

First Week
Second Week

Conflicts
Fall 2009
Professor Cooper

The text is Currie, Kay, Kramer & Roosevelt, CONFLICT OF LAWS: CASES—COMMENTS—QUESTIONS (Seventh Edition, 2006). This course will cover Chapter 1; Chapter 2, most of Sections 1-5 and Sections 6.D. and 6.E.; Chapter 3, Sections 1 and 2; selected parts of Chapter 4; most of Chapter 5; and limited parts of Chapter 6, Section 1. A few supplementary cases will be distributed later in the course. A course outline is attached. For references and background on conflicts issues, consult the attached list of Conflicts References. All handouts will be distributed exclusively electronically, on The West Educational Network (TWEN) at <lawschool.westlaw.com>. You are encouraged to submit comments or questions on TWEN or to Professor Cooper at <lcooper@umn.edu>. You are also welcome to visit me in my office, Room 432, or to make an appointment by e-mail to see me there.

Examination and Course Grades

Your grade in the course will be based on your performance on the final examination. Grades may be increased by one level (such as from a B+ to an A-) for regular positive contributions to class discussion. The final examination will be open book to the extent that you will be able to bring into the examination room your Currie, Kay, Kramer & Roosevelt textbook; assignment sheets; PowerPoint slides, flow charts, or other class materials downloaded from TWEN; and any outline prepared this semester to which you contributed at least one-quarter of the material. You may not bring into the examination room any other materials including commercial outlines, books, or outlines prepared in whole or in part by students in a previous semester.

Attendance

In accordance with the Law School's Rules of Scholastic Requirements, Rule 1.1, regular class attendance is required. If, after a warning about excessive absences, the pattern continues, a student's grade may be lowered or the student may be required to drop the class.

Prohibition of Recording — Use of Electronics in the Classroom

You are not permitted to make a recording of a class without the express permission of the instructor. Please note that law school policies prohibit your use of computers or other electronic media for any non-class-related use while class is in session. Such conduct is distracting and disrespectful to members of the class and to me. If you see others violating these rules, please ask them to stop and if the conduct nevertheless persists please let me know.

Special Honor Code Rule Regarding PowerPoint Slides

It is an Honor Code violation to have on your computer or to view in hardcopy or electronic form PowerPoint slides for the Labor Law class that were distributed in a prior semester.

The West Educational Network and E-Mail

A web site has been established for communications regarding this class at <http://lawschool.westlaw.com>. You will need your Westlaw password in order to register to use the web site. You will also need an additional password specific to this class that I will provide to you in class. Assignment sheets will be available for downloading from the web site. Overhead slides used in class will also be posted on TWEN only after class discussion of the topic to which the slides pertain. From time to time, I will also post supplementary materials of interest on the web site that may or may not be mentioned in class. You are encouraged to post material on the web site as well, such as questions or comments about readings, topics discussed in class, conflicts issues in the news; or responses to the postings of other class members. The web site is designed to permit you to make postings anonymously and that privilege will be retained so long as it is not abused. I retain the right to delete postings from the web site for objectionable content or language. The web site is also a very important means for me to find out what material discussed in class may need further explanation. It is entirely appropriate, for example, to post a message that says, "Would you please go over ____ again?"

Whenever possible, I prefer that electronic communications regarding the class be done on TWEN rather than e-mail so that the class as a whole can benefit from the discussion. If you have a personal communication, such as scheduling a time for an appointment or explaining an absence from class, feel free to use e-mail. My e-mail address is lcooper@umn.edu. In addition to your own e-mail provider, you can also use TWEN to send e-mail to me by clicking on my e-mail address wherever it appears at the web site.

Class Schedule

Professional responsibilities require my attendance at three out-of-town conferences this semester, all held at the end of the week. In lieu of my requested Monday through Wednesday schedule, the Associate Dean scheduled this course for four days a week to avoid having to schedule a significant number of make-up classes. The following schedule avoids consecutive four-day weeks. No classes will be held Thanksgiving week.

September 2009						
S	M	T	W	T	F	S
		1	2	3	4	5
6	7	8 Class	9 Class	10 Class	11 Class	12
13	14	15 Class	16 Class	17 Class	18	19
20	21	22 Class	23 Class	24 Class	25 Class	26
27	28	29 Class	30 Class			

October 2009						
S	M	T	W	T	F	S
				1	2	3
4	5	6 Class	7 Class	8	9	10
11	12	13 Class	14 Class	15 Class	16 Class	17
18	19	20 Class	21 Class	22 Class	23	24
25	26	27 Class	28 Class	29 Class	30 Class	31

November 2009						
S	M	T	W	T	F	S
1	2	3 Class	4 Class	5	6	7
8	9	10 Class	11 Class	12 Class	13	14
15	16	17 Class	18 Class	19 Class	20	21
22	23	24	25	26	27	28
29	30					

