanor).

opportunity brokers means Washington, not Arkansas, is the state with the most significant relationship to the claims in this action.

**c. Consideration of All Restatement Factors Also Compels the Conclusion that Washington Law Applies**

Even if this Court were to consider all the Restatement § 188 factors, Washington would emerge as the state with the most significant relationship. Hillcrest discusses at length each of the five Restatement § 188(2) contacts and the principles of Restatement § 6(2), which are to be applied when evaluating contacts. Hillcrest acknowledges that in determining the state with the most significant relationship, “the Court is not to merely ‘count the contacts’ between each state.” Br. at 26 (quoting Potlatch No. 1 Fed. Credit Union v. Kennedy, 76 Wn.2d 806, 810 (1969)). In other words, not all contacts are of equal importance. See Restatement § 188(2) (“These contacts are to be evaluated according to their relative importance with respect to the particular issue.”).

Despite this acknowledgement, Hillcrest’s analysis amounts to little more than counting contacts. See, e.g., Br. at 37 (claiming—incorrectly—that “four of the five factors identified in Section 188(2)” favor application of Arkansas law). In fact, the fundamental factors relevant to the dispute are undisputed and compel application of Washington law: Hillcrest seeks a fee commission for contemplated

performance in brokering, negotiating, and facilitating a Washington corporation's acquisition of the assets of (or all shares of stock in) another Washington corporation, where such assets were located in Washington and used in the operation of a Washington television station. Against these substantial Washington contacts, Hillcrest can only point to secondary Arkansas contacts (which are partial and offset by Washington contacts).

**(i) Place of contracting is an insignificant contact**

Hillcrest contends that Arkansas is the place of contracting based on its allegation that the March 2006 Letter was executed in Arkansas. CP 2-3, ¶ 9; Br. at 29 (“[I]t is a hypothetical fact consistent with the allegations of the Complaint that the last act necessary to give the contract binding effect was Mr. Morton’s signing of it, and that act occurred in Arkansas.”). But even if true, “[s]tanding alone, the place of contracting is a relatively insignificant contact.” Restatement § 188 cmt. e; see, e.g., Baffin Land, 70 Wn.2d at 901-02 (applying Washington law notwithstanding fact that contract was executed in New York).<sup>15</sup>

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<sup>15</sup> According to In re Stoddard’s Estate, 60 Wn.2d at 266, a case heavily relied on by Hillcrest, “brokerage contracts . . . are unilateral and the place of contracting is where the last act necessary to make it binding occurs, which is the place where the broker produces a purchaser ready, able and willing to buy at the authorized price.” Here, Hillcrest seeks to recover based on contemplated

**(ii) Place of negotiation is insignificant where, as here, negotiation occurred in multiple states primarily by email, mail, or telephone**

Although Hillcrest contends that a substantial part of the negotiations for the March 2006 Letter took place in Arkansas, CP 2-3, ¶ 9, negotiations also took place in Washington, as implicitly acknowledged in an affidavit submitted by Mr. Morton in the Arkansas Action. CP 31, ¶ 4; CP 78, ¶ 4 (“The Memorandum of Understanding came to me signed by [Fisher CFO Robert] Bateman. I then signed while present in Little Rock.”); CP 31, ¶ 3; CP 74-76 (March 2006 Letter and Mr. Bateman’s email forwarding same to Mr. Morton). As a result, place of negotiation is a relatively insignificant factor. As set forth in the Restatement: “This contact is of less importance when there is no one single place of negotiation and agreement, as, for example, when the parties do not meet but rather conduct their negotiations from separate states by mail or telephone.” Restatement § 188 cmt. e; see also Cannon, Inc. v. Fed. Ins. Co., 82 Wn. App. 480, 493-94 (1996) (applying Washington law, notwithstanding fact that place of contracting and negotiation were in Quebec).

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brokering of a deal between two Washington corporations, and thus Washington would be the place of contracting.

**(iii) Place of performance strongly favors Washington law**

As discussed in Parts V.B.2 and V.B.3.b, place of performance strongly favors application of Washington law. Hillcrest's contention that it could have fully performed in Arkansas is incomplete, formalistic, and ignores the fact that its contemplated performance required communication with Washington corporations to effectuate a transfer of Washington assets from one Washington corporation to another, where such assets were located in Washington and used in the operation of a Washington television station.

Hillcrest's analysis is also flawed for an additional reason, albeit similar: Hillcrest entirely ignores Fisher's performance. The March 2006 Letter contemplated that Hillcrest would acquire all AAB assets and then assign them to Fisher. CP 75-76. Thus, even if Hillcrest's performance could be deemed to occur exclusively in Arkansas, the agreement on which Hillcrest sues called for Washington-based Fisher to acquire, via assignment, all AAB assets—which were located in Washington. The March 2006 Letter also called for Fisher to provide a draft asset purchase agreement to Equity Broadcasting (i.e., to Hillcrest, as alleged in the complaint), which Fisher did on April 7, 2006. CP 31-32, 75-76, 91-145, 147. Thus, consideration of Fisher's performance further supports the

conclusion that place of performance strongly favors application of Washington law.

**(iv) Location of subject matter strongly favors Washington law**

Those same facts (and others) plainly dictate that Washington be deemed the location of the subject matter of the contract, and thus this factor strongly favors application of Washington law. The subject matter of the March 2006 Letter was Fisher's potential purchase of all AAB assets for the purpose of acquiring television station KWOG. All the relevant factors call for application of Washington law (buyer and seller were incorporated in Washington, and their principal places of business were in Washington, as were the assets to be acquired, which principally included a television station broadcasting in Washington).

In another example of Hillcrest's exalting form over substance, when discussing the subject matter of the contract, Hillcrest ignores the fundamental facts of the transaction discussed in the preceding paragraph and instead focuses exclusively on the location of AAB share certificates. Br. at 35-36. The physical location of share certificates, to the extent relevant at all, is of particularly secondary importance here, where Fisher Broadcasting purchased *all* shares of stock in AAB. CP 2-3, ¶¶ 7, 11. That is, through its stock purchase, Fisher Broadcasting acquired full

control of AAB (incorporated and located in Washington), including all its assets (located in Washington and used for television broadcasting in Washington). Hillcrest's attempt to focus on the physical location of share certificates is a distraction that has no bearing on the conflict of laws analysis.

**(v) Domicile/residence of the parties is a neutral contact**

The final factor is neutral, as Hillcrest is an Arkansas entity and defendants are Washington corporations. CP 1-2, ¶¶ 1-3. This Court should reject Hillcrest's strained attempt to characterize "the scales [as] tipped slightly towards the application of Arkansas law" based on place of contracting (a relatively insignificant factor) and place of performance (which, instead, strongly favors application of Washington law).

**(vi) Restatement § 6(2) principles strongly favor Washington law**

Hillcrest also addresses Restatement § 6(2) factors, but its analysis of several factors is flawed. Br. at 37-43. Most fundamental, and as discussed above, Washington's policy interest in regulating real estate and business opportunity brokers far outweighs any policy interest of Arkansas or the general principle of "the protection of justified expectations."

Restatement § 6(2)(b)-(d); see discussion in Part V.B.3.b.

Hillcrest misapplies Restatement § 6(2)(e), “the basic policies underlying the particular field of law.” Broker licensing statutes are a means for states to protect their citizens. Washington’s statute bars all actions by unlicensed brokers for recovery of commissions, not simply those in which the broker was in fact dishonest. This absolute bar on commissions for unlicensed brokers is an important deterrent. Contrary to Hillcrest’s argument, this Restatement factor does not invite this Court to ignore Washington’s interest in regulating broker activities involving a Washington corporation’s purchase of another Washington corporation with assets located in Washington.

Fisher agrees with Hillcrest that the following factors are neutral: “[C]ertainty, predictability and uniformity of result” and “ease in the determination and application of the law to be applied.” Restatement § 6(2)(f), (g); Br. at 41-43. So too is the factor regarding “the needs of the interstate and international systems,” notwithstanding Hillcrest’s suggestion that a Washington court’s application of Washington’s broker licensing law to a transaction involving corporations, residents, and assets located in Washington would somehow threaten “harmonious relations” between Washington and Arkansas. See Br. at 39-40; Restatement § 6(2)(a).

**d. In Sum, Washington Is the State with the Most Significant Relationship to the Transaction and Parties**

To summarize the discussion above, Washington law applies in this action because it has the most significant relationship to the claims in the action, based on its strong policy interest as well as the number and significance of Restatement § 188 contacts, in light of the principles of Restatement § 6. The table below summarizes the Restatement factors.

**TABLE: Summary of Restatement Factors**

Arkansas	Factor	Washington
Final signature by Hillcrest	<b>Place of Contracting</b> (Relatively insignificant, standing alone, § 188 cmt. e)	Location where Hillcrest could produce seller (AAB) willing to sell at authorized price (see <u>In re Stoddard's Estate</u> )
Hillcrest, by telephone, mail, and email	<b>Place of Negotiation</b> (Insignificant when multiple states by telephone/mail, § 188 cmt. e)	Fisher, by telephone, mail, and email
Hillcrest location for communications and negotiations with AAB and Fisher (both in Washington)	<b>Place of Performance</b> (Strongly favors Washington law)	AAB location for negotiations Fisher location for negotiations with AAB via Hillcrest Performance: Effectuate transaction between two Washington corps. Fisher's performance (transfer of assets to Fisher; draft and provide asset purchase agreement to Hillcrest)
	<b>Subject Matter of Agreement</b> (Strongly favors Washington law)	Purchase of Washington corp. by another Washington corp. AAB assets KWOG broadcasting in Washington
Hillcrest	<b>Domicile, Residency, Place of Business</b> (Split)	Fisher Communications Fisher Broadcasting
Parties' justified expectations (but courts reluctant to subordinate policy regarding illegality, § 202 cmt. e)	<b>Policy Factors</b> (Strongly favors Washington law)	Regulation of unlicensed brokers (gross misdemeanor, RCW 18.85.340)

**C. The Superior Court Appropriately Considered Supporting Documents Submitted by Fisher and Correctly Refused to Grant Discovery, Which Cannot Cure the Defects in Hillcrest's Claims**

**1. Judicial Notice Was Appropriate, and Even if an Error, It Was Harmless**

Hillcrest contends that the Superior Court erred in taking judicial notice of three documents or, alternatively, erred by not providing Hillcrest with the “opportunity to conduct discovery concerning the evidence and to file a supplemental response.” Br. at 44. In making this argument, Hillcrest fails to indicate the limited purpose for which the documents were considered and instead speaks in broad and general terms of the need for discovery. Here too Hillcrest’s argument lacks merit. First, the Superior Court’s consideration of the documents was proper. Second, even if the court should not have considered the documents, doing so would constitute harmless error. The facts referenced in the documents are merely cumulative; the fundamental facts necessary for the conflict of laws analysis are undisputed and compel application of Washington law. The discussion below first addresses the harmless error argument, because it establishes that this Court need not even reach the judicial notice issue.

In support of its Motion for Judgment on the Pleadings, Fisher submitted seven documents that were referred to in, but not attached to, Hillcrest’s complaint in this action; were attached to Hillcrest’s complaint

in the Arkansas Action; were otherwise filed by Hillcrest in the Arkansas Action; and/or are publicly available. CP 30-147, 182-90. Hillcrest does *not* challenge the Superior Court's consideration of the March 2006 Letter, an Amended and Supplemental Affidavit filed by Mr. Morton in connection with the Arkansas Action, the court's order dismissing Hillcrest's complaint in the Arkansas Action for lack of personal jurisdiction, or January 2006 correspondence between Hillcrest and AAB ("KWOG Letter of Intent"). See Br. at 46-48 (challenging only Exhibits 1, 5, and 6 to the November 16, 2009, Declaration of Harry H. Schneider, Jr.). Instead, Hillcrest objects to the trial court's consideration of the following three documents: (1) the Stock Purchase Agreement entered into by Fisher Broadcasting, AAB, and Christopher Racine; (2) a draft asset purchase agreement between AAB and Equity Broadcasting ("Draft Asset Purchase Agreement"), provided by Fisher to Equity Broadcasting and Mr. Morton; and (3) an April 10, 2006, email from Fisher to Mr. Morton forwarding the Draft Asset Purchase Agreement. CP 30-32, 35-72, 91-147.

Hillcrest does not challenge the authenticity of the three documents. In fact, each of the three documents was attached to *Hillcrest's* complaint in the Arkansas Action, which Hillcrest fails to mention in its brief. CP 30-32, ¶¶ 2, 6-7 (copies of the documents filed in

the Arkansas Action were retrieved from PACER). Hillcrest complains that the court below took judicial notice of the “thirty-eight page, June 26, 2006, Stock Purchase Agreement” and the “fifty-one page draft Asset Purchase Agreement,” Br. at 46-47, but fails to mention the limited purposes for which the documents were offered and considered:

- AAB was a Washington corporation, domiciled in Washington (Stock Purchase Agreement; Draft Asset Purchase Agreement), CP 15, 24, 35, 95
- KWOOG broadcasting facilities were located in Washington (Stock Purchase Agreement; Draft Asset Purchase Agreement), CP 15, 35, 95
- In April 2006, Fisher provided Equity Broadcasting and Mr. Morton with the Draft Asset Purchase Agreement, as specified in the March 2006 Letter (i.e., the place of performance includes Fisher’s performance in Washington) (Draft Asset Purchase Agreement, attached to April 10, 2006, email from Fisher to Mr. Morton), CP 24, 91-145, 147
- Mr. Racine was a Washington resident (Stock Purchase Agreement), CP 24, 35

In complaining about the trial court’s consideration of the three documents and Hillcrest’s alleged need for discovery, it is telling that Hillcrest does not challenge any of the facts identified above, save one: Hillcrest suggests that “[d]iscovery may . . . have revealed that Mr. Racine did not reside in Washington state.” Br. at 48.

Yet even if it was error for the trial court to consider the Stock Purchase Agreement for the purpose of establishing that Mr. Racine was a Washington resident (i.e., in the event that Mr. Racine misidentified himself as a Washington resident in the first paragraph of a \$16-million stock purchase agreement), such error is harmless unless the court's decision "would have been materially affected had the error not occurred." Maicke v. RDH, Inc., 37 Wn. App. 750, 754 (1984). Whether or not Mr. Racine was a Washington resident is not at all material to the conflict of laws analysis. In fact, *the analysis in Part V.B above does not even discuss Mr. Racine's residency.*

Hillcrest has not challenged, and cannot credibly dispute, the remaining facts identified in the bullet points above. Yet even if it did, the facts are supported by other documents that Hillcrest does not challenge: (1) the KWOG Letter of Intent (addressed to Mr. Racine and AAB, with a SeaTac address and a reference to "KWOG, Analog Channel 51, DTV Channel 50, Bellevue, Washington") and (2) the March 2006 Letter (Fisher "intend[s] to provide [Mr. Morton] with a draft asset purchase agreement . . .").<sup>16</sup> CP 31, 74-76, 182-83, 186-90. Finally, even ignoring any or all of the facts above, the conflict of laws analysis would reach the

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<sup>16</sup> Note also that AAB is "African-American Broadcasting of *Bellevue*, Inc." CP 35, 91 (emphasis added); see also CP 186.

same result: Washington has the most significant relationship to the claims in the action. The judicially noticed facts are cumulative, supplementing undisputed facts that compel the application of Washington law.

