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FUTURESELECT PORTFOLIO MANAGEMENT, INC.,
FUTURESELECT PRIME ADVISOR II LLC, THE MERRIWELL
FUND, L.P., and TELESIS IIW, LLC,

Respondents,

v.

TREMONT GROUP HOLDINGS, INC., TREMONT PARTNERS, INC.,
OPPENHEIMER ACQUISITION CORPORATION,
MASSACHUSETTS MUTUAL LIFE INSURANCE CO., and
ERNST & YOUNG LLP,

Petitioners.

**SUPPLEMENTAL BRIEF OF
TREMONT GROUP HOLDINGS, INC.
AND TREMONT PARTNERS, INC.**

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I. INTRODUCTION

Tremont Group Holdings, Inc. and Tremont Partners, Inc. (together, "Tremont") seek review of the Opinion of the Court of Appeals entered on August 12, 2013 in this action ("Opinion") to the extent it finds that the Washington State Securities Act, RCW 21.20.010 ("WSSA"), rather than New York's "Martin Act," N.Y. Gen. Bus. L. art 23-A, §§ 352, 353, governs plaintiffs' state securities law claims. This Court granted Tremont's Petition for Review ("Petition") by Order dated January 8, 2014.

II. ISSUE PRESENTED FOR REVIEW

The Court of Appeals did not apply the choice of law analysis adopted in binding Washington Supreme Court precedent in deciding that Washington law should govern plaintiffs' state securities claims. If the Court of Appeals had properly applied the "most significant relationship" test, it would have applied New York law and affirmed the trial court's dismissal of those claims. Should this Court reverse the Court of Appeals and affirm the dismissal of those claims pursuant to CR 12(b)(6)? (*See* Petition at 3-4.)

III. STATEMENT OF THE CASE

Tremont respectfully refers the Court to the Statement of the Case in its Petition, which Tremont incorporates herein by reference. (*See*

Petition at 4-9.)

IV. ARGUMENT

The Court of Appeals' Opinion should be reversed and the trial court's dismissal of plaintiffs' state securities claims reinstated because the Court of Appeals applied the wrong choice of law analysis and consequently reached the wrong result.

A. This Court's Choice of Law Precedent

As stated by this Court in *Rice v. Dow Chemical Co.*, 124 Wn.2d 205, 875 P.2d 1213 (1994), "[t]o determine which state's law applies to a particular issue, Washington has adopted the 'most significant relationship' test as set out in the Restatement (Second) of Conflict of Laws § 145 (1971)."¹ *Rice*, 124 Wn.2d at 213, 875 P.2d at 1217 (citation omitted). This test "requires a court to evaluate the contacts of the interested jurisdictions with respect to the claims at issue and the interests and policies of those jurisdictions." *Haberman v. Wash. Pub. Power Supply Sys.*, 109 Wn.2d 107, 134, 744 P.2d 1032, 1053 (1987); *see also* Restatement (Second) of Conflict of Laws § 145(2) (1971).

The Restatement § 145 test is a "2-step analysis." *Southwell v. Widing Transp., Inc.*, 101 Wn.2d 200, 204, 676 P.2d 477, 480 (1984). The

¹ The applicable provisions of the Restatement are attached as exhibits to the Appendix to this brief.

first step "involves an evaluation of the contacts with each interested jurisdiction . . . according to their relative importance with respect to the particular issue." *Id.*; accord *Johnson v. Spider Staging Corp.*, 87 Wn.2d 577, 581, 555 P.2d 997, 1000 (1976). The evaluation "is not merely to count contacts, but rather to consider which contacts are most significant and to determine where these contacts are found." *Southwell*, 101 Wn.2d at 204, 676 P.2d at 480. The second step "involves an evaluation of the interests and public policies of [the] potentially concerned jurisdictions." *Id.*²

B. The Court of Appeals Failed To Apply This Court's Choice of Law Precedent

While the Court of Appeals mentioned *Haberman*, *Southwell* and Section 145 of the Restatement in its Opinion (*see* Opinion at 9-11), it did not apply the teaching of those authorities. Instead, it focused on five categories of contacts identified in Section 148 of the Restatement without regard to any of the other relevant contacts recognized by this Court. (*See id.* at 11-15.) Moreover, in conducting its choice of law analysis, the Court of Appeals neither weighed the relative importance of the relevant

² This Court has never held that the second step is triggered "only" if the contacts identified in the first step are evenly balanced. (*Cf.* Ans. at 17-19.) Rather, as reflected in this Court's precedents, both steps are indispensable to a choice of law analysis. *See, e.g., Haberman*, 109 Wn.2d at 134, 744 P.2d at 1053; *Southwell*, 101 Wn.2d at 204, 676 P.2d at 480 (each evaluating jurisdictions' interests even though contacts were not evenly balanced).

contacts as directed by this Court nor considered the respective interests and public policies of Washington and New York. The analysis therefore was inappropriately truncated and fundamentally flawed, leading to the erroneous conclusion that "Washington has substantially more significant contacts than any other state." (*Id.* at 15.)

C. Step 1: New York Has the Most Significant Contacts With This Case

Washington's choice of law analysis for determining which state's law should govern a state securities act claim was settled more than 25 years ago when this Court issued its decision in *Haberman*. That case applied the "most significant relationship" test of Restatement § 145 that had previously been adopted in other contexts and identified the most important contacts to be evaluated in determining which state securities law statute governs plaintiffs' state securities law claims. *See Haberman*, 109 Wn.2d at 134-36, 744 P.2d at 1053-54.

1. *Haberman* Identifies the Most Substantial Contacts for State Securities Law Claims

In *Haberman*, a joint operating agency established as a municipal corporation under Washington law and located in Washington issued bonds to investors located throughout the United States to finance two power plants to be constructed in Washington. *See id.*, 109 Wn.2d at 114-19, 744 P.2d at 1043-46. After the construction stopped and the bonds

became worthless, plaintiff bondholders asserted claims under WSSA against defendants who allegedly made misrepresentations in connection with the sale of the bonds. *See id.* at 118-19, 744 P.2d at 1045-46.

In deciding whether WSSA should be applied to claims against out-of-state parties joined as defendants in litigation pending in this State, this Court identified the following categories of contacts as "the most substantial contacts" related to "the subject matter of [the] case": (1) where the securities in question were issued; (2) where a majority of the defendants resided; (3) where the parties had substantial business dealings; (4) where the alleged misrepresentations were made; and (5) where the allegedly tortious conduct at issue could best be regulated. *See Haberman*, 109 Wn.2d at 134-35, 744 P.2d at 1053. Because Washington was the locus of all those contacts, this Court ruled that WSSA should be applied in that case. *See id.* at 135-36, 744 P.2d at 1054.

2. *Haberman* Demonstrates That New York
Has the Most Significant Relationship to the
State Securities Law Claims Asserted in This Case

In this case, after considering all relevant contacts and weighing them as required by this Court's precedents, it becomes abundantly clear that New York, not Washington, has substantially more significant contacts with the subject matter of this litigation than any other state. Indeed, every one of the five contacts this Court deemed most important in

Haberman supports application of New York law here:

(i) The securities at issue (*i.e.*, plaintiffs' limited partnership interests in the Rye Funds) were issued by the Rye Funds at their principal place of business in New York (*see, e.g.*, CP 32 ¶ 127; 970, 1022, 1069, 1151, 1217, 1268, 1309, 1984);

(ii) All defendants (with the exception of MassMutual) are headquartered in New York (*see, e.g.*, CP 87; 890-91 ¶¶ 4, 13-15);

(iii) New York is where all of the allegedly wrongful conduct occurred – where Tremont made alleged misrepresentations to plaintiffs and conducted purportedly inadequate due diligence on Bernard Madoff (CP 9-13, 42 ¶¶ 34, 36, 37, 39, 40-46, 182-83), where Madoff operated his business (*id.* 2, 14 ¶¶ 3, 49, 50; 91 ¶ 21), where the Rye Funds and their administrator created the monthly statements sent to investors to report the Funds' performance (*id.* 9, 10 ¶¶ 33, 38; 1080, 1131, 1159, 1208, 1223, 1230) and where the Funds' auditor, Ernst & Young, performed allegedly deficient audits of the Funds' financial statements (*id.* 4, 5, 10, 11, 13, 14, 20, 23 ¶¶ 11, 13, 38, 48, 77, 88);

(iv) With the exception of one meeting in Washington in 1997, every face-to-face meeting between plaintiffs and Tremont alleged in the Complaint occurred in New York. As for the single Washington visit purportedly made in 1997 by an unidentified "Tremont representative" (CP 9-10 ¶ 34), the Complaint nowhere identifies any misrepresentations made at that meeting.³ In contrast, the Complaint alleges that plaintiffs' principal decision maker (*i.e.*, their investment adviser) "regularly" visited Tremont in New York (*id.* 11 ¶ 39) – including in February 1998 (*id.* 9-10 ¶ 34), June 2000 (*id.* 11 ¶ 39), February 2002 (*id.*) and June 2003 (*id.*) – where Tremont allegedly misrepresented its "ongoing oversight and testing of Madoff" (*id.*); and

³ According to the Complaint, at the 1997 meeting in Washington, the alleged Tremont representative told plaintiffs' investment adviser "that the Rye Funds invested all of their assets with Madoff and Madoff was given complete investment discretion over those assets, subject to Tremont's oversight and ongoing due diligence." (CP 9-10 ¶ 34.) The Complaint nowhere alleges, however, that the foregoing representation was false in any respect. Thus, the alleged Washington visit is not even relevant, much less material, to the choice of law analysis.

(v) As further shown below, New York has the strongest interest in regulating the allegedly tortious conduct of resident corporations involved in the issuance of hedge fund securities and investment of hedge fund assets within its borders. *Compare Haberman*, 109 Wn.2d at 134-36, 744 P.2d at 1053-54.

In its Opinion, the Court of Appeals did not weigh or otherwise consider the key *Haberman* contacts in its choice of law analysis.⁴ Rather, it concluded Washington has the most significant relationship to plaintiffs' WSSA claims based solely on the following findings: (i) plaintiffs are domiciled and have their principal place of business in this State; (ii) the communications underlying plaintiffs' claims allegedly were transmitted by defendants from New York to plaintiffs in Washington; (iii) on one occasion in 1997, an unidentified Tremont representative visited plaintiffs' investment adviser in Washington; and (iv) plaintiffs "acted in reliance" in Washington on purported misrepresentations made by Tremont in New

⁴ The Court of Appeals limited its comparison of contacts as follows: "the place of reliance (here, Washington) is a more important contact than both the place of reception (Washington) and the place where the defendant made the representations (New York)." (Opinion at 13.) This comparison appears to be based on an overly broad reading of Restatement (Second) of Conflict of Laws § 148 comment g (1971). As discussed below, Restatement (Second) of Conflict of Laws § 145 comment e explains that where, as here, a defendant's alleged fraud injures parties in two or more states, "the place where the defendant's conduct occurred will usually be given particular weight in determining the state of the applicable law." When evaluating this factor in *Haberman*, this Court gave predominant weight to the state from which the alleged misrepresentations "emanated." *Haberman*, 109 Wn.2d at 135, 744 P.2d at 1053.

York.⁵ (Opinion at 14-15.)

Plaintiffs contend that the Court of Appeals' analysis "closely adhered" to the test adopted in *Haberman*. (Ans. at 12.) This is plainly wrong because the Court of Appeals did not consider and weigh all relevant contacts, as required by *Haberman* and this Court's other precedents. Undaunted, plaintiffs contend that the Court of Appeals nevertheless reached the correct result in light of the "specific facts of the case." (*Id.*) But the facts, fairly considered, compel the opposite conclusion: New York has the most significant connection to this dispute.⁶

The important, undisputed and indisputable New York contacts gleaned from the Complaint and the documents it references are set forth

⁵ The Court of Appeals' truncated analysis appears related to its finding that "when any two of those contacts [under Section 148 of the Restatement] are located wholly in a single state, this will usually be the state of the applicable law with respect to most issues." (Opinion at 13.) That finding is contrary to this Court's instruction in *Southwell* that the proper approach is "not merely to count contacts, but to consider which contacts are most significant and to determine where these contacts are found." *Id.*, 101 Wn.2d at 204, 676 P.2d at 480.

⁶ Contrary to plaintiffs' contention (Ans. at 11, 14), Tremont does not contend that *Haberman* limits the contacts a court may consider when applying the "most significant relationship" test. Rather, Tremont submits that the Court of Appeals erred by ignoring "the most substantial contacts" identified by this Court in *Haberman*, and by failing to weigh the relative importance of those contacts to the state securities law claims alleged in the Complaint.

in the Petition and at pages 6 to 7 and 9 to 16 of this brief.⁷ Those contacts show that the transactions and alleged misconduct at the heart of this dispute were centered in New York, not in Washington or any other state where Rye Fund investors happen to reside. *See, e.g., Bryant v. Wyeth*, 879 F. Supp. 2d 1214, 1224 (W.D. Wash. 2012) ("Here, the cause of action is fraud, stemming from wide-spread dissemination of allegedly false information. [Defendant] disseminated this information from Pennsylvania, centering the parties' relationship there[.]"). Under *Haberman*, those contacts dictate the application of New York law. *See id.*, 109 Wn.2d at 135-36, 744 P.2d at 1054.

The concentration of all the significant contacts in New York becomes even clearer when considered in the broader context of this litigation. This case is one of several stemming from the Madoff debacle, a unique, "only in New York" phenomenon. *See, e.g., In re Tremont Grp. Holdings, Inc. Sec. Litig.*, 626 F. Supp. 2d 1338, 1339-41 (J.P.M.L. 2009) (CP 99-102; 104-07) (consolidating related cases in the United States District Court for the Southern District of New York). From his office in

⁷ Because they are identified in or may be inferred from the Complaint or documents integral to the Complaint, these contacts are appropriately included in the choice of law analysis. *See, e.g., Rodriguez v. Loudeye Corp.*, 144 Wn. App. 709, 725-28, 189 P.3d 168, 176-77 (2008). (*Cf. Ans.* 13 n.6, 15-16.)

Manhattan, where he ran a seemingly successful, well-regarded and largely unrivaled electronic market making business, Madoff capitalized on his trading operation to offer a compelling investment strategy to investors throughout the United States and the world. *See, e.g., Newman v. Family Mgmt. Corp.*, 748 F. Supp. 2d 299, 303 (S.D.N.Y. 2010), *aff'd*, 530 F. App'x 21 (2d Cir. 2013). As for those investors seeking access to Madoff's strategy through Tremont, they needed to make a figurative, if not literal, pilgrimage to New York to secure that access.⁸ Indeed, as plaintiffs allege in their Complaint, "Madoff was notorious for restricting who he accepted as an investor," and New York-based Tremont was "one of the few avenues to investing with Madoff." (CP 9 ¶ 32.)

To avail themselves of this limited (but much coveted) opportunity, plaintiffs and other interested investors invested in the Rye Funds. They did so by delivering subscription agreements to Tremont

⁸ Plaintiffs admitted this point in a brief they filed in connection with the petition they submitted to the United States Bankruptcy Court for the Southern District of New York to assert a claim in Madoff's New York bankruptcy proceeding. They wrote, "FutureSelect deliberately entrusted millions of dollars with Bernard L. Madoff Investments Securities LLC ('BLMIS'), all of which was lost when Bernard Madoff's fraud was uncovered and BLMIS was liquidated. Like many other investors, FutureSelect made its investment in BLMIS through 'feeder funds.' At the time it made its investments, FutureSelect understood that the feeder funds would deposit virtually all of FutureSelect's investment into BLMIS, and that BLMIS would manage its investment. Indeed, the only reason FutureSelect used the feeder funds was in order to deposit its investment with BLMIS." (CP 422.)

and/or the Rye Funds' administrator in New York to apply for the purchase of limited partnership interests in the Rye Funds. (CP 1088, 1166, 1289, 1365, 1875, 1876, 1903, 1930, 1959, 1981.) As provided in the subscription agreements, plaintiffs could not become limited partners unless and until Tremont determined, in its sole discretion, to accept their subscriptions in New York. (*Id.* 1088, 1166, 1313, 1365, 1877, 1903, 1931, 1959, 1989.) Upon deposit of plaintiffs' cash in the Funds' bank accounts in New York (*id.* 1088, 1166, 1983), the cash became the property of the Rye Funds in New York, which the Funds then invested with (and ultimately lost to) Madoff in New York. *See Securities Investor Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC*, 454 B.R. 285, 295-96 (Bankr. S.D.N.Y. 2011), *aff'd sub nom. In re Aozora Bank Ltd. v. Sec. Investor Prot. Corp.*, 480 B.R. 117 (S.D.N.Y. 2012), *aff'd sub nom. In re Bernard L. Madoff Inv. Sec. LLC*, 708 F.3d 422 (2d Cir. 2013); *see also Feldman v. Pioneer Petroleum, Inc.*, 606 F. Supp. 916, 922 (W.D. Okla. 1985) (finding relationship centered in state where the limited partnerships in which plaintiffs invested maintained their accounts and allocated their assets), *aff'd*, 813 F.2d 296 (10th Cir. 1987). All the while, Tremont is alleged to have continued to monitor Madoff's investment activity on behalf of the Rye Funds in New York. (*See, e.g.*, CP 12-13 ¶¶ 40-46.) It also prepared and disseminated monthly account statements to plaintiffs

from New York (*id.* 9-10 ¶¶ 33, 38; 1131, 1208, 1223), and retained Ernst & Young in New York to audit the Rye Funds' financial statements (*id.* 4, 5, 10, 11, 13, 14, 20, 23 ¶¶ 11, 13, 38, 48, 77, 88), which Tremont sent to the Funds' investors from New York. (*Id.* 986, 1012, 1041, 1131, 1208, 1223.)

New York was unquestionably the center of the relationship among Madoff, Tremont, the Rye Funds and the Funds' investors. Under the feeder fund structure employed,⁹ Madoff, Tremont and the Rye Funds were the New York hub of the parties' relationship, and the investors (including plaintiffs) were the multi-state spokes surrounding the hub. All of the allegedly wrongful conduct identified in the Complaint occurred in the New York hub where defendants operated their businesses, while the impact of investing with Madoff radiated out from New York to the Rye Funds' investors – wherever they happened to be located. *See Anwar v. Fairfield Greenwich Ltd.*, 728 F. Supp. 2d 372, 400 (S.D.N.Y. 2010) (finding for choice of law purposes in a Madoff feeder fund case that the "core facts implicated in every cause of action . . . center on conduct that occurred in New York"); *see also Bryant*, 879 F. Supp. 2d at 1224 ("The

⁹ Under this structure, investors "invested directly or indirectly in feeder funds [such as the Rye Funds], which, in turn, invested with BLMIS." *Securities Investor Prot. Corp.*, 454 B.R. at 289.

place where the relationship is centered is . . . often 'the same as the place where the conduct causing [the] injury occurred.'" (citation omitted)).