As to the appropriateness of taking judicial notice of the documents at issue, the Superior Court was correct in doing so. At any stage of the proceedings, a court may take judicial notice of facts that are not subject to reasonable dispute. ER 201(b), (f). When deciding a motion under CR 12, a court may take judicial notice of a public document so long as the document's authenticity is not subject to reasonable dispute. See Rodriguez v. Loudeye Corp., 144 Wn. App. 709, 725-26 (2008).

Here, authenticity of the documents is not in dispute; as discussed above, the documents were previously filed publicly as attachments to Hillcrest's complaint in the Arkansas Action. CP 30-32. The "corollary" offered in Hillcrest's brief misstates Rodriguez by suggesting that a court should not take judicial notice of documents if authenticity may be disputed *or* if documents are not alleged in a complaint. Br. at 45. This misstatement results from Hillcrest's conflating two distinct circumstances under which a court may consider documents outside the pleadings: the court may take judicial notice under ER 201(b), and in addition, "[d]ocuments whose contents are alleged in a complaint but which are not physically attached to the pleading may also be considered in ruling on a CR 12(b)(6) motion

to dismiss.” Rodriguez, 144 Wn. App. at 725-26.<sup>17</sup> Here, authenticity of the documents is not challenged and the facts are not subject to reasonable dispute, so judicial notice was appropriate.

**2. Discovery Is Unwarranted Because the Facts Necessary to Resolve the Conflict of Laws Question Are Undisputed**

Hillcrest contends that because the Superior Court considered the additional evidence submitted by Fisher, “it should have given Hillcrest the opportunity to conduct discovery about the evidence and to file a supplemental response to the motion.” Br. at 47-48. But taking judicial notice of facts does not convert a motion to dismiss into a summary judgment motion. Rodriguez, 144 Wn. App. at 725-26 (explaining that it is proper to consider judicially noticed facts when ruling on a motion to dismiss); see also United States v. 14.02 Acres of Land More or Less in Fresno Cnty., 547 F.3d 943, 955 (9th Cir. 2008) (holding that a court may consider judicially noticed facts without converting a Rule 12 motion into a summary judgment motion). Thus, Hillcrest had no entitlement to

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<sup>17</sup> Hillcrest’s citation to the unpublished federal case Aecon Bldgs, Inc. v. Zurich N.A. No. C07-832-MJP, 2008 WL 786654 (W.D. Wash. Mar. 20, 2008), is not on point. Br. at 45-46. In that case, the court denied defendants’ request to take judicial notice of an answer filed in another case, in which plaintiff denied that its predecessor was a Washington corporation. The court noted that the denial was accurate insofar as the predecessor corporation no longer existed, and therefore it did not undercut a clear statement in a contract (cited by both parties as valid) that the predecessor was a Washington corporation.

discovery simply because the court took judicial notice of documents submitted by Fisher.

But even more fundamental, discovery is inappropriate in this action because it would be futile, since the fundamental facts relevant to the determination of the conflict of laws analysis are undisputed. Hillcrest's vague appeals for discovery identify two topics for discovery: the physical location of AAB share certificates (and whether they had issued prior to Fisher's agreement to purchase them) and Mr. Racine's residency. Br. at 35, 48. Neither is a material fact, as discussed above. See discussion in Part V.B.3.c(iv) and Part V.C.1. Moreover, no discovery would challenge the fundamental facts that compel the conclusion that Washington law applies: Fisher Broadcasting, Fisher Communications, AAB, and KWOG are all located in Washington, and—whether Fisher purchased AAB's assets or shares—the resulting transaction was one Washington corporation's acquisition of another Washington corporation, whose assets were located in Washington. Discovery would serve no purpose, but would simply confirm what is already known: Washington law controls.

## VI. CONCLUSION

The Superior Court correctly concluded that Washington law applies to the claims in this action and that, therefore, Hillcrest fails to

state a claim for relief. For the reasons set forth above, this Court should affirm the Superior Court's order granting Fisher's Motion for Judgment on the Pleadings and dismissing Hillcrest's complaint with prejudice.

RESPECTFULLY SUBMITTED this 6th day of July, 2010.

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# APPENDIX

**APPENDIX NO. 1**  
**RCW 18.85.010**

## RCW 18.85.010

Definitions. (Effective until July 1, 2010.)

In this chapter words and phrases have the following meanings unless otherwise apparent from the context:

(1) "Real estate broker," or "broker," means a person, while acting for another for commissions or other compensation or the promise thereof, or a licensee under this chapter while acting in his or her own behalf, who:

(a) Sells or offers for sale, lists or offers to list, buys or offers to buy real estate or business opportunities, or any interest therein, for others;

(b) Negotiates or offers to negotiate, either directly or indirectly, the purchase, sale, exchange, lease, or rental of real estate or business opportunities, or any interest therein, for others;

(c) Negotiates or offers to negotiate, either directly or indirectly, the purchase, sale, lease, or exchange of a manufactured or mobile home in conjunction with the purchase, sale, exchange, rental, or lease of the land upon which the manufactured or mobile home is, or will be, located;

(d) Advertises or holds himself or herself out to the public by any oral or printed solicitation or representation that he or she is so engaged; or

(e) Engages, directs, or assists in procuring prospects or in negotiating or closing any transaction which results or is calculated to result in any of these acts;

(2) "Real estate salesperson" or "salesperson" means any natural person employed, either directly or indirectly, by a real estate broker, or any person who represents a real estate broker in the performance of any of the acts specified in subsection (1) of this section;

(3) An "associate real estate broker" is a person who has qualified as a "real estate broker" who works with a broker and whose license states that he or she is associated with a broker;

(4) The word "person" as used in this chapter shall be construed to mean and include a corporation, limited liability company, limited liability partnership, or partnership, except where otherwise restricted;

(5) "Business opportunity" shall mean and include business, business opportunity and good will of an existing business or any one or combination thereof;

(6) "Commission" means the real estate commission of the state of Washington;

(7) "Director" means the director of licensing;

(8) "Real estate multiple listing association" means any association of real estate brokers:

(a) Whose members circulate listings of the members among themselves so that the properties described in the listings may be sold by any member for an agreed portion of the commission to be paid; and

(b) Which require in a real estate listing agreement between the seller and the broker, that the members of the real estate multiple listing association shall have the same rights as if each had executed a separate agreement with the seller;

(9) "Clock hours of instruction" means actual hours spent in classroom instruction in any tax supported, public technical college, community college, or any other institution of higher learning or a correspondence course from any of the aforementioned institutions certified by such institution as the equivalent of the required number of clock hours, and the real estate commission may certify courses of instruction other than in the aforementioned institutions;

(10) "Incapacitated" means the physical or mental inability to perform the duties of broker prescribed by this chapter; and

(11) "Commercial real estate" means any parcel of real estate in this state other than real estate containing one to four residential units. "Commercial real estate" does not include a single-family residential lot or single-family residential units such as condominiums, townhouses, manufactured homes, or homes in a subdivision when sold, leased, or otherwise conveyed on a unit-by-unit basis, even when those units are part of a larger building or parcel of real estate, unless the property is sold or leased for a commercial purpose.

[2003 c 201 § 1; 1998 c 46 § 2; 1997 c 322 § 1; 1987 c 332 § 1; 1981 c 305 § 1; 1979 c 158 § 68; 1977 ex.s. c 370 § 1; 1973 1st ex.s. c 57 § 1; 1972 ex.s. c 139 § 1; 1969 c 78 § 1; 1953 c 235 § 1; 1951 c 222 § 1; 1943 c 118 § 1; 1941 c 252 § 2; Rem. Supp. 1943 § 8340-25. Prior: 1925 ex.s. c 129 § 4.]

**APPENDIX NO. 2**  
**RCW 18.85.100**

RCW 18.85.100

License required — Prerequisite to suit for commission. (*Effective until July 1, 2010.*)

It shall be unlawful for any person to act as a real estate broker, associate real estate broker, or real estate salesperson without first obtaining a license therefor, and otherwise complying with the provisions of this chapter.

No suit or action shall be brought for the collection of compensation as a real estate broker, associate real estate broker, or real estate salesperson, without alleging and proving that the plaintiff was a duly licensed real estate broker, associate real estate broker, or real estate salesperson prior to the time of offering to perform any such act or service or procuring any promise or contract for the payment of compensation for any such contemplated act or service.

[1997 c 322 § 6; 1972 ex.s. c 139 § 9; 1951 c 222 § 8. Formerly: (i) 1941 c 252 § 6; Rem. Supp. 1941 § 8340-29. (ii) 1941 c 252 § 25; Rem. Supp. 1941 § 8340-48.]

**APPENDIX NO. 3**  
**RCW 18.85.340**

RCW 18.85.340

Violations — Penalty. (*Effective until July 1, 2010.*)

Any person acting as a real estate broker, associate real estate broker, or real estate salesperson, without a license, or violating any of the provisions of this chapter, shall be guilty of a gross misdemeanor.

[1997 c 322 § 21; 1951 c 222 § 20; 1941 c 252 § 23; Rem. Supp. 1941 § 8340-46. Prior: 1925 ex.s. c 129 § 17.]

**APPENDIX NO. 4**  
**Restatement (Second) of Conflict of Laws § 6**

Restatement of the Law — Conflict of Laws  
Restatement (Second) of Conflict of Laws  
Current through August 2009

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Chapter 1. Introduction

§ 6. Choice-Of-Law Principles

[Link to Case Citations](#)

- (1) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.
- (2) When there is no such directive, the factors relevant to the choice of the applicable rule of law include
- (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.

**Comment on Subsection (1):**

*a. Statutes directed to choice of law.* A court, subject to constitutional limitations, must follow the directions of its legislature. The court must apply a local statutory provision directed to choice of law provided that it would be constitutional to do so. An example of a statute directed to choice of law is the Uniform Commercial Code which provides in certain instances for the application of the law chosen by the parties (§ 1-105(1)) and in other instances for the application of the law of a particular state (§§ 2-402, 4-102, 6-102, 8-106, 9-103). Another example is the Model Execution of Wills Act which provides that a written will subscribed by the testator shall be valid as to matters of form if it complies with the local requirements of any one of a number of enumerated states. Statutes that are expressly directed to choice of law, that is to say, statutes which provide for the application of the local law of one state, rather than the local law of another state, are comparatively few in number.

*b. Intended range of application of statute.* A court will rarely find that a question of choice of law is explicitly covered by statute. That is to say, a court will rarely be directed by statute to apply the local law of one state, rather than the local law of another state, in the decision of a particular issue. On the other hand, the court will constantly be faced with the question whether the issue before it falls within the intended range of application of a particular statute. The court should give a local statute the range of application intended by the legislature when these intentions can be ascertained and can constitutionally be given effect. If the legislature intended that the statute should be applied to the out-of-state facts involved, the court should so apply it unless constitutional considerations forbid. On the other hand, if the legislature intended that the statute should be applied only to acts taking place within the state, the statute should not be given a wider range of application. Sometimes a statute's intended range of application will be apparent on its face, as when it expressly applies to all citizens of a state including those who are living abroad.

When the statute is silent as to its range of application, the intentions of the legislature on the subject can sometimes be ascertained by a process of interpretation and construction. Provided that it is constitutional to do so, the court will apply a local statute in the manner intended by the legislature even when the local law of another state would be applicable under usual choice-of-law principles.

**Comment on Subsection (2):**

*c. Rationale.* Legislatures usually legislate, and courts usually adjudicate, only with the local situation in mind. They rarely give thought to the extent to which the laws they enact, and the common law rules they enunciate, should apply to out-of-state facts. When there are no adequate directives in the statute or in the case law, the court will take account of the factors listed in this Subsection in determining the state whose local law will be applied to determine the issue at hand. It is not suggested that this list of factors is exclusive. Undoubtedly, a court will on occasion give consideration to other factors in deciding a question of choice of law. Also it is not suggested that the factors mentioned are listed in the order of their relative importance. Varying weight will be given to a particular factor, or to a group of factors, in different areas of choice of law. So, for example, the policy in favor of effectuating the relevant policies of the state of dominant interest is given predominant weight in the rule that transfers of interests in land are governed by the law that would be applied by the courts of the situs (see §§ 223-243). On the other hand, the policies in favor of protecting the justified expectations of the parties and of effectuating the basic policy underlying the particular field of law come to the fore in the rule that, subject to certain limitations, the parties can choose the law to govern their contract (see § 187) and in the rules which provide, subject to certain limitations, for the application of a law which will uphold the validity of a trust of movables (see §§ 269-270) or the validity of a contract against the charge of commercial usury (see § 203). Similarly, the policy favoring uniformity of result comes to the fore in the rule that succession to interests in movables is governed by the law that would be applied by the courts of the state where the decedent was domiciled at the time of his death (see §§ 260 and 263).

At least some of the factors mentioned in this Subsection will point in different directions in all but the simplest case. Hence any rule of choice of law, like any other common law rule, represents an accommodation of conflicting values. Those chapters in the Restatement of this Subject which are concerned with choice of law state the rules which the courts have evolved in accommodation of the factors listed in this Subsection. In certain areas, as in parts of Property (Chapter 9), such rules are sufficiently precise to permit them to be applied in the decision of a case without explicit reference to the factors which underlie them. In other areas, such as in Wrongs (Chapter 7) and Contracts (Chapter 8), the difficulties and complexities involved have as yet prevented the courts from formulating a precise rule, or series of rules, which provide a satisfactory accommodation of the underlying factors in all of the situations which may arise. All 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. In these areas, the courts must look in each case to the underlying factors themselves in order to arrive at a decision which will best accommodate them.

Statement of precise rules in many areas of choice of law is made even more difficult by the great variety of situations and of issues, by the fact that many of these situations and issues have not been thoroughly explored by the courts, by the generality of statement frequently used by the courts in their opinions, and by the new grounds of decision stated in many of the more recent opinions.

The Comments which follow provide brief discussion of the factors underlying choice of law which are mentioned in this Subsection.

*d. Needs of the interstate and international systems.* Probably the most important function of choice-of-law rules is to make the interstate and international systems work well. Choice-of-law rules, among other things, should seek to further harmonious relations between states and to facilitate commercial intercourse between them. In formulating rules of choice of law, a state should have regard for the needs and policies of other states and of the community of states. Rules of choice of law formulated with regard for such needs and policies are likely to commend themselves to other states and to be adopted by these states. Adoption of the same choice-of-law rules by many states will fur-

ther the needs of the interstate and international systems and likewise the values of certainty, predictability and uniformity of result.

*e. Relevant policies of the state of the forum.* Two situations should be distinguished. One is where the state of the forum has no interest in the case apart from the fact that it is the place of the trial of the action. Here the only relevant policies of the state of the forum will be embodied in its rules relating to trial administration (see Chapter 6). The second situation is where the state of the forum has an interest in the case apart from the fact that it is the place of trial. In this latter situation, relevant policies of the state of the forum may be embodied in rules that do not relate to trial administration.