3. The Location of Investors Is Not Given Substantial Weight in Cases Involving Alleged Multi-State Misrepresentations

Under the circumstances, plaintiffs' presence and alleged injury in Washington is, for choice of law purposes, of secondary importance, and certainly no weightier than the residence of any other Rye Fund investor.¹⁰ *See Rice*, 124 Wn.2d at 216, 875 P.2d at 1219 ("residency in the forum state alone has not been considered a sufficient relation to the action to warrant application of forum law"); *Kelley v. Microsoft Corp.*, 251 F.R.D. 544, 552 (W.D. Wash. 2008) (finding, "place of injury is of lower importance in a case of . . . misrepresentation"). In cases such as this one, where plaintiffs assert they were deceived by alleged misconduct occurring in a single jurisdiction, "the place where the defendant's conduct occurred" is more significant for choice of law purposes. Restatement (Second) of Conflict of Laws § 145 cmt. e (1971); *see also Vicon, Inc. v. CMI Corp.*, 657 F.2d 768, 772 (5th Cir. 1981); *Bryant*, 879 F. Supp. 2d at

¹⁰ Like the trial court, this Court may take judicial notice that Rye Fund investors residing in multiple states have brought parallel litigation against Tremont in New York and other jurisdictions. (*See, e.g.*, CP 99-406, 475-86 (complaints filed by other Rye Fund investors and decisions entered in those cases.) *See also Berge v. Gorton*, 88 Wn.2d 756, 763, 567 P.2d 187, 192 (1977) (taking judicial notice of other court proceedings).

1222; *Kelley*, 251 F.R.D. at 552.

The foregoing principles apply with particular force to this case given that three of the four plaintiffs are hedge funds (the "FutureSelect Funds") with investors dispersed throughout the United States. While the FutureSelect Funds are entities domiciled in Washington, they are investment vehicles through which investors in multiple jurisdictions gained access to Madoff in New York. (*See, e.g.*, CP 5-6 ¶¶ 15-18; 2963, 3142.) Consequently, the Washington contacts here are of minimal significance at best. *See Anwar*, 728 F. Supp. 2d at 400 (noting that Madoff feeder fund investors were "widely dispersed throughout the world and their injury was sustained in various 'locations with only limited connection to the conduct at issue'" (citation omitted)).

In sum, under the first step of this Court's two-step choice of law analysis, the contacts with the greatest relative importance to plaintiffs' securities law claims are the contacts Tremont and the other defendants had with the State of New York, where all of the alleged wrongdoing occurred.

**D. Step 2: New York Has the Strongest Interest
in the Application of Its Law to This Dispute**

Both Washington and New York have an interest in the application of their respective securities statutes to resolve this dispute. As shown

below, New York's interest is greater under the circumstances of this case.

As this Court has recognized, a state has an overriding interest in regulating securities transactions emanating from its borders even when the purchasers of the securities in question reside in other jurisdictions. In *Haberman*, for example, the plaintiff investors were located, and thus allegedly injured, throughout the country, both in Washington and other states. This Court nevertheless determined that Washington law should apply given this State's interest in "regulating the conduct of parties involved in the sale of bonds issued by a [local] corporation . . . to finance construction of in-state power generating facilities." *Id.*, 109 Wn.2d at 135, 744 P.2d at 1053.

In this case, New York has an analogous interest in regulating the conduct of the New York-based actors – *i.e.*, Tremont, the Rye Funds and Ernst & Young – allegedly involved in providing access to and information regarding a well-known and well-regarded money manager (Madoff) headquartered in New York, the hedge fund capital of the world.¹¹ These parties variously were responsible for: (a) the creation of the Rye Funds to provide exclusive access to Madoff (*see, e.g.*, CP 9-10 ¶¶

¹¹ *See New York Still World's Hedge Fund Capital, London Distant Second*, FINalternatives (Apr. 29, 2011) (New York is "home to firms managing a whopping 41% of all global hedge fund assets").

32, 35); (b) the issuance, offer and sale of limited partnership interests in those Funds (*id.* 3, 20, 31 ¶¶ 6, 7, 123; 1309, 1984); (c) the preparation and dissemination of information regarding the terms and risks of investing in the Funds (*id.* 1052, 1136, 1213); (d) the management of the Rye Funds' assets and oversight of their investments (*see, e.g., id.* 9 ¶ 32); (e) the maintenance of the Funds' books and records for the benefit of all Fund investors (*id.* 1041, 1080, 1159, 1230); and (f) the audit of the Funds' financial statements. (*See, e.g., id.* 10-11 ¶ 38.) Given the New York locus of virtually all the Madoff-related activity giving rise to plaintiffs' state securities law claims, New York's interest in the application of its law to resolve this Madoff-related dispute is paramount. As one court has observed:

New York City, New York, is widely known as the nation's financial capital, if not that of the world. Investors throughout the country trade in markets operating out of New York. New York's interest in regulating these markets predominates because the financial industry is critical to its overall economic health and viability, as well as that of the nation.

ExpressJet Airlines, Inc. v. RBC Capital Mkts. Corp., C.A. No. H-09-992, 2009 WL 2244468, at *13 (S.D. Tex. July 27, 2009) (granting motion to transfer venue); *see also J. Zeevi & Sons Ltd. v. Grindlays Bank Ltd.*, 37 N.Y.2d 220, 227, 333 N.E.2d 168, 172-73 (1975) (because New York "is a financial capital of the world," it had "an overriding and paramount

interest" in applying its law to resolve a dispute regarding a letter of credit).

While Washington plainly has an interest in applying its own securities law to protect resident investors (*cf.* Ans. at 19), it is no stronger than the identical interest of every other state (including New York) in which Rye Fund investors reside. *See, e.g.*, Restatement (Second) of Conflict of Laws § 145 cmt. e (when the victims of an alleged fraudulent scheme are found in multiple states, the law of the state where the alleged fraud occurred generally controls). This interest is outweighed by New York's overriding and paramount interest in regulating financial services companies headquartered in New York, the financial capital of the world, who do business with customers in every one of the fifty states. *Cf. Rice*, 124 Wn.2d at 216, 875 P.2d at 1219 (Washington's interest in "seeing to it that its residents are compensated for personal injuries" is not in itself an "overriding concern" justifying application of Washington law where the underlying alleged tort occurred elsewhere); *see also Rosenthal v. Fonda*, 862 F.2d 1398, 1402 (9th Cir. 1988) (noting New York's interest in "protecting nonresidents to create a stable financial center that will attract out-of-state business" (citation omitted)); *accord Kelley*, 251 F.R.D. at 553 (finding that, where defendant's conduct allegedly harmed individuals in multiple states, the state of defendant's residence had a "predominant"

interest in regulating the defendant).

Other Restatement factors also compel application of New York law here. Given New York's central and critical role in the functioning of the nation's capital markets, applying New York law in securities cases such as this one would better serve the important interests of protecting the "justified expectations" of parties to interstate securities transactions and promoting "certainty, predictability and uniformity of result" in disputes arising out of nationwide securities offerings. Restatement (Second) of Conflict of Laws §§ 6(2)(d), (f) (1971). As recently explained by one court with respect to claims of fraud and negligent misrepresentation:

"New York has the greater interest in regulating its vast securities industry to ensure that application of the law leads to the appropriate admonitory effects on industry participants." Moreover, the majority of the allegedly fraudulent statements or omissions, as well as the business practices and decisions that precipitated the misrepresentations, occurred in New York. The exceptions are a few remarks allegedly made directly to [plaintiff] in Florida – which themselves appear to have been based on information or directives received from [defendant] Citigroup's New York headquarters.

For these reasons, "[a]ll parties could reasonably expect New York law to govern the conduct within its borders that forms the basis of both claims," whereas the defendants would not have reasonably expected Florida law to apply – at least no more so than the law of any jurisdiction in which a Citigroup investor resided. And subjecting defendants to liability in any jurisdiction in which a Citigroup investor lived at the time of a misrepresentation "would paralyze actors in the securities market," rather than engendering

predictability, uniformity, and certainty. The [Restatement] factors thus tip decisively in favor of the application of New York law.

In re Citigroup Inc. Sec. Litig., 11 Civ. 3827, 2013 WL 6569875, at *10-11 (S.D.N.Y. Dec. 13, 2013) (citations omitted).

E. Choice of Law Analysis Does Not Depend on Which Law Is Most Favorable to Plaintiffs

Contrary to plaintiffs' suggestion (Ans. at 19-20), application of Washington law is not mandated by plaintiffs' belief that Washington law is more favorable to their case than New York law. In *Rice*, this Court applied Oregon rather than Washington law to preclude a Washington resident from asserting a personal injury claim, holding: "We follow a number of courts in other jurisdictions which have not been deterred from applying the statute of [a] nonforum state, even where such application would bar plaintiff's claim from accruing and where plaintiff's claim would not have been barred under forum law." *Id.*, 124 Wn.2d at 216, 875 P.2d at 1219; *see also Greenberg Traurig of N.Y., P.C. v. Moody*, 161 S.W.3d 56, 73-76 (Tex. Ct. App. 2004) (holding New York's Martin Act governed the state securities law claims of Texas investors).

Plaintiffs fare no better with the suggestion that application of New York law would deprive them of a remedy in this case. (Ans. at 19.) Plaintiffs have asserted a number of different claims and it does not

follow, as plaintiffs appear to contend, that the absence of a private right of action under New York's Martin Act would operate to bar any other claim against Tremont in this case. For example, Tremont has not challenged the Court of Appeals' determination sustaining the sufficiency of plaintiffs' negligent misrepresentation claim against it. Regardless of which law governs that claim, it will remain pending no matter what the outcome of this appeal. As this illustrates, application of New York law to resolve plaintiffs' state securities law claims would not impact the viability of plaintiffs' other claims against Tremont, much less ensure the demise of this lawsuit.

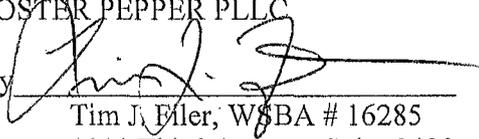
V. CONCLUSION

As shown above and in the Petition, the Court of Appeals disregarded controlling precedent and erroneously concluded that Washington rather than New York law governs plaintiffs' claims for alleged violations of state securities law, requiring reversal and reinstatement of the trial court's dismissal of those claims under New York law pursuant to CR 12(b)(6).