The problem dealt with in this Comment arises in the common situation where a statute or common law rule of the forum was formulated solely with the intrastate situation in mind or, at least, where there is no evidence to suggest that the statute or rule was intended to have extraterritorial application. If the legislature or court (in the case of a common law rule) did have intentions with respect to the range of application of a statute or common law rule and these intentions can be ascertained, the rule of Subsection (1) is applicable. If not, the court will interpret the statute or rule in the light of the factors stated in Subsection (2).

Every rule of law, whether embodied in a statute or in a common law rule, was designed to achieve one or more purposes. A court should have regard for these purposes in determining whether to apply its own rule or the rule of another state in the decision of a particular issue. If the purposes sought to be achieved by a local statute or common law rule would be furthered by its application to out-of-state facts, this is a weighty reason why such application should be made. On the other hand, the court is under no compulsion to apply the statute or rule to such out-of-state facts since the originating legislature or court had no ascertainable intentions on the subject. The court must decide for itself whether the purposes sought to be achieved by a local statute or rule should be furthered at the expense of the other choice-of-law factors mentioned in this Subsection.

*f. Relevant policies of other interested states.* In determining a question of choice of law, the forum should give consideration not only to its own relevant policies (see Comment *e*) but also to the relevant policies of all other interested states. The forum should seek to reach a result that will achieve the best possible accommodation of these policies. The forum should also appraise the relative interests of the states involved in the determination of the particular issue. In general, it is fitting that the state whose interests are most deeply affected should have its local law applied. Which is the state of dominant interest may depend upon the issue involved. So if a husband injures his wife in a state other than that of their domicile, it may be that the state of conduct and injury has the dominant interest in determining whether the husband's conduct was tortious or whether the wife was guilty of contributory negligence (see § 146). On the other hand, the state of the spouses' domicile is the state of dominant interest when it comes to the question whether the husband should be held immune from tort liability to his wife (see § 169).

The content of the relevant local law rule of a state may be significant in determining whether this state is the state with the dominant interest. So, for example, application of a state's statute or common law rule which would absolve the defendant from liability could hardly be justified on the basis of this state's interest in the welfare of the injured plaintiff.

*g. Protection of justified expectations.* This is an important value in all fields of the law, including choice of law. Generally speaking, it would be unfair and improper to hold a person liable under the local law of one state when he had justifiably molded his conduct to conform to the requirements of another state. Also, it is in part because of this factor that the parties are free within broad limits to choose the law to govern the validity of their contract (see § 187) and that the courts seek to apply a law that will sustain the validity of a trust of movables (see §§ 269-270).

There are occasions, particularly in the area of negligence, when the parties act without giving thought to the legal consequences of their conduct or to the law that may be applied. In such situations, the parties have no justified ex-

pectations to protect, and this factor can play no part in the decision of a choice-of-law question.

*h. Basic policies underlying particular field of law.* This factor is of particular importance in situations where the policies of the interested states are largely the same but where there are nevertheless minor differences between their relevant local law rules. In such instances, there is good reason for the court to apply the local law of that state which will best achieve the basic policy, or policies, underlying the particular field of law involved. This factor explains in large part why the courts seek to apply a law that will sustain the validity of a contract against the charge of commercial usury (§ 203) or the validity of a trust of movables against the charge that it violates the Rule Against Perpetuities (§§ 269-270).

*i. Predictability and uniformity of result.* These are important values in all areas of the law. To the extent that they are attained in choice of law, forum shopping will be discouraged. These values can, however, be purchased at too great a price. In a rapidly developing area, such as choice of law, it is often more important that good rules be developed than that predictability and uniformity of result should be assured through continued adherence to existing rules. Predictability and uniformity of result are of particular importance in areas where the parties are likely to give advance thought to the legal consequences of their transactions. It is partly on account of these factors that the parties are permitted within broad limits to choose the law that will determine the validity and effect of their contract (see § 187) and that the law that would be applied by the courts of the state of the situs is applied to determine the validity of transfers of interests in land (see § 223). Uniformity of result is also important when the transfer of an aggregate of movables, situated in two or more states, is involved. Partly for this reason, the law that would be applied by the courts of the state of a decedent's domicile at death is applied to determine the validity of his will in so far as it concerns movables (see § 263) and the distribution of his movables in the event of intestacy (see § 260).

*j. Ease in the determination and application of the law to be applied.* Ideally, choice-of-law rules should be simple and easy to apply. This policy should not be overemphasized, since it is obviously of greater importance that choice-of-law rules lead to desirable results. The policy does, however, provide a goal for which to strive.

*k. Reciprocity.* In formulating common law rules of choice of law, the courts are rarely guided by considerations of reciprocity. Private parties, it is felt, should not be made to suffer for the fact that the courts of the state from which they come give insufficient consideration to the interests of the state of the forum. It is also felt that satisfactory development of choice-of-law rules can best be attained if each court gives fair consideration to the interests of other states without regard to the question whether the courts of one or more of these other states would do the same. As to whether reciprocity is a condition to the recognition and enforcement of a judgment of a foreign nation, see § 98, Comment *e*.

States sometimes incorporate a principle of reciprocity into statutes and treaties. They may do so in order to induce other states to take certain action favorable to their interests or to the interests of their citizens. So, as stated in § 89, Comment *b*, many States of the United States have enacted statutes which provide that a suit by a sister State for the recovery of taxes will be entertained in the local courts if the courts of the sister State would entertain a similar suit by the State of the forum. Similarly, by way of further example, some States of the United States provide by statute that an alien cannot inherit local assets unless their citizens in turn would be permitted to inherit in the state of the alien's nationality. A principle of reciprocity is also sometimes employed in statutes to permit reciprocating states to obtain by cooperative efforts what a single state could not obtain through the force of its own law. See, e.g., Uniform Reciprocal Enforcement of Support Act; Uniform (Reciprocal) Act to Secure Attendance of Witnesses from Without a State in Criminal Proceedings; Interpleader Compact Law.

#### REPORTER'S NOTE

The rule of this Section was cited and applied in Mitchell v. Craft, 211 So.2d 509 (Miss.1968). Subsection (1) of the rule was cited and applied in Oxford Consumer Discount Company v. Stefanelli, 102 N.J.Super. 549, 246 A.2d

460 (1968).

See generally Leflar, Choice-Influencing Considerations in Conflicts Law, 41 N.Y.U.L.Rev. 267 (1966); Leflar, Conflicts Law: More on Choice-Influencing Considerations, 54 Calif.L.Rev. 1584 (1966); Traynor, Is This Conflict Really Necessary? 37 Texas L.Rev. 657 (1954); Cheatham and Reese, Choice of the Applicable Law, 52 Colum.L.Rev. 959 (1952); Reese, Conflict of Laws and the Restatement Second, 28 Law & Contemp. Prob. 679 (1963).

Cases where the court explicitly looked to similar factors in deciding a question of choice of law are Clark v. Clark, 107 N.H. 351, 222 A.2d 205 (1966); Heath v. Zellmer, 35 Wis.2d 578, 151 N.W. 2d 664 (1967).

*Comment k:* On the subject of reciprocity, see Lenhoff, Reciprocity and the Law of Foreign Judgments, 16 La.L.Rev. 465 (1956); Lenhoff, Reciprocity in Function, 15 U.Pitt.L.Rev. 44 (1954); Lenhoff, Reciprocity: The Legal Aspect of a Perennial Idea, 44 Nw.U.L.Rev. 619, 662 (1952).

On rare occasions, the courts have incorporated the reciprocity principle into a common law rule of choice of law. See e.g., Forgan v. Bainbridge, 34 Ariz. 408, 274 Pac. 155 (1928); Union Securities Co. v. Adams, 33 Wyo. 45 236 Pac. 513 (1925).

Case Citations

(1971)

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**APPENDIX NO. 5**  
**Restatement (Second) of Conflict of Laws § 188**

Restatement of the Law — Conflict of Laws  
Restatement (Second) of Conflict of Laws  
Current through August 2009

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Chapter 8. Contracts  
Topic 1. Validity Of Contracts And Rights Created Thereby  
Title A. General Principles

§ 188. Law Governing In Absence Of Effective Choice By The Parties

[Link to Case Citations](#)

(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 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 domicile, 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.

**Comment:**

*a. Scope of section.* The rule of this Section applies in all situations where there has not been an effective choice of the applicable law by the parties (see § 187).

**Comment on Subsection (1):**

*b. Rationale.* The principles stated in § 6 underlie all rules of choice of law and are used in evaluating the significance of a relationship, with respect to the particular issue, to the potentially interested states, the transaction and the parties. The factors listed in Subsection (2) of the rule of § 6 can be divided into five groups. One group is concerned with the fact that in multistate cases it is essential that the rules of decision promote mutually harmonious and beneficial relationships in the interdependent community, federal or international. The second group focuses upon the purposes, policies, aims and objectives of each of the competing local law rules urged to govern and upon the concern of the potentially interested states in having their rules applied. The factors in this second group are at times referred to as "state interests" or as appertaining to an "interested state." The third group involves the needs of the parties, namely the protection of their justified expectations and certainty and predictability of result. The fourth group is directed to implementation of the basic policy underlying the particular field of law, such as torts or con-

tracts, and the fifth group is concerned with the needs of judicial administration, namely with ease in the determination and application of the law to be applied.

The factors listed in Subsection (2) of the rule of § 6 vary somewhat in importance from field to field and from issue to issue. Thus, the protection of the justified expectations of the parties is of considerable importance in contracts whereas it is of relatively little importance in torts (see § 145, Comment *b*). In the torts area, it is the rare case where the parties give advance thought to the law that may be applied to determine the legal consequences of their actions. On the other hand, parties enter into contracts with forethought and are likely to consult a lawyer before doing so. Sometimes, they will intend that their rights and obligations under the contract should be determined by the local law of a particular state. In this event, the local law of this state will be applied, subject to the qualifications stated in the rule of § 187. In situations where the parties did not give advance thought to the question of which should be the state of the applicable law, or where their intentions in this regard cannot be ascertained, it may at least be said, subject perhaps to rare exceptions, that they expected that the provisions of the contract would be binding upon them.

The need for protecting the expectations of the parties gives importance in turn to the values of certainty, predictability and uniformity of result. For unless these values are attained, the expectations of the parties are likely to be disappointed.

Protection of the justified expectations of the parties by choice-of-law rules in the field of contracts is supported both by those factors in Subsection (2) of § 6 which are directed to the furtherance of the needs of the parties and by those factors which are directed to implementation of the basic policy underlying the particular field of law. Protection of the justified expectations of the parties is the basic policy underlying the field of contracts.

Protection of the justified expectations of the parties is a factor which varies somewhat in importance from issue to issue. As indicated above, this factor is of considerable importance with respect to issues involving the validity of a contract, such as capacity, formalities and substantial validity. Parties entering a contract will expect at the very least, subject perhaps to rare exceptions, that the provisions of the contract will be binding upon them. Their expectations should not be disappointed by application of the local law rule of a state which would strike down the contract or a provision thereof unless the value of protecting the expectations of the parties is substantially outweighed in the particular case by the interest of the state with the invalidating rule in having this rule applied. The extent of the interest of a state in having its rule applied should be determined in the light of the purpose sought to be achieved by the rule and by the relation of the transaction and the parties to that state (see Comment *c*).

Protection of justified expectations plays a less significant role in the choice-of-law process with respect to issues that involve the nature of the obligations imposed by a contract upon the parties rather than the validity of the contract or of some provision thereof. By and large, it is for the parties themselves to determine the nature of their contractual obligations. They can spell out these obligations in the contract or, as a short-hand device, they can provide that these obligations shall be determined by the local law of a given state (see § 187, Comment *c*). If the parties do neither of these two things with respect to an issue involving the nature of their obligations, as, for example, the time of performance, the resulting gap in their contract must be filled by application of the relevant rule of contract law of a particular state. All states have gap-filling rules of this sort, and indeed such rules comprise the major content of contract law. What is important for present purposes is that a gap in a contract usually results from the fact that the parties never gave thought to the issue involved. In such a situation, the expectations of the parties with respect to that issue are unlikely to be disappointed by application of the gap-filling rule of one state rather than of the rule of another state. Hence with respect to issues of this sort, protection of the justified expectations of the parties is unlikely to play so significant a role in the choice-of-law process. As a result, greater emphasis in fashioning choice-of-law rules in this area must be given to the other choice-of-law principles mentioned in the rule of § 6.

*c. Purpose of contract rule.* 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 de-

termining 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 the 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 domicile 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.

Whether an invalidating rule should be applied will depend, among other things, upon whether the interest of the state in having its rule applied to strike down the contract outweighs in the particular case the value of protecting the justified expectations of the parties and upon whether some other state has a greater interest in the application of its own rule.

Frequently, it will be possible to decide a question of choice of law in contract without paying deliberate attention to the purpose sought to be achieved by the relevant contract rules of the interested states. This will be so whenever by reason of the particular circumstances one state is obviously that of the applicable law.

*d. The issue involved.* The courts have long recognized that they are not bound to decide all issues under the local law of a single state. Thus, in an action on a contract made and to be performed in a foreign state by parties domiciled there, a court under traditional and prevailing practice applies its own state's rules to issues involving process, pleadings, joinder of parties, and the administration of the trial (see Chapter 6), while deciding other issues-- such as whether the defendant had capacity to bind himself by contract--by reference to the law selected by application of the rules stated in this Chapter. The rule of this Section makes explicit that selective approach to choice of the law governing particular issues.

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.

**Comment on Subsection (2):**

*e.* Important contacts in determining state of most significant relationship. In the absence of an effective choice of law by the parties (see § 187), the forum, in applying the principles of § 6 to determine the state of most significant relationship, should give consideration to the relevant policies of all potentially interested states and the relative interests of those states in the decision of the particular issue. The states which are most likely to be interested are those which have one or more of the following contacts with the transaction or the parties. Some of these contacts also figure prominently in the formulation of the applicable rules of choice of law.

**The place of contracting.** As used in the Restatement of this Subject, the place of contracting is the place where occurred the last act necessary, under the forum's rules of offer and acceptance, to give the contract binding effect, assuming, hypothetically, that the local law of the state where the act occurred rendered the contract binding.

Standing alone, the place of contracting is a relatively insignificant contact. To be sure, in the absence of an effective choice of law by the parties, issues involving the validity of a contract will, in perhaps the majority of situations, be determined in accordance with the local law of the state of contracting. In such situations, however, this state will be the state of the applicable law for reasons additional to the fact that it happens to be the place where occurred the last act necessary to give the contract binding effect. The place of contracting, in other words, rarely stands alone

and, almost invariably, is but one of several contacts in the state. Usually, this state will be the state where the parties conducted the negotiations which preceded the making of the contract. Likewise, this state will often be the state of the parties' common domicile as well. By way of contrast, the place of contracting will have little significance, if any, when it is purely fortuitous and bears no relation to the parties and the contract, such as when a letter of acceptance is mailed in a railroad station in the course of an interstate trip.