Respectfully submitted this 7th day of February, 2014.

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APPENDIX

Exhibit A

Restat 2d of Conflict of Laws, § 6

Restatement 2d, Conflict of Laws - Rule Sections > Chapter 1-

§ 6 Choice-Of-Law Principles

- (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.

COMMENTS & ILLUSTRATIONS

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

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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 further 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-

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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 expectations 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

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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 NOTES

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).

Cross Reference

ALR Annotations:

Duty of courts to follow decisions of other states, on questions of common law or unwritten law, in which the cause of action had its situs, 73 A.L.R. 897.

Digest System Key Numbers:

Action 17

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Exhibit B

Restat 2d of Conflict of Laws, § 145

Restatement 2d, Conflict of Laws - Rule Sections > Chapter 7- > Topic 1- > Title A-

§ 145 The General Principle

(1) The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties under the principles stated in § 6.

(2) Contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:

- (a) the place where the injury occurred,
- (b) the place where the conduct causing the injury occurred,
- (c) the domicil, residence, nationality, place of incorporation and place of business of the parties, and
- (d) the place where the relationship, if any, between the parties is centered.

These contacts are to be evaluated according to their relative importance with respect to the particular issue.

COMMENTS & ILLUSTRATIONS

Comment:

a. Scope of section. The rule of this Section states a principle applicable to all torts and to all issues in tort and, as a result, is cast in terms of great generality. This is made necessary by the great variety of torts and of issues in tort and by the present fluidity of the decisions and scholarly writings on choice of law in torts. Title B (§§ 146-155) deals with particular torts as to which it is possible to state rules of greater precision. Undoubtedly, this list will lengthen with increased experience. Title C (§§ 156-174) deals with particular issues in tort. It seems clear that the best way to bring precision into the field is by attempting to state special rules for particular torts and for particular issues in tort.

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 occurrence 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 policies underlying the particular field of law, such as torts or contracts, 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. Thus, the protection of the justified expectations of the parties, which is of extreme importance in such fields as contracts, property, wills and trusts, is of lesser importance in the field of torts. This is because persons who cause injury on non-privileged occasions, particularly when the injury is unintentionally caused, usually act without giving thought to the law that may be applied to determine the legal consequences of this conduct. Such persons have few, if any, justified expectations in the area of choice of law to protect, and as to them the protection of justified expectations can play little or no part in the decision of a choice of law question. Likewise, the values of certainty, predictability and uniformity of result are of lesser importance in torts than in areas where the parties and their lawyers are likely to give thought to the problem of the applicable law in planning their transactions. Finally, a number of policies, such as the deterrence of tortious conduct and the provision of compensation for the injured victim, underlie the

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tort field. These policies are likely to point in different directions in situations where the important elements of an occurrence are divided among two or more states.

Because of the relative insignificance of the above-mentioned factors in the tort area of choice of law, the remaining factors listed in § 6 assume greater importance. These remaining factors are the needs of the interstate and international systems, the relevant policies of the forum, the relevant policies of other interested states and particularly of the state with the dominant interest in the determination of the particular issue, and ease in the determination and application of the law to be applied.

c. Purpose of tort rule. The purpose sought to be achieved by the relevant tort rules of the interested states, and the relation of these states to the occurrence and the parties, are important factors to be considered in determining the state of most significant relationship. This is because the interest of a state in having its tort rule applied in the determination of a particular issue will depend upon the purpose sought to be achieved by that rule and by the relation of the state to the occurrence and the parties. If the primary purpose of the tort rule involved is to deter or punish misconduct, as may be true of rules permitting the recovery of damages for alienation of affections and criminal conversation, the state where the conduct took place may be the state of dominant interest and thus that of most significant relationship (see § 154, Comment *c*). On the other hand, when the tort rule is designed primarily to compensate the victim for his injuries, the state where the injury occurred, which is often the state where the plaintiff resides, may have the greater interest in the matter. This factor must not be overemphasized, however. To some extent, at least, every tort rule is designed both to deter other wrongdoers and to compensate the injured person. Undoubtedly, the relative weight of these two objectives varies somewhat from rule to rule, and in the case of a given rule it will frequently be difficult to tell which of these objectives is the more important.

A rule which exempts the actor from liability for harmful conduct is entitled to the same consideration in the choice-of-law process as is a rule which imposes liability. Frequently, however, it will be more difficult to discern the purpose of a rule denying liability than of a rule which imposes it. Take, for example, a statute which abolishes the right of action for alienation of affections. Such a statute may have been designed only to spare the local courts from the burden of having to hear such actions. If so, the statute should only be applied to bar actions brought in the state of its enactment. On the other hand, the statute may have had as its sole, or alternative, purpose the protection of defendants against being harassed by such actions. If so, there would be a basis for applying the statute to bar an action brought outside the state of its enactment if the complained-of conduct had taken place in that state and particularly if, in addition, the defendant had been domiciled there.

Frequently, it will be possible to decide a question of choice of law in tort without paying deliberate attention to the purpose sought to be achieved by the relevant tort 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 a simple motor accident case that occurred outside the state of the forum, 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's operation of the vehicle was negligent -- 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.

Experience and analysis have shown that certain issues that recur in tort cases are most significantly related to states with which they have particular connections or contacts. So, for example, a state has an obvious interest in regulating the conduct of persons within its territory and in providing redress for injuries that occurred there. Thus, subject only to rare exceptions, the local law of the state where conduct and injury occurred will be applied to determine whether the actor satisfied minimum standards of acceptable conduct and whether the interest affected by the actor's conduct was entitled to legal protection (see §§ 146-147).

On the other hand, the local law of the state where the parties are domiciled, rather than the local law of the state of conduct and injury, may be applied to determine whether one party is immune from tort liability to the other or may be held liable to the other only for injuries resulting from intentional conduct or from some aggravated form of negligence, or conversely, whether one party owes the other a higher standard of care than would be required in the circumstances of the case by the local law of the state where conduct and injury occurred. An example is the issue of intra

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-family immunity, which, as stated in § 169, is usually determined by the local law of the state of the spouses' common domicil. Likewise, the circumstances under which a guest passenger has a right of action against the driver of an automobile for injuries suffered as a result of the latter's negligence may be determined by the local law of their common domicil, if at least this is the state from which they departed on their trip and that to which they intended to return, rather than by the local law of the state where the injury occurred.

Again the state where the conduct and injury occurred will not necessarily be the state that is primarily concerned with the issue whether tort claims arising from the injury survive the death of the tortfeasor. So when conduct and injury occur in state X but both the plaintiff and the defendant are domiciled in state Y, it would seem that, ordinarily at least, Y would have the greater interest in the issue of survival and that its law should control (see § 167, Comment c). Similarly, whether a charitable corporation can successfully assert the defense of charitable immunity may be determined by the local law of the state where the plaintiff is domiciled and the defendant incorporated rather than by the local law of the state where conduct and injury occurred (see § 168, Comment b). By way of further example, it would seem that the state where all interested persons are domiciled will, usually at least, have the greatest interest in determining the extent to which each shall share in a tort recovery. So it may be that questions relating to the distribution between spouses of a recovery for an injury to one of the spouses should be determined by the local law of their domicil (cf. § 166, Comment b).

Undoubtedly, future cases will provide the basis for constructing special rules for still other issues of choice of law.

Comment on Subsection (2):

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

The place where injury occurred. In the case of personal injuries or of injuries to tangible things, the place where the injury occurred is a contact that, as to most issues, plays an important role in the selection of the state of the applicable law (see §§ 146-147). This contact likewise plays an important role in the selection of the state of the applicable law in the case of other kinds of torts, provided that the injury occurred in a single, clearly ascertainable, state. This is so for the reason among others that persons who cause injury in a state should not ordinarily escape liabilities imposed by the local law of that state on account of the injury. So in the case of false imprisonment, the local law of the state where the plaintiff was imprisoned will usually be applied. Likewise, when a person in state X writes a letter about the plaintiff which is received by a person in state Y, the local law of Y, the state where the publication occurred, will govern most issues involving the tort, unless the contacts which some other state has with the occurrence and the parties are sufficient to make that other state the state which, with respect to the particular issue, has the most significant relationship to the occurrence and the parties (see § 149).

Situations do arise, however, where the place of injury will not play an important role in the selection of the state of the applicable law. This will be so, for example, when the place of injury can be said to be fortuitous or when for other reasons it bears little relation to the occurrence and the parties with respect to the particular issue (see § 146, Comments d-e). This will also be so when, such as in the case of fraud and misrepresentation (see § 148), there may be little reason in logic or persuasiveness to say that one state rather than another is the place of injury, or when, such as in the case of multistate defamation (see § 150), injury has occurred in two or more states. Situations may also arise where the defendant had little, or no, reason to foresee that his act would result in injury in the particular state. Such lack of foreseeability on the part of the defendant is a factor that will militate against selection of the state of injury as the state of the applicable law. Indeed, application of the local law of the state of injury in such circumstances might on occasion raise jurisdictional questions (see § 9, Comment f).

The place where conduct occurred. When the injury occurred in a single, clearly ascertainable state and when the conduct which caused the injury also occurred there, that state will usually be the state of the applicable law with respect to most issues involving the tort. This is particularly likely to be so with respect to issues involving standards of conduct, since the state of conduct and injury will have a natural concern in the determination of such issues.

Choice of the applicable law becomes more difficult in situations where the defendant's conduct and the resulting injury occurred in different states. When the injury occurred in two or more states, or when the place of injury cannot be ascertained or is fortuitous and, with respect to the particular issue, bears little relation to the occurrence and

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the parties, the place where the defendant's conduct occurred will usually be given particular weight in determining the state of the applicable law. For example, the place where the conduct occurred is given particular weight in the case of torts involving interference with a marriage relationship (see § 154) or unfair competition (see Comment *f*), since in the case of such torts there is often no one clearly demonstrable place of injury. Likewise, when the primary purpose of the tort rule involved is to deter or punish misconduct, the place where the conduct occurred has peculiar significance (see Comment *c*). And the same is true when the conduct was required or privileged by the local law of the state where it took place (see § 163, Comment *a*).