**The place of negotiation.** The place where the parties negotiate and agree on the terms of their contract is a significant contact. Such a state has an obvious interest in the conduct of the negotiations and in the agreement reached. This contact is of less importance when there is no one single place of negotiation and agreement, as, for example, when the parties do not meet but rather conduct their negotiations from separate states by mail or telephone.

**The place of performance.** The state where performance is to occur under a contract has an obvious interest in the nature of the performance and in the party who is to perform. So the state where performance is to occur has an obvious interest in the question whether this performance would be illegal (see § 202). When both parties are to perform in the state, this state will have so close a relationship to the transaction and the parties that it will often be the state of the applicable law even with respect to issues that do not relate strictly to performance. And this is even more likely to be so if, in addition, both parties are domiciled in the state.

On the other hand, the place of performance can bear little weight in the choice of the applicable law when (1) at the time of contracting it is either uncertain or unknown, or when (2) performance by a party is to be divided more or less equally among two or more states with different local law rules on the particular issue.

It is clear that the local law of the place of performance will be applied to govern all questions relating to details of performance see § 206).

**Situs of the subject matter of the contract.** When the contract deals with a specific physical thing, such as land or a chattel, or affords protection against a localized risk, such as the dishonesty of an employee in a fixed place of employment, the location of the thing or of the risk is significant (see §§ 189-193). The state where the thing or the risk is located will have a natural interest in transactions affecting it. Also the parties will regard the location of the thing or of the risk as important. Indeed, when the thing or the risk is the principal subject of the contract, it can often be assumed that the parties, to the extent that they thought about the matter at all, would expect that the local law of the state where the thing or risk was located would be applied to determine many of the issues arising under the contract.

**Domicil, residence, nationality, place of incorporation, and place of business of the parties.** These are all places of enduring relationship to the parties. Their significance depends largely upon the issue involved and upon the extent to which they are grouped with other contacts. So, for example, when a person has capacity to bind himself to the particular contract under the local law of the state of his domicile, there may be little reason to strike down the contract because that person lacked capacity under the local law of the state of contracting or of performance (see § 198). The fact that one of the parties is domiciled or does business in a particular state assumes greater importance when combined with other contacts, such as that this state is the place of contracting or of performance or the place where the other party to the contract is domiciled or does business. As stated in § 192, the domicile of the insured is a contact of particular importance in the case of life insurance contracts. At least with respect to most issues, a corporation's principal place of business is a more important contact than the place of incorporation, and this is particularly true in situations where the corporation does little, or no, business in the latter state.

**Illustrations:**

1. A, who is domiciled in state X, is declared a spendthrift by an X court. Thereafter, A borrows money in state Y from B, a Y domiciliary, who lends the money in ignorance of A's spendthrift status. Under the terms of the loan, the money is to be repaid in Y. A does not pay, and B brings suit in state Z. A would not be liable under X

local law because he has been declared a spendthrift; he would, however, be liable under the local law of Y. The first question for the Z court to determine is whether the interests of both X and Y would be furthered by application of their respective local law rules. This is a question that can only be determined in the light of the respective purposes of these rules (see Comment *c*). The purpose of the X local law rule is obviously to protect X domiciliaries and their families. Hence the interests of X would be furthered by application of the X spendthrift rule. On the other hand, Y's interests would be furthered by the application of its own rule, which presumably was intended for the protection of Y creditors and also to encourage persons to enter into contractual relationships in Y. Since the interests of X and Y would each be furthered by application of their respective rules, the Z court must choose between them. Among the questions for the Z court to determine are whether the value of protecting the justified expectations of the parties and the interest of Y in the application of its rule outweigh X's interest in the application of its invalidating rule. Factors which would support an affirmative answer to this question, and which indicate the degree of Y's interest in the application of its rule, are that A sought out B in Y, that B is domiciled in Y, that the loan was negotiated and made in Y and that the contract called for repayment in Y (see § 195). If it is found that an X court would not have applied its rule to the facts of the present case, the argument for applying the Y rule would be even stronger. For it would then appear that, even in the eyes of the X court, X interests were not sufficiently involved to require application of the X rule (see § 8, Comment *k*).<sup>2</sup> A, a married woman, who is domiciled in state X, comes to state Y and there borrows money from B. The loan contract provides that the money is to be repaid in Y. A does not pay, and B brings suit in state Z. A defends on the ground that under Y local law married women lack capacity to bind themselves by contract; they do have such capacity, however, under the local law of X. It is questionable in this case whether the interests of either X or Y would be furthered by application of their respective rules. Y's rule of incapacity was presumably designed to protect Y married women. On the other hand, X's rule of capacity was presumably designed, at least primarily, to protect X transactions. It seems clear in any event that the value of protecting the justified expectations of the parties is not outweighed in this case by any interest Y may have in the application of its rule of incapacity. Under the circumstances, the contract should be upheld on the issue of A's capacity by application of the X rule.

**Comment on Subsection (3):**

*f.* When place of negotiation and place of performance are in the same state. When the place of negotiation and the place of performance are in the same state, the local law of this state will usually be applied to govern issues arising under the contract, except as stated in §§ 189-199 and 203. A state having these contacts will usually be the state that has the greatest interest in the determination of issues arising under the contract. The local law of this state should be applied except when the principles stated in § 6 require application of some other law. As stated in Comment *c*, the extent of a state's interest in having its contract rule applied will depend upon the purpose sought to be achieved by that rule.

*g.* For reasons stated in § 186, Comment *b*, the reference is to the "local law" of the state of the applicable law and not to that state's "law" which means the totality of its law including its choice-of-law rules.

*h.* As to the situation where the local law rule of two or more states is the same, see § 186, Comment *c*.

**REPORTER'S NOTE**

See Rungee v. Allied Van Lines, Inc., 92 Idaho 718, 449 P.2d 378 (1968) (quoting and applying rule of Section).

See generally Vanston Bondholders Protective Committee v. Green, 329 U.S. 156, 161-162 (1946) (a case involving the validity of a covenant contained in a mortgage indenture where the Court said: "In determining which contract is the most significant in a particular transaction, courts can seldom find a complete solution in the mechanical formulae of the conflicts of law. Determination requires the exercise of an informed judgment in the balancing of all the interests of the states with the most significant contacts in order best to accommodate the equities among the parties to the policies of those states."); Rutas Aereas Nacionales, S.A. v. Robinson, 339 F.2d 265 (5th Cir.1964); Whitman v. Green, 289 F.2d 566 (9th Cir.1961) (note executed in Idaho by Idaho resident and secured by Idaho

really upheld against charge of usury by application of local law of Washington where note was delivered and payable. "In the case at bar the lender did not seek out the borrower in the State of Idaho, nor sit in wait for him in that state. Rather, the borrower sought out the lender in the State of Washington."); Perrin v. Pearlstein, 314 F.2d 863 (2d Cir.1963); Teas v. Kimball, 257 F.2d 817, 824 (5th Cir.1958) ("... the focus of the contract was so centered in Texas that its validity should be determined by the laws of contract of that state"); Global Commerce Corp. v. Clark-Babbitt Industries, 239 F.2d 716 (2d Cir.1956); Alaska Airlines, Inc. v. Stephenson, 217 F.2d 295 (9th Cir.1954); Grace v. Livingstone, 195 F.Supp. 933, 935 (D.Mass.1961), aff'd per curiam 297 F.2d 836 (1962), cert. den. sub. nom. 369 U.S. 871 (1962) ("In the silence of the parties, Massachusetts law governs for reasons well explained in the notes accompanying the April 22, 1960, amendments to the Second Restatement of Conflict of Laws, Tentative Draft No. 6."); Metzenbaum v. Golwynne Chemicals Corp., 159 F.Supp. 648 (S.D.N.Y.1958); Mutual Life Ins. Co. v. Simon, 151 F.Supp. 408 (S.D.N.Y.1957); Fricke v. Isbrandtsen Co., Inc., 151 F.Supp. 465, 467 (S.D.N.Y.1957) ("Ordinarily the federal courts determine which law governs a contract by 'grouping of contacts' or 'finding the center of gravity' of the contract. The law of the jurisdiction having the closest relation to the contract is selected because, it is felt, the parties contracted probably with that law (if any law) in mind, and that jurisdiction would probably have the greatest interest in defining the rights of the contracting parties. This doctrine, however nebulous in its statement, seems to fulfill more adequately the expectations of the parties than the definitively worded, but often artificially applied, doctrine of *lex loci contractus*."); Mulvihill v. Furness, Withy & Co., 136 F.Supp. 201, 206 (S.D.N.Y.1955) ("... the most salutary resolution of the conflicts problem is to ascertain the forum having the closest connection with the matters raised by the litigation."); Bernkrant v. Fowler, 55 Cal.2d 88, 360 P.2d 906 (1961) (application of Nevada local law to uphold an oral contract to make a will which would be invalid under the statute of frauds of California, the state of the decedent's domicil, based upon the interests of the two states, protection of the justified expectations of the parties, and the relevant contacts); Cochran v. Ellsworth, 126 Cal.App.2d 429, 437, 272 P.2d 904, 909 (1954) ("In this situation the bare physical act of signing the written instrument was a fortuitous, fleeting and relatively insignificant circumstance in the total contractual relationship between the parties. It should not be elevated to paramount importance, particularly when to do so will serve only the purpose of rendering invalid an otherwise legal agreement."); Graham v. Wilkins, 145 Conn. 34, 138 A.2d 705 (1958) (contract made in Pennsylvania to be performed in various states held governed by Connecticut local law on the ground that it had its "beneficial operation and effect" in Connecticut); Gregg v. Fitzpatrick, 54 Ga.App. 303, 187 S.E. 730 (1936) (contacts enumerated and local law of state in which majority of contacts were grouped applied); W. H. Barber Co. v. Hughes, 223 Ind. 570, 586, 63 N.E.2d 417, 423 (1945) ("The court will consider all acts of the parties touching the transaction in relation to the several states involved and will apply as the law governing the transaction the law of that state with which the facts are in most intimate contact."); H I M C Investment Co. v. Sicialiano, 103 N.J.Super. 27, 246 A.2d 502 (1968); Spahr v. P. & H. Supply Co., 223 Ind. 591, 63 N.E.2d 425 (1945); Auten v. Auten, 308 N.Y. 155, 161, 124 N.E.2d 99, 102 (1954) ("Although this 'grouping of contacts' theory may, perhaps, afford less certainty and predictability than the rigid general rules ... the merit of its approach is that it gives to the place 'having the most interest in the problem' paramount control over the legal issues arising out of a particular factual context, thus allowing the forum to apply the policy of the jurisdiction 'most intimately concerned with the outcome of [the] particular litigation' .... Moreover, by stressing the significant contacts, it enables the court not only to reflect the relative interests of the several jurisdictions involved ... but also to give effect to the probable intention of the parties and consideration to 'whether one rule or the other produces the best practical result.'"); Rubin v. Irving Trust Co., 305 N.Y. 288, 113 N.E.2d 424 (1953); Lilienthal v. Kaufman, 239 Or. 1, 395 P.2d 543 (1964); Johnston v. Commercial Travelers Mut. Acc. Ass'n, 242 S.C. 387, 131 S.E.2d 91 (1963); Boston Law Book Co. v. Hathorn, 119 Vt. 416, 423, 127 A.2d 120, 125 (1956) ("... where the contract contains no explicit provision that it is to be governed by some particular law the courts 'examine all the points of contact which the transaction has with the two or more jurisdictions involved, with the view to determine the "center of gravity" of the contract, or of that aspect of the contract immediately before the court, and when they have identified the jurisdiction with which the matter at hand is predominantly or most intimately concerned, they conclude that this is the proper law of the contract which the parties presumably had in view at the time of contracting.' "); Peterson v. Warren, 31 Wis.2d 547, 143 N.W.2d 560 (1966) (citing §§ 332 and 346 of Tent.Draft No. 6, 1960 and § 599d of Tent.Draft No. 11, 1965); Wojciuk v. United States Rubber Co., 19 Wis.2d 224, 122 N.W.2d 737 (1963) (rights of parties for breach of warranty will be determined by the law of the place "most closely associated with the transaction"); Potlatch No. 1 Federal Credit Union v. Kennedy, Wash.2d \_\_\_\_\_, 459 P.2d 32 (1969) (quoting and applying rule of Section); Baffin Land Corp. v. Monticello Motor

Inn, Inc., 70 Wash.2d 893, 425 P.2d 623 (1967) (quoting and applying rule as stated in § 332 of Tent.Draft No. 6, 1960); In re Estate of Knippel, 7 Wis.2d 335, 96 N.W.2d 514 (1959).

*Comment b:* The importance of protecting the justified expectations of the parties in contract choice-of-law cases has been frequently emphasized. See, e.g., Kossick v. United Fruit Co., 365 U.S. 731, 741 (1961) (“... we are dealing here with a contract, and therefore with obligations, by hypothesis, voluntarily undertaken.... This fact in itself creates some presumption in favor of applying the law tending toward the validation of the alleged contract.”); Pritchard v. Norton, 106 U.S. 124 (1882); Teas v. Kimball, 257 F.2d 817 (5th Cir.1958); Heede, Inc. v. West India Machinery and Supply Co., 272 F.Supp. 236 (S.D.N.Y.1967); Bernkrant v. Fowler, supra; Ehrenzweig, Contracts in the Conflict of Laws, 59 Colum.L.Rev. 973, 1171 (1959). This policy is of little assistance in situations where the question is whether an individual provision of a contract should be invalidated in order to preserve the principal obligation. See, e.g., Zogg v. Penn Mutual Life Insurance Co., 276 F.2d 861 (2d Cir.1960); Auten v. Auten, supra.

The desire of the courts to uphold contracts is demonstrated by the usury cases cited in the Reporter's Note to § 203.

The Uniform Commercial Code provides in § 1-105 that, in the absence of an effective choice of law by the parties, its provisions are applicable to “transactions bearing an appropriate relation to this state.”

For a suggestion that where the parties are to perform in different states the obligations of each party under the contract will be determined, at least on occasion, by the local law of the state where he was to perform, see Auten v. Auten, supra.

For a suggested alternative formulation, see Weintraub, Choice of Law in Contract, 54 Iowa L.Rev. 399 (1968).

Case Citations

(1971)

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**APPENDIX NO. 6**  
**Restatement (Second) of Conflict of Laws § 196**

Restatement of the Law — Conflict of Laws  
Restatement (Second) of Conflict of Laws  
Current through August 2009

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Chapter 8. Contracts  
Topic 1. Validity Of Contracts And Rights Created Thereby  
Title B. Particular Contracts

§ 196. Contracts For The Rendition Of Services

[Link to Case Citations](#)

**The validity of a contract for the rendition of services and the rights created thereby are determined, in the absence of an effective choice of law by the parties, by the local law of the state where the contract requires that the services, or a major portion of the services, be rendered, unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 to the transaction and the parties, in which the event the local law of the other state will be applied.**

**Comment:**

*a. Scope of section.* The rule of this Section applies to contracts for the rendition of services whether these are to be rendered by the contracting party himself or by others in his behalf. The rule applies to contracts with servants, independent contractors and agents and with persons exercising a public profession, as lawyers, doctors, brokers, commission agents and factors.

The rule applies if the major portion of the services called for by the contract is to be rendered in a single state and it is possible to identify this state at the time the contract is made. It is necessary that the contract should state where the major portion of the services is to be rendered or that this place can be inferred either from the contract's terms or from the nature of the services involved or from other circumstances. For this reason, the rule of this Section is unlikely to aid in the determination of the law governing contracts for employment aboard a ship sailing the high seas or to serve as a traveling salesman in two or more states. The same is true when the work called for by the contract can be done in any one of two or more states.

The law selected by application of the present rule determines such questions as the duration of the contract, the circumstances under which either party may terminate the contract, the validity of a clause forbidding the employee from entering a business competitive with that of the employer for a stated period after the termination of the employment, and whether the contract of employment must be in writing to be binding.

*b. Place where services are to be rendered.* The importance in the choice-of-law process of the place where the services, or a major portion of the services, are to be rendered depends somewhat upon the nature of the services involved. This place enjoys greatest significance when the work is to be more or less stationary and is to extend over a considerable period of time. This is true of a contract for employment on the ordinary labor force of a particular factory or of a contract with an independent contractor who will provide labor on a construction project. By way of contrast, the place where the services are to be rendered is of lesser importance when the services are to be of rela-

tively brief duration, such as when a workman is employed to do a minor repair job in a given state, or when the employee's duties will require him to travel with fair frequency between two or more states. Even in these latter situations, the place where the major portion of the services is to be rendered, provided that there is such a place, is the contact that will be given the greatest weight in determining, with respect to most issues, the state of the applicable law.

*c. Rationale.* In the absence of an effective choice of law by the parties (see § 187), the rule of this Section calls for the application of the local law of the state where the contract requires that the services, or a major portion of the services, be rendered unless, with respect to the particular issue, some other state has a more significant relationship to the transaction and the parties. Whether there is such other state should be determined in the light of the choice-of-law principles stated in § 6. For a general discussion of the application of these principles to the contracts area and of the principle favoring application of a law that would sustain the validity of the contract, see § 188, Comments *b-d*. What is said in these Comments is applicable here.

Several factors serve to explain the importance attributed by the rule to the place where the contract requires that the services, or a major portion of the services, be rendered. The rendition of the services is the principal objective of the contract, and the place where the services, or a major portion of the services, are to be rendered will naturally loom large in the minds of the parties. Indeed, it can often be assumed that the parties, to the extent that they thought about the matter at all, would expect that the local law of the state where the services, or a major portion of the services, are to be rendered would be applied to determine many of the issues arising under the contract. The state where the services are to be rendered will also have a natural interest in them and indeed may have an overriding interest in the application to them of certain of its regulatory rules. The rule of this Section also furthers the choice-of-law values of certainty, predictability and uniformity of result and, since the place where the contract requires that the services, or a major portion of the services, are to be rendered will be readily ascertainable, of ease in the determination of the applicable law.

*d.* When local law of state where services are to be rendered will not be applied. On occasion, a state which is not the place where the contract requires that the services, or a major portion of the services, should be rendered will nevertheless, with respect to the particular issue, be the state of most significant relationship to the transaction and the parties and hence the state of the applicable law. This may be so, for example, when the contract would be invalid under the local law of the state where the services are to be rendered but valid under the local law of another state with a close relationship to the transaction and the parties. In such a situation, the local law of the other state should be applied unless the value of protecting the expectations of the parties by upholding the contract is outweighed in the particular case by the interest of the state where the services are to be performed in having its invalidating rule applied. The latter state may well have such an overriding interest in situations where the rendition of the services would be contrary to its local law, either by reason of their nature or because of the circumstances in which they are to be performed. There will also be occasions when the local law of some state other than that where the services are to be performed should be applied in any event, because of the intensity of the interest of that state in having its local law applied to determine the particular issue (see Illustration 3).

#### Illustrations:

1. In state X, A and B, who are domiciled in that state, enter into a contract in which A agrees to render services for B in state Y. The contract is invalid under Y local law because the memorandum evidencing the parties' agreement was initialed but not subscribed by the party to be charged. The contract is valid under X local law. The contract should be upheld on the ground that any interest of Y in the application of its invalidating rule should be held to be outweighed by the countervailing interest of X and particularly by the value of protecting the justified expectations of the parties. 2. In state X, A and B, who are domiciled in that state, enter into a contract in which A employs B to act as a broker in selling land owned by A in state Y. It is understood that B will confine his activities to X. In X, B finds a purchaser for the land and now brings suit for his commissions in state Z. The contract is void under Y local law because B lacked a proper license; it is valid under X local law. Among the questions for the Z court to decide are whether Y's interest in the application of its rule of invalidity is so overriding as to re-

quire the application of the rule in the present case. The fact that both A and B are domiciled in X and that the services were to be rendered there lends strong support to the view that Y does not have such an overriding interest and accordingly that its rule of invalidity should not be applied. The situation would be different if the contract required B to render his services in Y, and B found the purchaser in Y. Here Y would presumably have such an overriding interest that its rule of invalidity should be applied. If, however, it were to appear that the Y courts would not apply their rule of invalidity in such a situation, there would be ground for the conclusion that no important interest of Y would be affected if the Z court were to uphold the contract by application of X local law.<sup>3</sup> In state X, H and W, husband and wife, who are domiciled in X, enter into a contract in which W agrees to render services for H in state Y. The contract is invalid under Y local law because under that law spouses lack capacity to contract with each other. They do have such capacity under X local law. Strong support for the application of X local law to this issue of capacity is to be found (a) in the fact that X, being the state of matrimonial domicile, has a great interest in this issue and (b) in the value of protecting the justified expectations of the parties by upholding the contract. Clearly, X local law should be applied to the issue of capacity if it were also to appear that the Y courts would not apply their rule of incapacity to the facts of the present case.

**Comment:**

*e.* For reasons stated in § 186, Comment *b*, the reference is to the “local law” of the state of the applicable law and not to that state’s “law,” which means the totality of its law including its choice-of-law rules.

*f.* As to the situation where the relevant local law rule of two or more states is the same, see § 186, Comment *c*. Particular issues are discussed in Title C (§§ 198-207).

*g.* As to workmen’s compensation, see §§ 181-185.

**REPORTER’S NOTE**

See Baffin Land Corp. v. Monticello Motor Inn, Inc., 70 Wash.2d 893, 425 P.2d 623 (1967) (citing § 346 l of Tent.Draft No. 6, 1960).

On occasion, the place where the services were to be rendered has coincided with that where the contract was made. Donnellan v. Halsey, 114 N.J.L. 175, 176 Atl. 176 (1935). The local law of the state where the services were to be rendered has been applied to govern the employment contract even though the contract itself was made elsewhere (Alexander v. Barker, 64 Kan. 396, 67 Pac. 829 (1902); Garnes v. Frazier & Foster, 118 S.W. 998 (Ky.Ct.App.1909); Denihan v. Finn-Iffland & Co., 143 Misc. 525, 256 N.Y.Supp. 801 (Mun.Ct.1932); Cookson v. Knauff, 157 Pa.Super. 401, 43 A.2d 402 (1945)), or where the place of making did not appear. Elk River Coal & Lumber Co. v. Funk, 222 Iowa 1222, 271 N.W. 204 (1937); Watts v. Long, 116 Neb. 656, 218 N.W. 410 (1928). In each of these cases, except the Denihan and Cookson cases, all the work was to be done in a single state. In the Denihan caas, however, the employee was assigned to work in New York but made sporadic trips to other States. The court held that New York local law governed since the employee performed the major portion of his work in that state. In the Cookson case the employee was hired in Canada to look after cattle being transported from Canada to Pennsylvania. The court considered Pennsylvania the place of performance and applied the local law of that state.

The same result has also been reached where the services were to be rendered by independent contractors and their servants. United States-Alaska Packing Co. v. Luketa, 58 F.2d 944 (9th Cir.1932) (local law of state where services were to be rendered applied even though the contract was made elsewhere); Pratt v. Sloan, 41 Ga.App. 150, 152 S.E. 275 (1930) (same).

The local law of the employer’s principal place of business has been applied where there was no identifiable place of employment. Helfer v. Corona Products, 127 F.2d 612 (8th Cir.1942); Weiner v. Pictorial Paper Package Corp., 303 Mass. 123, 20 N.E.2d 458 (1939). In the second case, the principal office was located in the same state where

the contract was made. The same may have been true in the first case, but the opinion does not make this clear.

As to the law governing contracts for brokers' services in buying or selling securities or commodities on an exchange, see Lyons Milling Co. v. Goffe & Carkener, 46 F.2d 241 (10th Cir.1931); Hoyt v. Wickham, 25 F.2d 777 (8th Cir.1928); Jacobs v. Hyman, 286 Fed. 346 (5th Cir.1923); Berry v. Chase, 146 Fed. 625 (6th Cir.1906).

See generally 3 Rabel, Conflict of Laws 181-203 (1950).

Case Citations

(1971)

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**APPENDIX NO. 7**  
**Restatement (Second) of Conflict of Laws § 202**

Restatement of the Law — Conflict of Laws  
Restatement (Second) of Conflict of Laws  
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Chapter 8. Contracts  
Topic 1. Validity Of Contracts And Rights Created Thereby  
Title C. Particular Issues

§ 202. Illegality

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**(1) The effect of illegality upon a contract is determined by the law selected by application of the rules of §§ 187-188.**

**(2) When performance is illegal in the place of performance, the contract will usually be denied enforcement.**

**Comment:**

*a.* Under the rule of this Section, questions involving the effect of illegality upon a contract are determined by the law chosen by the parties, if they have made an effective choice (see Comment *d* and § 187). Otherwise, these questions are determined by the law selected by application of the rule of § 188.

*b. Scope of section.* The rule of this Section covers all situations where the question involves the effect of illegality upon the validity of a contract and the rights created thereby. The rule applies to illegality existing when the contract was made or arising thereafter, to illegality known to one or to both or to neither of the contracting parties and to permanent or temporary illegality. The rule likewise applies whether the illegality involves the making of the contract, such as the making of a contract in violation of a Sunday law, or the performance of the contract, or whether or not it can be concluded from the terms of the contract or from other circumstances that the risk of illegality was intended to be borne by one of the parties. A special rule involving usury is stated in § 203.

*c. Existence and effect of illegality.* A distinction must here be drawn between the effect of illegality upon the validity of the contract and the existence of illegality as such. The effect of illegality upon the validity of the contract depends upon the law selected by application of the rules of §§ 187-188. On the other hand, whether there is any illegality will usually depend upon the local law of each state where an act related to the contract was, or is to be, done. So the local law of the state where a promise was made will usually be applied to determine the legality of its making. Similarly, the legality or illegality of performance under a contract is usually determined by the local law of the state where this performance either has taken, or is to take, place. On occasion, however, an act that is legal where done may be illegal in a state where it has, or will have, important consequences. An agreement made in one state to monopolize the shipment into another state of a certain commodity may be an example of the latter sort. For a discussion of the extent to which a state's criminal law may properly be applied to action that takes place outside that state's territory, see § 9 and Restatement, The Foreign Relations Law of the United States §§ 30, 44.

When the validity of a contract is attacked on the ground of illegality, the forum will first decide whether illegality does in fact exist by reference to the appropriate law, which, as stated above, is usually the local law of the state where the act in question either has been, or is to be, done. If the answer to this inquiry is in the negative, that is the end of the matter. If, on the other hand, illegality is found to exist, the forum will look to the local contracts law of the state selected by application of the rules of §§ 187-188 to determine the effect of this illegality upon the rights of the parties under the contract (see Comments *d-e*).

The law so selected will be applied to determine whether the contract is void or whether it can be avoided by one or by both of the parties. This law will also be applied to determine whether a distinction should be drawn between illegality existing at the time of the contract and that arising thereafter, and whether a party who was ignorant of the illegality has rights against the other party who entered the contract with knowledge thereof. The law so selected, if this law is in accord with the common law rule, will not require a party to do an act in the place of performance which is illegal there. This law may, however, provide that in appropriate circumstances the agreed-upon place of performance should be disregarded and performance compelled in a place where it is not forbidden. This law may also prove that in appropriate circumstances a person who is excused from performance by reason of illegality may nevertheless be compelled to pay damages on the ground that, in view of the provisions of the contract and of other circumstances, the risk of illegality should be borne by him.

**Illustrations:**

1. A contract for the purchase of grain futures in state X is made in state Y by parties who are domiciled in X. Suit for breach of the contract is brought in state Z, and the defense is that it is illegal to make such a contract in Y. The Z court will first look to Y local law to determine whether the alleged illegality does in fact exist. Then, if the answer to this question is in the affirmative, the Z court will look to the local contracts law of the state selected by application of the rules of §§ 187-188 to determine the effect of this illegality upon the rights of the parties under the contract. 2. Same facts as in Illustration 1 except that it is claimed that performance of the contract would be illegal in X. The forum will first consult X local law to determine whether such illegality would exist. Then, if the answer to this question is in the affirmative, the forum will look to the local contracts law of the state selected by application of the rules of §§ 187-188 to determine the effect of this illegality upon the rights of the parties under the contract.

**Comment:**

*d. Choice of law by the parties.* As stated in § 187, the law chosen by the parties will not be applied to determine the validity of a contract in situations where application of the chosen law would lead to a result that is repugnant 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 would be the state of the applicable law in the absence of an effective choice of law by the parties. Such a fundamental policy is particularly likely to be involved in situations where the contract is either void or voidable for illegality under the local law of this latter state.

*e. Law governing in absence of effective parties' choice.* In the absence of an effective choice of law by the parties (see Comment *d*), questions involving the effect of illegality upon a contract will be determined in accordance with the law selected by application of the rule of § 188. This rule in turn calls for the application of the choice-of-law principles stated in § 6, of which one, as explained in § 200, Comment *c*, is the protection of the justified expectations of the parties. This principle, however, has a relatively small role to play in the area under discussion. If the parties entered into the contract knowing of the illegality, it will often be questionable whether they had any justified expectations to protect. If the parties entered into the contract unaware of the illegality, or if the illegality arose thereafter, the parties would justifiably expect that the provisions of the contract would be binding upon them. But the parties would also expect that the contract would be enforced in accordance with its terms and this, for reasons stated in Comment *c*, would frequently not be done in the presence of illegality. Expectations, in other words, are likely to be defeated in cases such as these whether the contract is upheld or not. There is the further fact that rules on illegality, and on the effect of illegality, are likely to represent strongly-felt policies of the states involved. A court will be reluctant to subordinate such a policy of the state having the dominant interest in the issue to be de-

cided to the choice-of-law policy favoring the protection of the justified expectations of the parties. For all of these reasons, a court, in determining which law determines the effect of illegality upon the validity of a contract and the rights created thereby, will give less weight to the protection of the justified expectations of the parties than it gives to the choice-of-law principle, also mentioned in § 6, which seeks the effectuation of the relevant policies of the state with the dominant interest in the issue to be determined.