The place where the defendant's conduct occurred is of less significance in situations where, such as in the case of multistate defamation (see § 150), a potential defendant might choose to conduct his activities in a state whose tort rules are favorable to him.

The domicil, residence, nationality, place of incorporation and place of business of the parties. These are all places of enduring relationship to the parties. Their relative importance varies with the nature of the interest affected. When the interest affected is a personal one such as a person's interest in his reputation, or in his right of privacy or in the affections of his wife, domicil, residence and nationality are of greater importance than if the interest is a business or financial one, such as in the case of unfair competition, interference with contractual relations or trade disparagement. In these latter instances, the place of business is the more important contact. 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 place.

These contacts are of importance in situations where injury occurs in two or more states. So the place of the plaintiff's domicil, or on occasion his principal place of business, is the single most important contact for determining the state of the applicable law as to most issues in situations involving the multistate publication of matter that injures plaintiff's reputation (see § 150) or causes him financial injury (see § 151) or invades his right of privacy (see § 153).

In the case of other torts, the importance of these contacts depends largely upon the extent to which they are grouped with other contacts. The fact, for example, that one of the parties is domiciled or does business in a given state will usually carry little weight of itself. On the other hand, the fact that the domicil and place of business of all parties are grouped in a single state is an important factor to be considered in determining the state of the applicable law. The state where these contacts are grouped is particularly likely to be the state of the applicable law if either the defendant's conduct or the plaintiff's injury occurred there. This state may also be the state of the applicable law when conduct and injury occurred in a place that is fortuitous and bears little relation to the occurrence and the parties (see § 146, Comments *d-e*).

The importance of those contacts will frequently depend upon the particular issue involved (see Comment *d*).

The place where the relationship, if any, between the parties is centered. When there is a relationship between the plaintiff and the defendant and when the injury was caused by an act done in the course of the relationship, the place where the relationship is centered is another contact to be considered. So when the plaintiff is injured while traveling on a train or while riding as a guest passenger in an automobile, the state where his relationship to the railroad or to the driver of the automobile is centered may be the state of the applicable law. This is particularly likely to be the case if other important contacts, such as the place of injury or the place of conduct or the domicil or place of business of the parties, are also located in the state (see, for example, § 146, Comment *e* and § 147, Comment *e*). On rare occasions, the place where the relationship is centered may be the most important contact of all with respect to most issues. A possible example is where the plaintiff in state X purchases a train ticket from the defendant to travel from one city in X to another city in X, but is injured while the train is passing for a short distance through state Y. Here X local law, rather than the local law of Y, may be held to govern the rights and liabilities of the parties.

Illustrations:

1. A and B are both domiciled in state X. A accepts B's invitation to accompany him as his guest on an automobile trip which is to start in X, go through several neighboring states and then end in X. B is insured against liability by an X insurance company. While in state Y, a neighboring state, B negligently drives the automobile off the road and A is injured. A brings suit to recover for his injuries in a court of state Z. B would not be liable to A under Y local law, since a Y statute provides that a guest passenger shall have no right of action against his host for negligently-caused injuries. B would be liable to A, however, under X local law. 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

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interests of X would be furthered by application of the X rule if, as is probably the case, one purpose of this rule is to protect X passengers against negligent injury by X hosts. Whether the interests of Y would be furthered by application of the Y rule is more uncertain. If the only purpose of the Y rule is to protect Y insurance companies against collusion between host and guest, Y interests would not be furthered by application of the Y rule since an X insurance company is involved. In such a case, the Z court should permit A to recover against B by application of X local law. On the other hand, Y interests would presumably be furthered by application of the Y rule if at least one purpose of this rule is to protect hosts, while in Y, against the ingratitude of their guests. Among the questions for the Z court to determine in such a case would be whether X's interest in the application of its rule outweighs the countervailing interest of Y. Factors which would support an affirmative answer to this question are that A and B are both domiciled in X and that the relationship between them was centered in X. Other factors which would support application of the X rule are that the trip began and was to end in X and that it could be deemed fortuitous that the accident occurred in Y rather than in some other state. If it were to be found that a Y court would not have applied its rule to the facts of the present case, the arguments for applying the X rule would be even stronger, for it would then appear that, even in the eyes of the Y court, Y interests were not sufficiently involved to require application of the Y rule (see § 8, Comment *k*).

2. Same facts as in Illustration 1 except that the accident would not have occurred if the automobile had been equipped with a safety device required by Y local law, but not by the local law of X, and the question is whether B should be held liable to A as a result. In this case, Y's interests would be furthered by application of its rule since Y is clearly concerned with what are standards of acceptable conduct in Y. Among the other factors which would support application by the Z court of the Y rule in order to hold B liable are that conduct and injury occurred in Y and that Y has an obvious interest in the application of its rule. If it were to be found that an X court would have applied the Y rule to the facts of the present case, the arguments 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 relevant X rule (see § 8, Comment *k*).

Comment:

f. The tort involved. The relative importance of the contacts mentioned above varies somewhat with the nature of the tort involved. Thus, the place of injury is of particular importance in the case of personal injuries and of injuries to tangible things (see §§ 146-147). The same is true in the case of false imprisonment and of malicious prosecution and abuse of process (see § 155). On the other hand, the place of injury is less significant in the case of fraudulent misrepresentations (see § 148) and of such unfair competition as consists of false advertising and the misappropriation of trade values. The injury suffered through false advertising is the loss of customers or of trade. Such customers or trade will frequently be lost in two or more states. The effect of the loss, which is pecuniary in its nature, will normally be felt most severely at the plaintiff's headquarters or principal place of business. But this place may have only a slight relationship to the defendant's activities and to the plaintiff's loss of customers or trade. The situation is essentially the same when misappropriation of the plaintiff's trade values is involved, except that the plaintiff may have suffered no pecuniary loss but the defendant rather may have obtained an unfair profit. For all these reasons, the place of injury does not play so important a role for choice-of-law purposes in the case of false advertising and the misappropriation of trade values as in the case of other kinds of torts. Instead, the principal location of the defendant's conduct is the contact that will usually be given the greatest weight in determining the state whose local law determines the rights and liabilities that arise from false advertising and the misappropriation of trade values.

The principal location of the defendant's conduct is also the single most important contact in the case of interference with a marriage relationship (see § 154). In situations involving the multistate publication of matter that injures the plaintiff's reputation (see § 150) or causes him financial injury (see § 151) or invades his right of privacy (see § 153), the place of the plaintiff's domicile, or on occasion his principal place of business, is the single most important contact for determining the state of the applicable law.

g. Recovery on some theory other than tort. A plaintiff who cannot obtain recovery in tort under the law selected by application of the rule of this Section may sometimes obtain application of a more favorable law by relying upon some other basis of liability. Thus, the plaintiff may have the basis for a claim that the defendant is liable to him for his injuries on the ground of breach of contract. If so, the applicable law would be that selected by application of the rules of §§ 187-188. Conversely, a defendant who would be liable under the law selected by application of the rule of this Section may on occasion be able to escape liability because of some provision in a contract. A relationship of master and servant, carrier and passenger or vendor and vendee may provide a basis for a contention that the case should be characterized as one of contract rather than tort. In some situations, the same result will be reached irrespective of whether the problem is characterized as one of tort or of contract. As to characterization, see § 7.

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h. Reference is to "local law" of selected state. 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 (see § 4). Values of certainty of result and of ease of application dictate that the forum should apply the local law of the selected state and not concern itself with the complications that might arise if that state's choice-of-law rules were applied. There is also no basis for supposing that fairness requires the forum to apply the choice-of-law rules of the selected state. To the extent that they may give thought to the possible consequences before engaging in conduct which may be tortious, persons would probably expect that the local law of the state selected by application of the present rule would be applied.

On the other hand, in judging a state's interest in the application of one of its local law rules, the forum should concern itself with the question whether the courts of that state would have applied this rule in the decision of the case. The fact that these courts would have applied this rule may indicate that an important interest of that state would be served if the rule were applied by the forum. Conversely, the fact that these courts would not have applied this rule may indicate that no important interest of that state would be infringed if the rule were not applied by the forum (see § 8, Comment *k*). It should be reiterated that in the torts area the forum will not apply the choice-of-law rules of another state. The forum will consult these rules, however, for whatever light these rules may shed upon the extent of the other state's interest in the application of its relevant local law rule.

Illustration:

3. In state X, A shoots at a bird and hits B, who is standing in state Y. B, who is domiciled in Y, brings suit against A in state Z. If the Z court determines that Y is the state of most significant relationship, the Z court will apply Y local law. In determining whether Y is the state of most significant relationship, the Z court may consider whether the Y courts would have applied their own local law or the local law of another state in deciding the particular issue.

Comment:

i. When rule of two or more states is the same. When certain contacts involving a tort are located in two or more states with identical local law rules on the issue in question, the case will be treated for choice-of-law purposes as if these contacts were grouped in a single state.

Illustration:

4. By conduct in state X, A injures B in state Y. X and Y have the same local law rules with respect to liability in tort for causing personal injuries. The case will be treated for the purposes of this Section as if conduct and injury had taken place in one state.

REPORTER'S NOTES

The rule of this Section was cited and applied in Schwartz v. Schwartz, 447 P.2d 254 (Ariz. 1968) (as contained in Tent. Draft, No. 9, 1964); Mitchell v. Craft, 211 So.2d 509 (Miss. 1968); Kennedy v. Dixon, 439 S.W.2d 173 (Mo. 1969); Brown v. Church of the Holy Name of Jesus, R.I., 252 A.2d 176 (1969).