As stated in Subsection (3) of the rule of § 188, 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. This is because this state in the majority of instances will have the dominant interest in the determination of issues arising under the contract.

As stated in § 188, Comment c, the interest of a state in having its rule applied in the determination of a particular issue will depend upon the purpose sought to be achieved by the rule and upon the relation of the state to the transaction and the parties.

**Illustrations:**

3. In state X, A and B, who are domiciled in that state, enter into a contract whereby A is to supply a ship to transport laborers on four trips from state Y to state Z. After the ship has made two trips, the Y government prohibits the export of further workers, and the question is whether B is thereby excused from paying for the last two trips. Among the questions for the forum to consider is which state has the dominant interest in the issue to be decided. That A and B are both domiciled in X and that the contract was negotiated and executed there are factors which support the view that X is the state of dominant interest. 4. Same facts as in Illustration 3 except that A is domiciled in Y. That A is domiciled in Y, that the contract was partly to be performed there and that the contemplated performance would be invalid in Y are factors which support the view that Y is the state of dominant interest.

**Comment:**

*f. Temporary illegality of performance.* Sometimes the performance of a contract is made only temporarily illegal by the local law of the place of performance. If so, the local law of the state selected by application of the rules of §§ 187-188 will be applied to determine whether the duty to perform revives as soon as the bar of illegality has been removed.

**Illustration:**

5. By executive proclamation, the shipment of grain out of a certain state is forbidden for thirty days. The law selected by application of the rules of §§ 187-188 will be applied to determine whether the promisor is bound to make shipment at the expiration of the stipulated time.

**Comment:**

*g. Right to restitution.* What law governs a party's right to restitution upon the avoidance of a contract for illegality is discussed in § 221.

*h.* As to impossibility of performance, as contrasted with the illegality thereof, see § 205.

*i.* As to the substantive law on the effect of illegality upon a contract, see Chapter 18 of the Restatement of Contracts.

**REPORTER'S NOTE**

See Award Incentives, Inc. v. Van Rooyen, 263 F.2d 173 (3d Cir.1959) and authorities cited in Reporter's Note to § 205.

Case Citations

(1971)

END OF DOCUMENT

**APPENDIX NO. 8**  
**Hawaii Rev. Stat. ch. 444 (1976)**

1. *Hawaii. Laws, Statutes, etc.*  
2. **HAWAII REVISED STATUTES**

**COMPRISING THE STATUTES  
OF THE STATE OF HAWAII,  
CONSOLIDATED, REVISED, AND ANNOTATED**

**VOLUME 5A**

3. *1976 REPLACEMENT vol.*  
**(Including Acts of the 1976 Session)**

**TITLES 24-25, CHAPTERS 431-471**



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**PUBLISHED BY AUTHORITY**

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## CONTRACTORS

- (2) The seeking or obtaining of any written statement or acknowledgment in any form containing an affirmation of any obligation by a debtor or alleged debtor who has been declared bankrupt, without clearly disclosing the nature and consequences of the affirmation and the fact that the debtor or alleged debtor is not legally obligated to make the affirmation;
- (3) The collection of or the attempt to collect from a debtor or alleged debtor all or any part of the collection agency's fees or charge for services rendered;
- (4) The collection of or the attempt to collect any interest or other charge, fee, or expense incidental to the principal obligation unless the interest or incidental fee, charge, or expense is expressly authorized by the agreement creating the obligation and legally chargeable to the debtor or alleged debtor; or unless such interest or incidental fee, charge or expense is expressly authorized by law; and
- (5) Any communication with a debtor or alleged debtor whenever it appears that he is represented by an attorney and the attorney's name and address are known. [L 1973, c 74, pt of §1]

§443-46 Rules and regulations. The collection agency board shall promulgate rules and regulations, pursuant to chapter 91, for the purposes of administering and enforcing this part. [L 1973, c 74, pt of §1]

§443-47 Unfair competition, unfair or deceptive acts or practices. A violation of this part by a collection agency shall constitute unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce for the purpose of section 480-2. [L 1973, c 74, pt of §1]

## CHAPTER 444 CONTRACTORS

### SECTION

- 444-1 DEFINITIONS
- 444-2 EXEMPTIONS
- 444-3 CONTRACTORS LICENSE BOARD
- 444-4 POWERS AND DUTIES OF BOARD
- 444-5 EXECUTIVE SECRETARY; OTHER ASSISTANTS
- 444-6 PLACE OF MEETING
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**Sec. 444-1****PROFESSIONS AND OCCUPATIONS**

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- [444-32] SUBROGATION TO RIGHTS OF CREDITOR
- [444-33] WAIVER OF RIGHTS
- 444-34 MAXIMUM LIABILITY
- 444-35 DISCIPLINARY ACTION AGAINST LICENSEE

**§444-1 Definitions.** As used in this chapter:

- (1) "Board" means the contractors license board;
- (2) "Contractor" means any person who by himself or through others offers to undertake, or holds himself out as being able to undertake, or does undertake to alter, add to, subtract from, improve, enhance, or beautify any realty or construct, alter, repair, add to, subtract from, improve, move, wreck, or demolish any building, highway, road, railroad, excavation, or other structure, project, development, or improvement, or do any part thereof, including the erection of scaffolding or other structures or works in connection therewith;
- (3) "Contractor" includes a subcontractor and a specialty contractor;
- (4) "Person" means an individual, partnership, joint venture, corporation, or any combination thereof. "Corporation" includes an association, business trust or any organized trust or any organized group of persons;
- (5) "RME" means responsible managing employee;
- (6) "Sale" means any arrangement between two or more persons as a result of which there is, or is to be, a transfer of property for a consideration. [L 1957, c 305, §1 (s 1); Supp. §166A-1; HRS §444-1; am L 1969, c 56, §1; am L 1970, c 203, §2; am L 1974, c 112, §1(2)]

**Cross References**

Contractor, clarification of definition, see L 1970, c 203, §1.

**Case Notes**

Honolulu ordinances setting forth requirements for issuance of electrical contractor's license are invalid under §70-105, since this chapter indicates legislative intent to be the exclusive legislation applicable to contractors. 52 H. 550, 481 P.2d 116.

**§444-2 Exemptions.** This chapter shall not apply to:

- (1) An officer or employee of the United States, the State, or any political subdivision if the project or operation is performed by employees thereof;
- (2) Any person acting as a receiver, trustee in bankruptcy, personal representative, or any other person acting under any order or authorization of any court;
- (3) A person who sells or installs any finished products, materials, or articles of merchandise which are not actually fabricated into and do not become a permanent fixed part of the structure, or to the construction, alteration, improvement, or repair of personal property;

- (4) Any project or operation for which the aggregate contract price for labor, materials, and all other items is less than \$100. This exemption shall not apply in any case wherein the undertaking is only a part of a larger or major project or operation, whether undertaken by the same or a different contractor or in which a division of the project or operation is made in contracts of amounts less than \$100 for the purpose of evading this chapter or otherwise;
- (5) A registered architect or professional engineer acting solely in his professional capacity;
- (6) Any person who engages in the activities herein regulated as an employee with wages as his sole compensation;
- (7) Owners or lessees of property who build or improve residential, farm, industrial or commercial buildings or structures on such property for their own use, or for use by their grandparents, parents, siblings, or children and do not offer such buildings or structures for sale or lease. In all actions brought under this paragraph, proof of the sale or lease, or offering for sale or lease, of such structure within one year after completion is "prima facie" evidence that the construction or improvement of such structure was undertaken for the purpose of sale or lease; provided, however, that this shall not apply to residential properties sold or leased to employees of the owner or lessee;
- (8) Any copartnership or joint venture if all members thereof hold licenses issued under this chapter. [L 1957, c 305, §1 (s 2); Supp, §166A-2; HRS §444-2; am L 1969, c 163, §1; am L 1974, c 112, §1(3); am L 1975, c 128, §1; am L 1976, c 200, pt of §1]

**§444-3 Contractors license board.** (a) There shall be a contractors license board of thirteen members appointed by the governor in the manner prescribed in section 26-34.

- (b) (1) Nine members of the board shall be contractors who have been actively engaged in the contracting business for a period of not less than five years preceding the date of their appointment.
- (2) Eight members shall be residents of the city and county of Honolulu, two members shall be residents of the county of Hawaii, two members shall be residents of the county of Maui, and one member shall be a resident of the county of Kauai.
- (3) Three members of the board shall be general engineering contractors, three members shall be general building contractors, three members shall be specialty contractors, and four members shall be noncontractors. No member shall receive any compensation for his services, but each shall be reimbursed for his necessary traveling expenses incurred in the performance of his duties.
- (c) Except for members of the board first appointed, no one, except the four noncontractor members, shall be eligible for appointment who does not at the time of his appointment hold a valid and unexpired license to operate as a contractor. Each of the contractor members of the board first appointed shall, within thirty days of his appointment, qualify for and obtain a license to operate as a contractor.
- (d) Organization, records, reports. Immediately upon the appointment and qualification of the original members, and annually thereafter, the board shall

organize by the election of one member as chairman and one member as vice-chairman. The board shall keep a complete record of all its proceedings and shall present annually to the governor through the director of regulatory agencies a detailed statement of the receipts and disbursements of the board during the preceding year, with a statement of its acts and proceedings and such recommendations as the board may deem proper. [L 1957, c 305, §1 (s 3); am L Sp 1959 2d, c 1, §§5, 6, 15; am L 1963, c 114, §3; am L 1965, c 279, §1; Supp, §166A-3]

#### Cross References

Boards, generally, see §26-34 and notes thereto.

**§444-4 Powers and duties of board.** In addition to any other duties and powers granted by this chapter the contractors license board shall:

- (1) Grant licenses to contractors pursuant to this chapter;
- (2) Make, amend, or repeal such rules and regulations as it may deem proper fully to effectuate this chapter and carry out the purpose thereof which purpose is the protection of the general public. All such rules and regulations shall be approved by the governor and the director of regulatory agencies, and when adopted pursuant to chapter 91, shall have the force and effect of law. The rules and regulations may forbid acts or practices deemed by the board to be detrimental to the accomplishment of the purpose of this chapter. The rules and regulations may require contractors to make reports to the board containing such items of information as will better enable the board to enforce this chapter and rules and regulations, or as will better enable the board from time to time to amend the rules and regulations more fully to effectuate the purposes of this chapter. The rules and regulations may require contractors to furnish reports to owners containing such matters of information as the board deems necessary to promote the purpose of this chapter. The enumeration of specific matters which may properly be made the subject of rules and regulations shall not be construed to limit the board's general power to make all rules and regulations necessary fully to effectuate the purpose of this chapter;
- (3) Enforce this chapter and rules and regulations adopted pursuant thereto;
- (4) Suspend or revoke any license for any cause prescribed by this chapter, or for any violation of the rules and regulations, and refuse to grant any license for any cause which would be ground for revocation or suspension of a license;
- (5) Publish and distribute pamphlets and circulars containing such information as it deems proper to further the accomplishment of the purpose of this chapter.
- (6) Prepare, administer and grade such examinations and tests for applicants as may be required for the purposes of this chapter. The board shall determine the scope and length of such examinations and tests, whether they shall be oral, written, or both, and the score that shall be deemed a passing score. [L 1957, c 305, §1 (pt of §4); am L 1965, c 96, §107; Supp, pt of 166A-4; HRS §444-4; am L 1973, c 117, §1]

## CONTRACTORS

Sec. 444-7

### Case Notes

Rule-making authority of the board. 51 H. 673, 466 P.2d 1009.

**§444-5 Executive secretary; other assistants.** (a) Subject to chapters 76 and 77 the department of regulatory agencies may employ and remove such administrative and clerical assistants as the contractors license board may require and prescribe their powers and duties;

(b) (1) The department shall employ an executive secretary of the board whose position shall be subject to chapters 76 and 77. The executive secretary shall be employed with due regard to his fitness, thorough administrative ability and knowledge of and experience in the business of contracting. He shall devote his entire time to the duties of his office and shall not be actively engaged or employed in any other business, vocation, or employment, nor shall he have any pecuniary interest, direct or indirect, in any contracting enterprise or enterprises conducted or carried on within the State;

(2) The executive secretary shall, under the supervision of the board, administer this chapter and the rules and regulations and orders established thereunder and perform such other duties as the board may require; he shall attend but not vote at all meetings of the board; he shall be in charge of the offices of the board and responsible to the board for the preparation of reports and the collection and dissemination of data and other public information relating to contracting;

(3) The board may, by written order filed in its office, delegate to the executive secretary such of its powers or duties as it deems reasonable and proper for the effective administration of this chapter, except the power to make rules or regulations. The delegated powers and duties may be exercised by the executive secretary in the name of the board.

(c) The department may appoint an investigator who shall be exempt from the provisions of chapter 76 and who shall act as investigator for the contractors license board. [L 1957, c 305, §1 (pt of §4); am L Sp 1959 2d, c 1, §15; am L 1963, c 114, §3; Supp, pt of §166A-4; am L 1967, c 85, §3; HRS §444-5; am L 1974, c 112, §1(4)]

### Cross References

Administrative supervision, see §26-9.

**§444-6 Place of meeting.** The director of regulatory agencies shall provide suitable quarters for meetings of the contractors license board and for the transaction of its other business. [L 1957, c 305, §1 (s 5); am L Sp 1959 2d, c 1, §6; Supp, §166A-5]

**§444-7 Classification.** (a) For the purpose of classification, the contracting business includes any or all of the following branches:

- (1) General engineering contracting;
- (2) General building contracting;
- (3) Specialty contracting.

(b) A general engineering contractor is a contractor whose principal contracting business is in connection with fixed works requiring specialized engi-

neering knowledge and skill, including the following divisions or subjects: irrigation, drainage, water power, water supply, flood control, inland waterways, harbors, docks and wharves, shipyards and ports, dams and hydroelectric projects, levees, river control and reclamation works, railroads, highways, streets and roads, tunnels, airports and airways, sewers and sewage disposal plants and systems, waste reduction plants, bridges, overpasses, underpasses and other similar works, pipelines and other systems for the transmission of petroleum and other liquid or gaseous substances, parks, playgrounds and other recreational works, refineries, chemical plants and similar industrial plants requiring specialized engineering knowledge and skill, powerhouses, power plants and other utility plants and installations, mines and metallurgical plants, land levelling and earth-moving projects, excavating, grading, trenching, paving and surfacing work and cement and concrete works in connection with the above mentioned fixed works.

(c) A general building contractor is a contractor whose principal contracting business is in connection with any structure built, being built, or to be built, for the support, shelter, and enclosure of persons, animals, chattels, or movable property of any kind, requiring in its construction the use of more than two unrelated building trades or crafts, or to do or superintend the whole or any part thereof.

(d) A specialty contractor is a contractor whose operations as such are the performance of construction work requiring special skill and whose principal contracting business involves the use of specialized building trades or crafts. [L 1957, c 305, §1 (s 6); Supp, §166A-6]

**§444-8 Powers to classify and limit operations.** (a) The contractors license board may adopt rules and regulations necessary to effect the classification of contractors in a manner consistent with established usage and procedure as found in the construction business, and may limit the field and scope of the operations of a licensed contractor to those in which he is classified and qualified to engage, as defined in section 444-7.

(b) A licensee may make application for classification and be classified in more than one classification if the licensee meets the qualifications prescribed by the board for such additional classification or classifications. For qualifying or classifying in additional classifications, the licensee shall pay the appropriate application fee but shall not be required to pay any additional license fee.

(c) This section shall not prohibit a specialty contractor from taking and executing a contract involving the use of two or more crafts or trades, if the performance of the work in the crafts or trades, other than in which he is licensed, is incidental and supplemental to the performance of work in the craft for which the specialty contractor is licensed. [L 1957, c 305, §1 (s 7); am L 1965, c 241, §1; Supp, §166A-7]

#### Cross References

Rulemaking, see chapter 91.

#### Case Notes

Classifications; consistency with established usage and procedure and the public safety as provided in 444-4(2). 51 H. 673, 466 P.2d 1009.

**§444-9 Licenses required.** No person within the purview of this chapter shall act, or assume to act, or advertise, as general engineering contractor, general building contractor, or specialty contractor without a license previously obtained under and in compliance with this chapter and the rules and regulations of the contractors license board. [L 1957, c 305, §1 (s 8); Supp, §166A-8]

**[§444-9.1] Issuance of building permits.** Each county or other local subdivision of the State which requires the issuance of a permit as a condition precedent to the construction, alteration, improvement, demolition, or repair of any building or structure shall also require that each applicant for such a permit file as a condition to the issuance of a permit a statement that the applicant is licensed under this chapter, giving the number of the license and stating that it is in full force and effect, or, if the applicant is exempt from this chapter, the basis for the claimed exemption. [L 1974, c 112, pt of §1(1)]

**[§444-9.2] Advertising.** It is a misdemeanor for any person, including a person who is exempt by section 444-2 from this chapter, to advertise as a contractor unless such person holds a valid license under this chapter in the classification so advertised. "Advertise" as used in this section includes, but is not limited to, the issuance of any card, sign, or device to any person, the causing, permitting, or allowing of any sign or marking on or in any building or structure, or in any newspaper or magazine, or in any directory under a listing of contractor, or broadcasting by airwave transmission, with or without any limiting qualifications. [L 1974, c 112, pt of §1(1)]

**[§444-9.3] Aiding or abetting.** Aiding or abetting an unlicensed person to evade this chapter or knowingly combining or conspiring with an unlicensed person, or allowing one's license to be used by an unlicensed person, or acting as agent or partner or associate, or otherwise, of an unlicensed person, with the intent to evade this chapter, shall be a misdemeanor. [L 1974, c 112, pt of §1(1)]

**[§444-9.5] Licensing of craftsmen.** At least half of all craftsmen requiring licenses employed on a construction project by a specialty contractor in the trade in which he is licensed shall be licensed in accordance with and to the extent required by [chapter 448E]. The board may waive this requirement in any county when there are insufficient licensed craftsmen in that county to comply herewith. [L 1971, c 183, §2]

**§444-10 Investigation permitted.** The contractors license board may investigate, classify, and qualify applicants for contractors licenses. [L 1957, c 305, §1 (s 9); Supp, §166A-9]

**§444-11 No license issued when.** No license hereunder shall be issued to:

- (1) Any person unless he has filed an application therefor;
- (2) Any person who does not possess a good reputation for honesty, truthfulness, financial integrity, and fair dealing;
- (3) Any individual unless he is of the age of eighteen years or more;
- (4) Any individual qualifying as a contractor unless he has been a resident of the State for at least one year;

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- (5) Any copartnership or joint venture which is not exempt under section 444-2(8) unless the contracting business thereof is under the direct management of a partner or employee thereof, unless such partner has been a resident of the State for at least one year or such employee has been a resident of the State for at least two years, and unless such partner or employee holds an appropriate license;
- (6) Any individual who is unable to qualify as a contractor or any corporation, unless the contracting business of such individual or corporation is under the direct management of an officer or employee thereof, unless such officer or employee has been a resident of the State for at least two years, and unless such officer or employee holds an appropriate license;
- (7) Any person unless he submits satisfactory proof to the contractors license board that he has obtained workmen's compensation insurance or has been authorized to act as a self-insurer as required by chapter 386;
- (8) The provisions of this section shall not apply when it is determined by the contractors license board that less than ten persons are qualified to perform the work in question. The provisions also shall not apply with respect to projects which require additional qualifications beyond those established by the licensing law, and which are deemed necessary and in the public interest by the contracting agency. [L 1957, c 305, §1 (s 10); Supp, §166A-10; HRS §444-11; am L 1969, c 56, §2 and c 163, §2; am L 1971, c 191, §1; am L 1972, c 2, §18; am L 1975, c 41, §1]

**§444-12 Application; fees.** (a) Every applicant for a license under this chapter shall file an application with the contractors license board in such form and setting forth such information as may be prescribed or required by the board, and shall furnish such additional information bearing upon the issuance of the license as it shall require. Every application shall be sworn to before an officer authorized to administer oaths. In the case of a copartnership, joint venture, or corporation any member or officer thereof may sign the application and verify the same on behalf of the applicant.

(b) Every application, in the case of an individual, shall be accompanied by sworn certificates of not less than two persons who have known the applicant for a period of not less than six months, certifying that the applicant bears a good reputation for honesty, truthfulness, and fair dealing.

(c) Every application for a license hereunder shall be accompanied by an application fee of \$25. [L 1957, c 305, §1 (s 11); am L 1965, c 241, §2; Supp, §166A-11]

**Cross References**

Modification of fee, see §92-28.

**§444-13 Form for licenses.** The form of every license shall be prescribed by the contractors license board and shall be issued in the name of the board. [L 1957, c 305, §1 (s 12); Supp, §166A-12]

**§444-14 Place of business and posting of license.** (a) A licensed contractor shall have, maintain, and operate from a definite place of business in the State and shall display therein his or her contractor's license.

(b) The licensed contractor shall report any change of address or telephone number to the contractors license board within ten business days from such change. [L 1957, c 305, §1 (s 13); Supp, §166A-13; HRS §444-14; am L 1975, c 129, §1]

**§444-15 Fees; biennial renewals.** (a) The fees for each original license and biennial renewal thereof prescribed by this chapter shall be as follows:

- (1) Original license fee
  - License to act as specialty contractor ..... \$100
  - License to act as general engineering contractor..... \$200
  - License to act as general building contractor ..... \$200
- (2) Original license fee for responsible management employee (RME)
  - License to act as RME in specialty contracting ..... \$100
  - License to act as RME in general engineering contracting ..... \$200
  - License to act as RME in general building contracting ..... \$200
- (3) Renewals
  - Renewal of specialty contractor's license..... \$50
  - Renewal of general engineering contractor's license ..... \$150
  - Renewal of general building contractor's license ..... \$150
  - Renewal of RME for all classifications ..... \$50
- (4) Reissuance of a license or issuance of a certified copy of license.....\$5
- (5) Application for additional classifications (Fee shall be charged for each application. More than one classification may be requested on a single application without additional fee.) .....\$25
- (6) Inactive license fee (in lieu of renewal fee) .....\$20

(b) The biennial fee or inactive license fee shall be paid to the contractors license board on or before April 30 of each even-numbered year. Failure, neglect, or refusal of any licensee to pay the biennial renewal fee before such date shall constitute a forfeiture of his license. Any such license may be restored upon written application therefor within one year from such date and the payment of the required fee plus an amount equal to ten per cent thereof.

Upon written request by a contractor and for good cause, the board shall place an active license in an inactive status. The license, upon payment of the biennial inactive license fee, may continue inactive for a period of three years after which time it must be reactivated or shall automatically become forfeited. The license may be reactivated at any time within the three-year period by fulfilling the requirements for renewal, including the payment of the appropriate renewal fee. [L 1957, c 305, §1 (s 14); am L 1961, c 184, §2(a); am L 1965, c 241, §3; Supp, §166A-14; HRS §444-15; am L 1969, c 56, §3; am L 1975, c 118, §9]

For additional licensing requirements, see L 1975, c 118, §35, appended as note to HRS §436-4.

**§444-16 Action on applications.** Within one hundred and twenty days after the filing of a proper application for a license and the payment of the required fees, the contractors license board shall (1) conduct an investigation of

the applicant, and in such investigation may post pertinent information, including but not limited to, the name and address of the applicant, and if the applicant is associated in any partnership, corporation, or other entity, the names, addresses, and official capacities of his associates; and (2) either issue a license to the applicant or else notify him in writing by registered mail of the board's decision not to grant the license and specifically notify applicant of his right to have a hearing within fifteen days on the board's decision. The hearing shall be conducted in accordance with section 444-18. [L 1957, c 305, §1 (s 15); am L 1965, c 37, §1; Supp, §166A-15; HRS §444-16; am L 1973, c 116, §1]

#### Cross References

Mailing notice, see §1-28.

#### Case Notes

Where application for license was not acted upon within time specified, denial was defective. 51 H. 673, 466 P.2d 1009.

**[§444-16.5] Bond.** The contractors license board may require each licensee, applicant, individual or corporate, who is a specialty contractor to put up bond in the sum of not less than \$2,500 executed by the licensee or applicant as principal and by a surety company authorized to do business in the State as surety.

The board may require each licensee, applicant, individual or corporate, who is a general contractor to put up a bond in the sum of not less than \$5,000 executed by the licensee or applicant as principal and by a surety company authorized to do business in the State as surety.

The board, in exercising its discretion shall take into consideration the licensee's or applicant's financial condition and his experience in the field.

The bond shall be in such form as the board may prescribe, conditioned upon the payment of wages, as defined in section 104-1(5), to the employees of the contractor when due, and giving employees who have not been paid a right of action on the bond in their own names; and upon the honest conduct of the business of the licensee, and upon the right of any person injured or damaged by any wrongful act of the licensee to bring in his own name an action on the bond; provided that any claim for wages shall have priority over all other claims. [L 1969, c 234, §1]

**§444-17 Revocation, suspension, and renewal of licenses.** The contractors license board may revoke any license issued hereunder, or suspend the right of the licensee to use such licenses, or refuse to renew any such license for any of the following causes:

- (1) [Deleted. L 1974, c 205, §2(12)].
- (2) Any dishonest or fraudulent or deceitful act as a contractor which causes a substantial damage to another;
- (3) Engaging in any unfair or deceptive act or practice as prohibited by section 480-2;
- (4) Abandonment of any construction project or operation without reasonable or legal excuse;
- (5) Wilful diversion of funds or property received for prosecution or completion of a specific construction project or operation, or for a

- specified purpose in the prosecution or completion of any construction project or operation, and the use thereof for any other purpose;
- (6) Wilful departure from, or wilful disregard of plans or specifications in any material respect without consent of the owner or his duly authorized representative, which is prejudicial to a person entitled to have the construction project or operation completed in accordance with such plans and specifications;
  - (7) Wilful violation of any law of the State, or of any political subdivision thereof, relating to building, including any violation of any applicable rule or regulation of the department of health, or of any applicable safety or labor law;
  - (8) Failure to make and keep records showing all contracts, documents, records, receipts, and disbursements by a licensee of all his transactions as a contractor for a period of not less than three years after completion of any construction project or operation to which the records refer or to permit inspection of such records by the board;
  - (9) When the licensee being a copartnership or a joint venture permits any member or employee of such copartnership or joint venture who does not hold a license to have the direct management of the contracting business thereof;
  - (10) When the licensee being a corporation permits any officer or employee of such corporation who does not hold a license to have the direct management of the contracting business thereof;
  - (11) Misrepresentation of a material fact by an applicant in obtaining a license;
  - (12) Failure of a licensee to complete in a material respect any construction project or operation for the agreed price if such failure is without legal excuse;
  - (13) Wilful failure in any material respect to comply with this chapter or the rules and regulations promulgated pursuant thereto;
  - (14) Wilful failure or refusal to prosecute a project or operation to completion with reasonable diligence;
  - (15) Wilful failure to pay when due a debt incurred for services or materials rendered or purchased in connection with his operations as a contractor when he has the ability to pay or when he has received sufficient funds therefor as payment for the particular operation for which the services or materials were rendered or purchased;
  - (16) The false denial of any debt due or the validity of the claim therefor with intent to secure for licensee, his employer, or other person, any discount of such debt or with intent to hinder, delay, or defraud the person to whom such debt is due;
  - (17) Failure to secure or maintain workers' compensation insurance when not authorized to act as a self-insurer under chapter 386;
  - (18) Knowingly entering into a contract with an unlicensed contractor involving work or activity for the performance of which licensing is required under this chapter.

No license shall be suspended for longer than two years and no person whose license is revoked shall be eligible to apply for a new license until the expiration of two years. [L 1957, c 305, §1 (s 16); am L Sp 1959 2d, c 1, §19; am L 1965, c 36, §1; Supp, §166A-16; HRS §444-17; am L 1969, c 64, §1 and c 163, §3; am L 1974, c 205, §2(12); am L 1975, c 41, §1]

## Attorney General Opinions

Par. (15): Liability to pay moneys into employees' trust funds is within coverage of this paragraph. Att. Gen. Op. 68-7.

**§444-18 Hearings.** In every case where it is proposed to refuse to grant a license or to revoke or suspend a license or to refuse to renew a license, the contractors license board shall give the person concerned notice and hearing in conformity with chapter 91. The notice shall be given in writing by registered or certified mail with return receipt requested at least fifteen days before the hearing. The hearing whenever possible shall be held on the island on which the aggrieved party resides.

In all proceedings before it, the board and each member thereof shall have the same powers respecting administering oaths, compelling the attendance of witnesses, and the production of documentary evidence, and examining witnesses as are possessed by circuit courts. In case of disobedience by any person of any order of the board, or any member thereof, or of any subpoena issued by it, or him, or the refusal of any witness to testify to any matter regarding which he may be questioned lawfully, any circuit judge, on application by the board, or a member thereof, shall compel obedience as in the case of disobedience of the requirements of a subpoena issued by a circuit court, or a refusal to testify therein. [L 1957, c 305, §1 (s 17); am L 1965, c 96, §108; Supp, §166A-17; HRS §444-18; am L 1973, c 31, pt of §21]

## Case Notes

In absence of notice or hearing, denial of license is without effect. 51 H. 673, 466 P.2d 1009.

**§444-19 Appeal to circuit court.** An applicant who has been refused a license and every licensee whose license has been suspended, revoked, or not renewed may appeal the contractors license board's decision to the circuit court of the circuit in which the applicant or licensee resides in the manner provided in chapter 91. [L 1957, c 305, §1 (s 18); am L 1965, c 96, §109; Supp, §166A-18]

## Rules of Court

Appeal to circuit court, see HRCF rule 72.

**§444-20 Disposition of fees, refunds.** (a) All fees received by the contractors license board under this chapter shall be deposited by the director of regulatory agencies with the director of finance to the credit of the general fund.