Comments b-d: The importance of the precise issue in the choice of the applicable law is made clear by Brandle v. General Tire and Rubber Company, 408 F.2d 116 (4th Cir. 1969); Gaither v. Myers, 404 F.2d 216 (D.C. Cir. 1968); Manos v. Trans World Air Lines, Inc., 295 F.Supp. 1170 (N.D. Ill. 1969); Satchwill v. Vollrath Company, 293 F.Supp. 533 (E.D. Wis. 1968); Reich v. Purcell, 67 Cal.2d 551, 63 Cal. Rptr. 31, 432 P.2d 727 (1967); Abendschein v. Farrell, 162 N.W.2d 165 (Mich. App. 1968); Farber v. Smolack, 20 N.Y.2d 198, 229 N.E.2d 36 (1967); James v. Powell, 19 N.Y.2d 249, 225 N.E.2d 741 (1967) (two different issues in tort determined by the local law of two different states); Macey v. Rozbicki, 18 N.Y.2d 289, 221 N.E.2d 380 (1966); Babcock v. Jackson, 12 N.Y.2d 473, 191 N.E.2d 279 (1963); Dym v. Gordon, 16 N.Y.2d 120, 209 N.E.2d 792 (1965); Long v. Pan American World Airways, Inc., 16 N.Y.2d 337, 213 N.E.2d 796 (1965); Kilberg v. Northeast Airlines, Inc., 9 N.Y.2d 34, 172 N.E.2d 526 (1961); Williams v. Rawlings Truck Line, Inc., 357 F.2d 581 (D.C. Cir. 1965); Tramontana v. S. A. Empresa de Viacao Aerea Rio Grandense, 350 F.2d 468 (D.C. Cir. 1965), cert. den. 383 U.S. 943 (1966) (quoting rule as stated in Tentative Draft No. 9); Seguros Tepeyac, S.A. Compania Mexicana v. Bostrom, 347 F.2d 168 (5th Cir. 1965); Watts v. Pioneer Corn Co., 342 F.2d 617 (7th Cir. 1965); Gianni v. Fort Wayne Air Service, 342 F.2d 621 (7th Cir. 1965); Fabricius v. Horgen, 257 Iowa 268, 132 N.W.2d 410 (1965); Mellk v. Sarahson, 49 N.J. 226, 229 A.2d 625 (1967); Griffith v. United Air Lines, 416 Pa. 1, 203 A.2d 796 (1964); Woodward v. Stewart, R.I., 243 A.2d 917 (1968); Marmon v. Mustang Aviation, Inc., Tex., 430 S.W.2d 182 (1968) (dissenting opinion); Wilcox v. Wilcox, 26 Wis.2d 617, 133 N.W.2d 408 (1965). See also the authorities cited in the Reporter's Note to § 146.

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The needs of the international and interstate systems were explicitly considered in Romero v. International Terminal Operating Co., 358 U.S. 354, 382-383 (1959) ("we must apply those principles of choice of law that are consonant with the needs of a general federal maritime law and with due recognition of our self-regarding respect for the relevant interests of foreign nations in the regulation of maritime commerce as part of the legitimate concern of the international community"); Lauritzen v. Larsen, 345 U.S. 571, 582 (1953) ("in dealing with international commerce we cannot be unmindful of the necessity for mutual forbearance if retaliations are to be avoided"); Tramontana v. S. A. Empresa de Viacao Aerea Rio Grandense, supra; Dym v. Gordon, supra; Kilberg v. Northeast Airlines, Inc., supra.

Cases emphasizing the importance of applying the local law of the state which has the dominant interest in the decision of the particular issue include those cited above and Armiger v. Real S.A. Transportes Aereos, 377 F.2d 943 (D.C. Cir. 1967); McClure v. United States Lines Company, 368 F.2d 197 (4th Cir. 1966); Bowles v. Zimmer Manufacturing Company, 277 F.2d 868 (7th Cir. 1960); Erazo v. M/V Ciudad De Neiva, 270 F.Supp. 211 (D.Md. 1967); Gordon v. Parker, 83 F.Supp. 40 (D.Mass. 1949), aff'd 178 F.2d 888 (1st Cir. 1949); Grant v. McAuliffe, 41 Cal.2d 859, 264 P.2d 944 (1953); Graham v. General U.S. Grant Post No. 2665, 239 N.E.2d 856 (Ill.App. 1968) (quoting and applying rule as stated in § 379 of Tent. Draft No. 9; 1964); rev. on other grounds, 43 Ill.2d 1, 248 N.E.2d 657 (1969); Fuerste v. Bemis, Iowa, 156 N.W.2d 831 (1968); Johnson v. St. Paul Mercury Insurance Co., 218 So.2d 375 (La.App. 1969) quoting and applying rule as stated in § 379 of Tent. Draft No. 9, 1964); Wessling v. Paris, 417 S.W.2d 259 (Ky. 1967); Kopp v. Rechtzigel, 273 Minn. 441, 141 N.W.2d 526 (1966); Schmidt v. Driscoll Hotel, Inc., 249 Minn. 376, 82 N.W.2d 365 (1957); Casey v. Manson Construction and Engineering Co., 428 P.2d 898 (Ore. 1967) (quoting and applying rule as stated in Tentative Draft No. 9, 1964).

See also Clark v. Clark, 107 N.H. 351, 222 A.2d 205 (1966); Thigpen v. Greyhound Lines, Inc., 110 Ohio App.2d 179, 229 N.E.2d 107 (1967); Heath v. Zellmer, 35 Wis.2d 578, 151 N.W.2d 664 (1967).

Compare Arnett v. Thompson, 433 S.W.2d 109 (Ky. 1968) (Kentucky local law will be applied whenever permissible); Layne v. Layne, 433 S.W.2d 116 (Ky. 1968) (same).

Comment c: Cases emphasizing the importance in the choice-of-law process of the purposes of the tort rules involved include those cited above. See also Cavers, *The Choice-of-Law Process* c. 2, 3, 5-7 (1965); Currie, *Selected Essays on the Conflict of Laws* (1963) (passim); Ehrenzweig, *The Place of Acting in Intentional Multistate Torts*, 36 Minn.L.Rev. 1 (1951); Morris, *The Proper Law of a Tort*, 64 Harv.L.Rev. 881 (1951); Rheinheim, *The Place of Wrong*, 19 Tulane L.Rev. 4 (1944); Weintraub, *A Method for Solving Conflicts Problems -- Torts*, 48 Cornell L.Q. 215 (1963).

Decisions involving injuries to intangible interests support the rule of this Section:

Defamation: Insull v. New York World-Telegram Corporation, 172 F.Supp. 615, 633 (N.D. Ill. 1959), aff'd, 273 F.2d 166 (7th Cir. 1959) (stating that the law governing defamation is the local law of the "state which bears the most substantial relationship to all communications to third parties in all states in which communication occurs"); Palmisano v. News Syndicate Co., Inc., 130 F.Supp. 17, 20 (S.D.N.Y. 1955) (where the court, in denying summary judgment under the local law of plaintiff's domicile, stated: "If the state of plaintiff's principal reputation is different from the state of his technical domicile, . . . and to make the case progressively stronger, the situs of the other contacts considered by legal writers are partially, primarily or wholly in the state of principal reputation, then the assumption implicit in the concept of domicile should give way to the facts."); Dale System v. General Teleradio, 105 F.Supp. 745, 749 (S.D.N.Y. 1952) (explaining the choice of the applicable law on the ground that "a grouping of the dominant contacts in this case points to the internal law of New York").

Injurious Falsehood: Kemart Corporation v. Printing Arts Research Lab., Inc., 269 F.2d 375, 392-393 (9th Cir. 1959), cert. den., 361 U.S. 893 (1959) (explaining the choice of the applicable law as follows: "It is clear from the above that the State of California is the state having the closest relationship to the parties involved in the present litigation and has contacts with the subject matter of the litigation concerning the publications of the charge of patent infringement . . . equal or superior to any other state. Thus it is only fitting and proper that the law of California should be the substantive law governing this litigation."); Nagoya Associates, Inc. v. Esquire, Inc., 191 F.Supp. 379 (S.D.N.Y. 1961) (refusing summary judgment under the local law of any state chosen in accordance with rigid choice-of-law rules on the ground that the applicable law may appear from facts shown at the trial).

Alienation of Affections and Loss of Consortium: Gordon v. Parker, 83 F.Supp. 40 (D.Mass. 1949), aff'd, 178 F.2d 888 (1st Cir. 1949) (applying the local law of the state where defendant acted rather than the local law of the state where plaintiff and his wife were domiciled, after weighing the relative interests of the two states); Conway v. Ogier,

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1150 Ohio App. 251, 184 N.E.2d 681 (1961); cf. Albert v. McGrath, 278 F.2d 16 (D.C.Cir.1960) applying the local law of the state of conduct; Orr v. Sassemann, 239 F.2d 182 (5th Cir. 1956) (same).

Negligent delay in issuing insurance policy: "[W]e find it most reasonable, in these circumstances, to avoid a rigid rule and to pursue instead a more flexible approach which would allow the court in each case to inquire which state has the most significant relationships with the events constituting the alleged tort and with the parties." Lowe's North Wilkesboro Hardware, Inc. v. Fidelity Mut. Life Ins. Co., 319 F.2d 469, 473 (4th Cir. 1963).

As to unfair competition, see Note, 39 Temp.L.Q. 449 (1966).

Illustration No. 1 is based on Babcock v. Jackson, 12 N.Y.2d 473, 191 N.E.2d 279 (1963).