(b) The board may request the director of regulatory agencies to have any fee erroneously paid to it under this chapter refunded when the board deems it just and equitable. [L 1957, c 305, §1 (s 19); am L Sp 1959 2d, c 1, §§14, 15; am L 1961, c 184, §2 (b); am L 1963, c 114, §§1, 3; Supp, §166A-19]

**§444-21 Death or dissociation.** No copartnership, joint venture, or corporation shall be deemed to have violated any provision of this chapter by acting or assuming to act as a contractor after the death or dissociation of a licensee who had the direct management of the contracting business thereof prior to final disposition by the contractors license board of an application for a license made within thirty days from the date of the death or dissociation. [L 1957, c 305, §1 (s 20); Supp, §166A-20]

**§444-22 Civil action.** The failure of any person to comply with any provision of this chapter shall prevent such person from recovering for work done, or materials or supplies furnished, or both on a contract or on the basis of the reasonable value thereof, in a civil action, if such person failed to obtain a license under this chapter prior to contracting for such work. [L 1957, c 305, §1 (s 21); Supp, §166A-21; HRS §444-22; am L 1969, c 56, §4]

**§444-23 Violation, penalty.** Any person who violates, or omits to comply with any of the provisions of this chapter shall be fined not more than \$5,000. [L 1957, c 305, §1 (s 22); Supp, §166A-22; HRS §444-23; am L 1975, c 127, §1]

**§444-24 Injunction.** The contractors license board may, in addition to any other remedies available, apply to a circuit judge for a preliminary or permanent injunction restraining any person from acting, or assuming to act, or advertising, as general engineering contractor, general building contractor, or specialty contractor, without a license previously obtained under and in compliance with this chapter and the rules and regulations of the board, and upon hearing and for cause shown, the judge may grant the preliminary or permanent injunction. [L 1965, c 13, §1; Supp, §166A-23]

#### Rules of Court

Injunctions, see HRCPC rule 65.

**§444-25 Payment for goods and services.** A contractor shall pay his subcontractor for any goods and services rendered within sixty days after receipt of a proper statement by the subcontractor that the goods have been delivered or services have been performed. The subcontractor shall be entitled to receive interest on the unpaid principal amount at the rate of one percent per month commencing on the sixtieth day following receipt of the statement by the contractor, provided that this section shall not apply if the delay in payment is due to a bona fide dispute between the contractor and the subcontractor concerning the goods and services contracted for. If there is no bona fide dispute between the subcontractor and the contractor concerning the goods or services contracted for, the subcontractor shall be entitled to payment for goods and services under this section.

If payment is contingent upon receipt of funds held in escrow or trust, the contractor shall clearly state this fact in his solicitation of bids. If the solicitation for bids contains the statement that the time of payment is contingent upon the receipt of funds held in escrow or trust and a contract is awarded in response to the solicitation, interest will not begin to accrue upon any unpaid balance until the sixtieth day following receipt by the contractor of the subcontractor's statement or the thirtieth day following receipt of the escrow or trust funds, whichever occurs later. [L 1969, c 147, §2; am L 1971, c 92, §1]

**[§444-25.5] Disclosure.** Any licensed contractor entering into a contract involving home improvements shall upon or before signing the contract, but before the application for a building permit:

- (1) Explain verbally in detail to the owner all lien rights of all parties performing under the contract including the homeowner, the contractor, any subcontractor or any materialman supplying commodities or labor on the project.

**Sec. 444-25.5      PROFESSIONS AND OCCUPATIONS**

- (2) Explain verbally in detail the owner's option to demand bonding on the project, how such a bond would protect the owner and the approximate expense of such a bond.
- (3) Secure signatures of the owner on a separate form approved by the contractors license board, which shall be printed in at least 12 point type and in the same language in which the contract was negotiated and which shall contain the provisions set out in subsections (a) and (b).
- (4) Violation of this section shall be deemed an unfair or deceptive practice and shall be subject to provisions of chapter 480, as well as the provisions of this chapter.
- (5) The contractors license board is authorized and directed to develop the disclosure form pursuant to this section. [L 1975, c 183, §4]

**Revision Note**

"Contractors license board" substituted for "contractor's licensing board" to conform to official designation.

**§444-26 Contractors recovery fund; use of fund; fees.** The contractors license board is authorized and directed to establish and maintain a contractors recovery fund from which any person aggrieved by an act, representation, transaction, or conduct of a duly licensed contractor, which is in violation of the provisions of this chapter or the regulations promulgated pursuant thereto, may recover by order of the circuit court or district court of the county where the violation occurred, an amount of not more than \$10,000 for damages sustained by the act, representation, transaction or conduct. Recovery from the fund shall be limited to the actual damages suffered by the claimant, including court costs and fees as set by law, and reasonable attorney fees as determined by the court.

Every contractor, when renewing his license in 1974, shall pay in addition to his license renewal fee, a fee of \$50 for deposit in the contractors recovery fund. On or after May 1, 1974, when any person makes application for a contractors license he shall pay, in addition to his original license fee, a fee of \$50 for deposit in the contractors recovery fund. In the event that the contractors license board does not issue the license, this fee shall be returned to the applicant. [L 1973, c 170, pt of §1; am L 1976, c 144, §1]

**[§444-27] Additional payments to fund.** If, on December 31 of any year, the balance remaining in the contractors recovery fund is less than \$150,000, every contractor, when renewing his license during the following calendar year, shall pay, in addition to his license renewal fee, a fee not to exceed \$50 for deposit in the contractors recovery fund. [L 1973, c 170, pt of §1]

**§444-28 Statute of limitations; recovery from fund.** (a) No action for a judgment which may subsequently result in an order for collection from the contractors recovery fund shall be commenced later than six years from the accrual of the cause of action thereon. When any aggrieved person commences action for a judgment which may result in collection from the contractors recovery fund, the aggrieved person shall notify the contractors license board in writing to this effect at the time of the commencement of such action. The contractors license board shall have the right to intervene in and defend any such action. Nothing in this section shall supersede the statute of limitation as contained in section 657-8.

(b) When any aggrieved person recovers a valid judgment in any circuit court or district court of the county where the violation occurred against any contractor for such act, representation, transaction, or conduct which is in violation of the provisions of this chapter or the regulations promulgated pursuant thereto, which occurred on or after June 1, 1974, the aggrieved person may, upon the termination of all proceedings, including reviews and appeals in connection with the judgment, file a verified claim in the court in which the judgment was entered and, upon ten days' written notice to the contractors license board, may apply to the court for an order directing payment out of the contractors recovery fund, of the amount unpaid upon the judgment, subject to the limitations stated in this section. Before proceeding against the contractors recovery fund, the aggrieved person must first proceed against any existing bond covering the licensed contractor.

(c) The court shall proceed upon such application in a summary manner, and, upon the hearing thereof, the aggrieved person shall be required to show:

- (1) He is not a spouse of debtor, or the personal representative of such spouse.
- (2) He has complied with all the requirements of this section.
- (3) He has obtained a judgment as set out in subsection (b) of this section, stating the amount thereof and the amount owing thereon at the date of the application.
- (4) He has made all reasonable searches and inquiries to ascertain whether the judgment debtor is possessed of real or personal property or other assets, liable to be sold or applied in satisfaction of the judgment.
- (5) That by such search he has discovered no personal or real property or other assets liable to be sold or applied, or that he has discovered certain of them, describing them, owned by the judgment debtor and liable to be so applied, and that he has taken all necessary action and proceedings for the realization thereof, and that the amount thereby realized was insufficient to satisfy the judgment, stating the amount so realized and the balance remaining due on the judgment after application of the amount realized.

(d) The court shall make an order directed to the contractors license board requiring payment from the contractors recovery fund of whatever sum it shall find to be payable upon the claim, pursuant to the provisions of and in accordance with the limitations contained in this section, if the court is satisfied, upon the hearing of the truth of all matters required to be shown by the aggrieved person by subsection (c) of this section and that the aggrieved person has fully pursued and exhausted all remedies available to him for recovering the amount awarded by the judgment of the court.

(e) Should the contractors license board pay from the contractors recovery fund any amount in settlement of a claim or toward satisfaction of a judgment against a licensed contractor, the license of the contractor shall be automatically terminated upon the issuance of a court order authorizing payment from the contractors recovery fund. No contractor shall be eligible to receive a new license until he has repaid in full, plus interest at the rate of six per cent a year, the amount paid from the contractors recovery fund on his account. A discharge in bankruptcy shall not relieve a person from the penalties and disabilities provided in this subsection.

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(f) If, at any time, the money deposited in the contractors recovery fund is insufficient to satisfy any duly authorized claim or portion thereof, the contractors license board shall, when sufficient money has been deposited in the contractors recovery fund, satisfy such unpaid claims or portions thereof, in the order that such claims or portions thereof were originally filed.

(g) With respect to the repair or alteration of an existing residential building or structure or any appurtenance thereto, including but not limited to swimming pools, retaining walls, garages or sprinkling systems, initial construction of such appurtenances, and landscaping of private residences, including condominium or cooperative units, pursuant to a contract between the owner and a licensed contractor for which the owner has paid the contractor in full, should, because of the contractor's default, a mechanic's or materialman's lien be enforced against the property pursuant to section 507-47, the court hearing the action shall award such an owner or his assigns a valid judgment against the contractor in an amount equal to the amount of the lien together with reasonable attorney's fees as determined by the court. The judgment shall include an order directing payment out of the contractors recovery fund. Notwithstanding any other provisions of this section to the contrary, the owner or his assigns need not meet any other requirement to secure payment from the contractors recovery fund, except that notice of the lien enforcement hearing shall be given to the contractors license board so it may appear pursuant to section 444-31. [L 1973, c 170, pt of §1; am L 1975, c 183, §1]

[§444-29] **Management of fund.** The sums received by the contractors license board for deposit in the contractors recovery fund shall be held by the contractors license board in trust for carrying out the purposes of the contractors recovery fund. The contractors license board, as trustee of the recovery fund, shall be authorized to retain private legal counsel to represent the board in any action which may result in collection from the contractors recovery fund. These funds may be invested and reinvested in the same manner as funds of the state employees' retirement system, and the interest from these investments shall be deposited to the credit of the contractors education fund, and which shall be available to the contractors license board for educational purposes, which is hereby created. [L 1973, c 170, pt of §1]

[§444-30] **False statement.** It shall constitute a misdemeanor for any person or his agent to file with the contractors license board any notice, statement, or other document required under the provisions of this chapter, which is false or untrue or contains any material misstatement of fact. [L 1973, c 170, pt of §1]

[§444-31] **The contractors license board has standing in court.** When the contractors license board receives notice, as provided in section 444-28 (a), the contractors license board may enter an appearance, file an answer, appear at the court hearing, defend the action or take whatever other action it may deem appropriate. The contractors license board or its legal representative shall be served with all pleadings in an action which may result in a recovery from the contractors recovery fund.

Settlement of any claim against the contractors recovery fund shall be made only with the unanimous agreement of the contractors license board, director of regulatory agencies and attorney general that settlement is in the best interest of the contractors recovery fund. [L 1973, c 170, pt of §1]

## COUNTY LICENSES

[§444-32] **Subrogation to rights of creditor.** When, upon the order of the court, the contractors license board has paid from the contractors recovery fund any sum to the judgment creditor, the contractors license board shall be subrogated to all of the rights of the judgment creditor and the judgment creditor shall assign all his right, title and interest in the judgment to the contractors license board and any amount and interest so recovered by the contractors license board on the judgment shall be deposited to the credit of said fund. [L 1973, c 170, pt of §1]

[§444-33] **Waiver of rights.** The failure of an aggrieved person to comply with all of the provisions of this chapter relating to the contractors recovery fund shall constitute a waiver of any right hereunder. [L 1973, c 170, pt of §1]

§444-34 **Maximum liability.** Notwithstanding any other provision, the liability of the contractors recovery fund shall not exceed \$20,000 for any licensed contractor. [L 1973, c 170, pt of §1; am L 1975, c 183, §2]

§444-35 **Disciplinary action against licensee.** Nothing contained herein shall limit the authority of the contractors license board to take disciplinary action against any licensee for a violation of any of the provisions of chapter 444, or of the rules and regulations of the contractors license board; nor shall the repayment in full of all obligations to the contractors recovery fund by any licensed contractor nullify or modify the effect of any other disciplinary proceeding brought pursuant to the provisions of chapter 444 or the rules and regulations. [L 1973, c 170, pt of §1; am L 1975, c 183, §3]

## CHAPTER 445 COUNTY LICENSES

### GENERALLY

#### SECTION

- 445-1 DEFINITION: "TREASURER"
- 445-2 TREASURER TO ISSUE
- 445-3 SIGNED BY WHOM
- 445-4 FEES IN ADVANCE
- 445-5 FEES; DATE WHEN DUE AND PAYABLE
- 445-6 PLACE OF BUSINESS
- 445-7 STATEMENT BY PARTNERS; PENALTIES
- 445-8 NOT TRANSFERABLE
- 445-9 CANCELED ON TRANSFERRING, ETC., BUSINESS; PENALTY
- 445-10 TERM OF LICENSE
- 445-11 EXPOSED TO VIEW; PENALTY
- 445-12 BUSINESS WITHOUT LICENSE FORBIDDEN
- 445-13 LICENSE INSPECTORS
- 445-14 LIMITS OF LICENSE
- 445-15 CONTROL BY ORDINANCE
- 445-16 PENALTY, UNLESS OTHERWISE PRESCRIBED

### AUCTION

- 445-21 FEE
- 445-22 PUBLIC AUCTION UNLAWFUL WHEN
- 445-23 HOURS FOR AUCTIONS
- 445-24 FICTITIOUS BIDS
- 445-25 DESCRIPTION OF GOODS SOLD CONSIDERED WARRANTIES
- 445-26 AUCTION AT PLACES OTHER THAN AUCTION ROOM; MOCK AUCTIONS
- 445-27 PENALTY
- 445-28 PLACE OF PUBLIC AUCTION ROOM
- 445-29 DESIGNATION OF PLACE FOR BUSINESS
- 445-30 RECORD BOOKS
- 445-31 BOND

No. 64826-8-I

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**COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON**

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**HILLCREST MEDIA, LLC,**

**Appellant,**

**v.**

**FISHER COMMUNICATIONS, INC., and  
FISHER BROADCASTING COMPANY,**

**Respondents.**

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**CERTIFICATE OF SERVICE**

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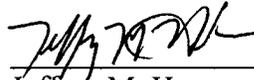
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STATE OF WASHINGTON  
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I certify that on this 6th day of July, 2010, I caused to be served a true and correct copy of Brief of Respondents, by hand delivery, on attorneys for Appellant at the address below stated:

Guy W. Beckett  
Berry & Beckett, PLLP  
1708 Bellevue Avenue  
Seattle, WA 98122

I certify and declare under penalty of perjury under the laws the State of Washington that the foregoing is true and correct

Dated at Seattle, Washington, this 6th day of July, 2010.

  
\_\_\_\_\_  
Jeffrey M. Hanson