In recent maritime death cases, the courts have refused to distinguish between admiralty and other kinds of cases for choice-of-law purposes, and have followed the approach of Babcock v. Jackson, supra. Scott v. Eastern Air Lines, Inc., 399 F.2d 14 (3d Cir. 1968); Thomas v. United Air Lines, 24 N.Y.2d 973 (1969). In earlier maritime cases the majority of courts applied the local law of the state where injury occurred to determine the rights and liabilities of the parties, Levinson v. Deupree, 345 U.S. 648 (1953); Skovgaard v. The Tungus, 358 U.S. 588 (1959); Hess v. United States, 361 U.S. 314 (1960); Harris v. United Air Lines, Inc., 275 F.Supp. 431 (S.D.Iowa 1967).

See generally Currie, The Choice Among State Laws in Maritime Death Cases, 21 Vand.L.Rev. 297 (1968).

Comment h: The courts, subject to a few rare exceptions, have not applied the renvoi doctrine in tort cases. The doctrine was expressly rejected in Haumschild v. Continental Casualty Co., 7 Wis.2d 130, 95 N.W.2d 814 (1959). Some support for the application of the renvoi doctrine in tort cases is furnished by Truath v. Northeast Airlines, Inc., Civil No. 149-256 S.D.N.Y.; Fouts v. Fawcett Publications, Inc., 116 F.Supp. 535 (D.Conn.1953); Hazlitt v. Fawcett Publications, Inc., 116 F.Supp. 538 (D.Conn.1953); cf. Richards v. United States, 369 U.S. 1 (1962) (application of Federal Tort Claims Act).

In support of what is said in the second paragraph of this comment, see Maffatone v. Woodson, 99 N.J.Super. 559, 240 A.2d 693 (1968).

Comment i: See Geehan v. Monahan, 257 F.Supp. 278 (E.D.Wis.1966); Carpenter, Recent Cases of Interest, 41 Chi.-B.Rec. 95 (1963); Leflar, True "False Conflicts", et Alia, 48 B.U.L.Rev. 164, 171-174 (1968).

The rule of this Section is approved in Moreland, Conflicts of Law -- Choice of Law in Torts -- A Critique, 56 Ky.L.J. 5 (1967). For criticisms of the rule, see Currie, Comments on Babcock v. Jackson, 63 Colum.L.Rev. 1233 (1963); Ehrenzweig, The 'Most Significant Relationship' in the Conflicts Law of Torts, 28 Law & Contemp.Prob. 700 (1963); Comment, The Second Conflicts Restatement of Torts: A Caveat, 51 Calif.L.Rev. 762 (1963). See Note, 54 Ky.L.J. 728 (1966) (suggesting that the local law of the place of injury should be applied except where that place is fortuitous).

Cross Reference

ALR Annotations:

Modern status of rule that substantive rights of parties to a tort action are governed by the law of the place of the wrong. 29 A.L.R.3d 603.

What law governs the right of a tortiously injured married woman to sue in her own name and the ownership of the cause of action. 97 A.L.R.2d 725.

Choice of law in application of automobile guest statutes. 95 A.L.R.2d 12.

What is place of tort causing personal injury or resultant damage or death, for purpose of principle of conflict of laws that law of place of tort governs. 77 A.L.R.2d 1266.

What law governs liability of manufacturer or seller for injury caused by product sold. 76 A.L.R.2d 130.

Conflict of laws with respect to the "single publication" rule as to defamation, invasion of privacy, or similar tort. 58 A.L.R.2d 650.

Conflict of laws as to survival or revival of wrongful death actions against estate or personal representative of wrongdoer. 17 A.L.R.2d 690.

Law of state where ticket was purchased, rather than law of state where accident occurred, as governing in action against carrier for death of passenger. 13 A.L.R.2d 650.

State or country deemed to be the place of tort causing personal injury or death, as regards principle that law of

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place of tort governs. 133 A.L.R. 260.

Right of personal representative appointed at the forum or in a jurisdiction where decedent was domiciled or where the tort occurred, to maintain action for death under foreign statute which provides that the action shall be brought by executor or administrator. 85 A.L.R. 1231, s. 162 A.L.R. 323.

Nature of differences between lex loci and lex fori which will sustain or defeat jurisdiction of a cause of action for death arising under the the law of another state or country, 77 A.L.R. 1311.

Power of court, in exercise of discretion, to refuse to entertain action for nonstatutory tort occurring in another state or country. 32 A.L.R. 6, s. 48 A.L.R.2d 800.

Extraterritorial operation of Workmen's Compensation Acts; conflict of laws. 28 A.L.R. 1345, s. 35 A.L.R. 1414, 45 A.L.R. 1234, 59 A.L.R. 735, 82 A.L.R. 709, 90 A.L.R. 119.

Applicability of state statutes and rules of law to actions under Federal Employers' Liability Act. 12 A.L.R. 693, s. 36 A.L.R. 917, 89 A.L.R. 693.

Digest System Key Numbers:

Automobiles 229 1/2

Negligence 103 1/2

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Exhibit C

Restat 2d of Conflict of Laws, § 148

Restatement 2d, Conflict of Laws - Rule Sections > Chapter 7- > Topic 1- > Title B-

§ 148 Fraud and Misrepresentation

(1) When the plaintiff has suffered pecuniary harm on account of his reliance on the defendant's false representations and when the plaintiff's action in reliance took place in the state where the false representations were made and received, the local law of this state determines the rights and liabilities of the parties unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 to the occurrence and the parties, in which event the local law of the other state will be applied.

(2) When the plaintiff's action in reliance took place in whole or in part in a state other than that where the false representations were made, the forum will consider such of the following contacts, among others, as may be present in the particular case in determining the state which, with respect to the particular issue, has the most significant relationship to the occurrence and the parties:

- (a) the place, or places, where the plaintiff acted in reliance upon the defendant's representations,
- (b) the place where the plaintiff received the representations,
- (c) the place where the defendant made the representations,
- (d) the domicile, residence, nationality, place of incorporation and place of business of the parties,
- (e) the place where a tangible thing which is the subject of the transaction between the parties was situated at the time, and
- (f) the place where the plaintiff is to render performance under a contract which he has been induced to enter by the false representations of the defendant.

COMMENTS & ILLUSTRATIONS

Comment:

a. Scope of section. The rule of this Section applies to actions brought to recover pecuniary damages suffered on account of false representations, whether fraudulent, negligent or innocent. In situations where the false representations result in physical injury to persons or to tangible things, the applicable law is selected by application of the rules of §§ 146 and 147. Whether the plaintiff has a right to restitution is determined by the law selected by application of the rule of § 221. As to the law governing the liability of a trustee for breach of trust, see §§ 271 and 279.

b. Rationale. The rule of this Section calls for application of the local law of the state selected on the basis of the stated contacts unless, with respect to the particular issue, some other state has a more significant relationship to the occurrence and the parties. Whether there is such another state will be determined in the light of the choice-of-law principles stated in § 6. In large part the answer to this question will depend upon whether some other state has a greater interest in the determination of the particular issue than the state selected on the basis of the stated contacts. The extent of the interest of each of the potentially interested states should be determined on the basis, among other things, of the purpose sought to be achieved by their relevant local law rules and of the particular issue involved (see § 145, Comments *c-e*). Particular issues are discussed in Title C (§§ 156-174).

c. Place of loss and place of defendant's conduct. As stated in Comment *a*, the rule of this Section is limited to situations where the harm suffered by the plaintiff is pecuniary in nature. This is the sort of harm that is normally suffered through reliance on false representations. Sometimes, plaintiff's reliance will consist in receiving from the defendant, or relinquishing to him, some tangible thing, as by way of purchase or sale. On other occasions, the plaintiff may be induced by defendant's representations to purchase goods from another in order to equip himself to render certain services to the defendant in return for an expected consideration that does not materialize. On still other occasions, plaintiff's initial reliance may consist of his entering into a contract, either with the defendant or with a third person, in which the plaintiff binds himself to take certain action. Plaintiff's reliance may also take the form of non-action in that plaintiff may refrain from taking action that he otherwise would have taken. In all of these situations, the plaintiff's loss ultimately consists in the fact that he either relinquished value he would otherwise have retained or else did not receive value he would otherwise have obtained.

When the loss is pecuniary in its nature, the place of loss is far more difficult to locate than when the damage consists of physical injury to persons or to tangible things. When the plaintiff's only action in reliance is the relinquish-

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ment of assets, whether tangible or intangible, to the defendant, the place of loss may be said with approximately equal persuasiveness to be either the place of relinquishment or the place where the plaintiff received the consideration for the relinquishment which turned out to be less than anticipated. When plaintiff's initial act of reliance is his entry into a contract by which he binds himself to relinquish assets, the place of loss may be considered to be either the place where the plaintiff entered into the contract or the place where he relinquished the assets pursuant to the terms of the contract, or finally the place where he received the consideration for the relinquishment. The place of loss may be even more difficult to locate when plaintiff relinquishes no assets to the defendant but binds himself by contract to embark upon a given course of action or when plaintiff's reliance simply takes the form of non-action. In part, because of the difficulties involved in its location, the place of loss does not play so important a role in the determination of the law governing actions for fraud and misrepresentation as does the place of injury in the case of injuries to persons or to tangible things.

The place where the defendant made his false representations, on the other hand, is as important a contact in the selection of the law governing actions for fraud and misrepresentation as is the place of the defendant's conduct in the case of injuries to persons or to tangible things. Under the rule of Subsection (1), when the false representations are made and received in the only state where the plaintiff relied on these representations by taking action, the local law of this state determines the rights and liabilities of the parties unless, with respect to the particular issue, some other state has a more significant relationship to the occurrence and the parties. In other situations, the forum will give consideration to such of the contacts mentioned in Subsection (2) as may be present in the particular case in selecting the state of most significant relationship.

The relative weight that will be given the various contacts is discussed in Comments *f-j*.

Comment on Subsection (1):

d. The rule of Subsection (1) covers situations where plaintiff's action in reliance is limited to the taking of action in the state where defendant's representations were made and received. The rule therefore does not apply when plaintiff's action in reliance takes place in two or more states, such as when he enters into a contract in one state and renders performance under the contract in another.

The state selected by application of the rule of Subsection (1) will usually be the state of dominant interest, since the two principal elements of the tort, namely, conduct and loss, occurred within its territory. The state will thus in the ordinary case have the dominant interest in regulating the defendant's conduct and in determining whether the plaintiff should receive compensation for his loss.

Situations, however, will arise where, although the defendant's false representations and the plaintiff's action in reliance occurred in the same state, some other state will be that of most significant relationship and therefore the state of the applicable law even with respect to such issues, as those discussed in §§ 156-166 and 172, which would usually be determined by the local law of the state of the plaintiff's reliance and of the defendant's conduct. A possible example of this sort is where A and B are both domiciled in state X and, by reason of A's fraudulent representations made to him in state Y, B signs in Y a long-term lease of land in X. As to issues that are less likely to be governed by the local law of the state of the plaintiff's reliance and of the defendant's conduct, see §§ 167-171 and 173-174.

Comment on Subsection (2):

e. In the situations dealt with in this Subsection, the forum will usually consider a number of contacts in determining which is the state of most significant relationship with respect to the particular issue. The more important of these contacts are considered below; their relative importance in a given case should be determined in the light of the choice-of-law principles stated in § 6 with emphasis upon the purpose sought to be achieved by the relevant tort rules of the potentially interested states, the particular issue and the tort involved.

f. *The place, or places, where the plaintiff acted in reliance upon the defendant's representations.* The plaintiff's reliance may take a variety of forms. He may rely by relinquishing assets, which may be tangible or intangible. The assets may be relinquished to the defendant or they may be relinquished to a third person, such as when the plaintiff makes expenditures to equip himself to render a stipulated service to the defendant. The assets may likewise be relinquished at one or more times in a single state or they may be relinquished in two or more states.

The plaintiff may rely in many other ways. He may rely by entering into a contract either with the defendant or with a third person. He may take other kinds of action, or he may do nothing at all, such as when he fails to take action in reliance on the defendant's representations.

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Plaintiff's action in reliance may take place entirely in one state or it may take place in two or more states, such as when he enters into a contract with the defendant in state X and then pursuant to the terms of the contract relinquishes assets in state Y. Plaintiff's action in reliance provides a more important contact when it is confined to a single state than when it is divided among two or more. When a major part of the action in reliance takes place in one state and a lesser part in another, the first state has a more important contact with the occurrence than does the latter.

When plaintiff's action in reliance is taken pursuant to the terms of an agreement made by the plaintiff with the defendant, or is otherwise of a sort contemplated by the defendant, the place of reliance is a more important contact than it is in other situations, such as where the plaintiff, without the knowledge of the defendant, purchases certain equipment from a third person in order to equip himself to render the services called for by his agreement with the defendant. The place where plaintiff takes action in reliance provides a more important contact when this place is stipulated in the agreement between plaintiff and defendant than when this is not the case.

g. The place where the plaintiff received the representations. This is the place where the representations were first communicated to the plaintiff. This place constitutes approximately as important a contact as does the place where the defendant made the representations. On the other hand, this place is not so important a contact as is the place where the plaintiff acted in reliance on the defendant's representations.

h. The place where the defendant made the false representations. This contact is as important as, and occupies a position wholly analogous to, the place of conduct that results in injury to persons or to tangible things (see §§ 146-147). The making of the representations provides a more important contact when the representations are made only in one state than when they are made in two or more. When a major part of the representations is made in one state and a lesser part in another, the first state has a more important contact with the occurrence than does the latter.

i. Other contacts. The plaintiff's domicile or residence, if he is a natural person, or the principal place of business, if plaintiff is a corporation, are contacts of substantial significance when the loss is pecuniary in its nature, as is true of the situations covered by the rule of this Section. This is so because a financial loss will usually be of greatest concern to the state with which the person suffering the loss has the closest relationship. When the fraud involves an individual plaintiff's business, the place of his business will usually be a more important contact than his domicile. The domicile, residence and place of business of the plaintiff are more important than are similar contacts on the part of the defendant. In the case of individuals, domicile and residence are more important contacts than nationality. In the case of corporations, the principal place of business is a more important contact than the place of incorporation.

When the subject of the transaction between the parties is a tangible thing, the place where the thing is situated at the time of the transaction is a contact of some importance provided, at least, that both parties were aware that the thing was situated in this place at that time. This contact is of particular importance when the subject of the transaction is land.

Another contact is the place where the plaintiff is to render performance under the contract which he has been induced to enter by the false representations of the defendant provided that this place can be identified and that at least the great bulk of plaintiff's performance is to take place in a single state.

j. The general approach. No definite rules as to the selection of the applicable law can be stated, except in the situation covered by Subsection (1). If any two of the above-mentioned contacts, apart from the defendant's domicile, state of incorporation or place of business, are located wholly in a single state, this will usually be the state of the applicable law with respect to most issues. So when the plaintiff acted in reliance upon the defendant's representations in a single state, this state will usually be the state of the applicable law, with respect to most issues, if (a) the defendant's representations were received by the plaintiff in this state, or (b) this state is the state of the plaintiff's domicile or principal place of business, or (c) this state is the situs of the land which constituted the subject of the transaction between the plaintiff and the defendant, or (d) this state is the place where the plaintiff was to render at least the great bulk of his performance under his contract with the defendant. The same would be true if any two of the other contacts mentioned immediately above were located in the state in question even though this state was not the place where the plaintiff received the representations.

k. As to recovery on some theory other than tort, see § 145, Comment *g*.

l. For reasons stated in § 145, Comment *h*, 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.

m. As to the situation where the local law rule of two or more states is the same, see § 145, Comment *i*.

REPORTER'S NOTES

See Gates v. P. F. Collier, Inc., 378 F.2d 888 (9th Cir. 1967) (quoting rule of § 379 of Tent. Draft No. 9, 1964).

Comment d: See Texas Tunneling Company v. City of Chattanooga, 204 F.Supp. 821 (E.D.Tenn.1962); Israel v. Alexander, 50 F.Supp. 1007 (S.D.N.Y.1942); Commonwealth Fuel Co. v. McNeil, 103 Conn. 390, 130 Atl. 794 (1925); Bradbury v. Central Vermont Ry., 299 Mass. 230, 12 N.E.2d 732 (1938).

Comment j: In the following cases the local law of the state in which plaintiff acted in reliance upon defendant's representations, and which had other contacts with the case, was held applicable although the representations were made elsewhere: Iasigi v. Brown, 17 How. (58 U.S.) 182 (1854) (state of applicable law was that of plaintiff's place of business); Doody v. John Sexton & Co., 411 F.2d 1119 (1st Cir. 1969) (state of applicable law was apparently that of plaintiff's domicile); Hablas v. Armour and Company, 270 F.2d 71 (8th Cir. 1959) (state of applicable law was apparently that of plaintiff's domicile; at least part of the misrepresentations complained of were made elsewhere); Smith v. New York Life Insurance Company, 208 F.Supp. 240 (S.D.Iowa 1962); (state of applicable law was that of plaintiff's domicile); Boulevard Airport, Inc. v. Consolidated Vultee Aircraft Corp., 85 F.Supp. 876 (E.D.Pa.1949) (state of applicable law was that of plaintiff's place of business); A. B. v. C. D., 36 F.Supp. 85 (E.D.Pa.1940) (state of applicable law was domicile of one of the parties); cf. Federated Capital Corp. v. Florida Capital Corp., 280 F.Supp. 301 (S.D.N.Y.1968) (application of local law of state of "greatest concern with the specific issue."); Geller v. Transamerica Corporation, 53 F.Supp. 625 (D.Del.1943), aff'd per curiam, 151 F.2d 534 (3d Cir. 1945) (domicil of parties and place where representations were made not appearing, the local law of the state where plaintiff acted in reliance and where he received the consideration for his action was applied). The local law of the state where plaintiff acted in reliance on what he believed to be the true state of facts has likewise been applied when defendant's wrongful conduct consisted of nondisclosure. Smyth Sales v. Petroleum Heat & Power Co., 128 F.2d 697 (3d Cir. 1942); Strand v. Librascope, Incorporated, 197 F.Supp. 743 (E.D.Mich.1961).

In Zinn v. Ex-Cell-O Corporation, 148 Cal.App.2d 56, 306 P.2d 1017 (1957), the local law of the state where the misrepresentations were made and where plaintiff did business was applied when plaintiff acted in reliance in that state as well as in another. Western Newspaper Union v. Woodward, 133 F.Supp. 17 (W.D.Mo.1955), reached the same result on closely similar facts, except that in this case the misrepresentations made at the plaintiff's place of business were confirmed by telephone from another state.

In Keeler v. Fred T. Ley & Co., 49 F.2d 872 (1st Cir. 1931), second appeal 65 F.2d 499 (1st Cir. 1933), the local law of New York, the situs of the land which was the subject of the transaction, was applied to an action for fraud against a Massachusetts corporation. The other contacts were not indicated.

Comment *l* is supported by A. B. v. C. D., supra.

The most comprehensive treatment of the subject is to be found in Note, Conflict of Laws in Multistate Fraud and Deceit, 3 Vand.L.Rev. 767 (1950).

Cross Reference

Digest System Key Numbers:

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Jan D. Howell certifies and states: On February 7, 2014, I caused to be served a true and correct copy of the following document on the following counsel of record at their address as stated by the method of service as indicated.

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EXECUTED at Seattle, Washington on February 7, 2014.



Jan Howell

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Attached for filing please find the Supplemental Brief of Tremont Group Holdings, Inc. and Tremont Partners, Inc..

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