December 2009						
S	M	T	W	T	F	S
		1 Class	2 Class	3 Class	4	5
6	7	8 Class	9 Class	10	11	12
13	14	15	16	17	18	19
20	21 Final Exam	22	23	24	25	26
27	28	29	30	31		

Questions and Problems for Class Discussion

Tuesday, September 8: Introduction

1. Read pp. 2-6 (Short History of Choice of Law).

2. A Minnesotan, Brian Grewe, attending college in Wisconsin, contracted in Wisconsin with The Southwestern Company, a corporation incorporated in and having its principal place of business in Tennessee, to work for the summer selling the Company's books in Texas. The Company required its Texas sales staff to work through the day on August 19th and then meet with other staff working in Louisiana to form a carpool so as to arrive in Tennessee for a meeting that was to start at 8 a.m. on August 20th. While traveling on the interstate highway in Mississippi, the driver of the car in which Grewe was riding fell asleep. The car went off the road at high speed and collided with a tree. Grewe, asleep in the back seat, was thrown from the car and suffered serious spinal cord damage resulting in paraplegia. The assets of the owner and driver of the car are insufficient to compensate Grewe for his extensive injuries.

(a) Grewe retains an attorney in Minnesota to sue Southwestern. The attorney has to decide whether the lawsuit can be filed in Minnesota, Wisconsin, Texas, Tennessee or Mississippi. Are forums in all of these states available for plaintiff's lawsuit? What legal doctrine(s) must you consider to decide this question?

(b) Assuming that the lawsuit can be filed in one or more states, does Grewe's attorney have the choice of filing the case in state court or federal court? Why or why not? What legal doctrine(s) must you consider to decide this question?

(c) Assume that a Minnesota statute says that actions arising out of automobile accidents that occur outside the state of Minnesota may not be brought in the courts of Minnesota. Would any legal doctrine arguably make such a statute unlawful?

(d) Assuming that the attorney is able to file the action in more than one state, the attorney will want to assess, in addition to the relative convenience of litigation in each of the states, whether the substantive law that would be applied to the case would be more favorable in one state than the other. If the action is brought in Minnesota, will a Minnesota court necessarily apply the substantive law of Minnesota on the question of whether Southwestern's direction to appear in Tennessee early in the morning after a long day of work in Texas constitutes negligence? If the action is brought in Mississippi, will the Mississippi court necessarily apply the substantive law of Mississippi on the negligence issue? What body of legal doctrine will the various states use to decide what substantive law to apply? Would these courts necessarily apply the same state's law to the question of statute of limitations as they would to questions of negligence?

(e) Would your answers to the questions immediately above be different if the lawsuits were pending in federal courts rather than state courts? What legal doctrine(s) would you consider to answer that question?

(f) Assume that the attorney decides to file the lawsuit in a Minnesota state court, that the Minnesota district court applies the *substantive law of Mississippi* and dismisses the case on the ground that under Mississippi law the actions of Southwestern do not constitute negligence. Plaintiff's attorney appeals to the Minnesota Supreme Court, but that court affirms the dismissal. The attorney files a petition for certiorari in the United States Supreme Court on the ground that the Minnesota decision violates the United States Constitution. Are there any constitutional doctrines that would be implicated by a state's decision to apply the substantive law of one state rather than that of another?

(g) Assume again that the attorney filed the lawsuit in Minnesota, but that in this instance the Minnesota court applied the *substantive law of Minnesota* and rendered a judgment in favor of the plaintiff. The plaintiff was unable to collect on the judgment against Southwestern in Minnesota, but he discovered that Southwestern had substantial assets in Tennessee. Plaintiff's attorney brings suit in Tennessee on the Minnesota judgment in order to collect the amount of the judgment from Southwestern's assets in Tennessee. Can the Tennessee

court refuse to enforce the Minnesota judgment on the ground that the result reached by the Minnesota court is contrary to the law of Tennessee? To what legal doctrine(s) must you refer in order to answer this question?

Wednesday, September 9: Torts under the First Restatement

1. Read pp. 6-17 (*Carroll* and Notes).
2. Why does the Alabama court in *Carroll* apply Mississippi law to decide a case involving an Alabama plaintiff employed under an Alabama contract by an Alabama defendant arising from an act that occurred in Alabama?
3. The text in note 1 on p. 14 indicates that, under the 1934 Restatement, tort actions are governed by the law of the “place of wrong.” Where was the place of wrong in *Carroll*? Why? If one is to have a rule based on the place of wrong, is there some rationale for choosing the place of injury rather than the place of negligence? Should this question be decided in reliance upon principles of tort law or principles of conflicts?
4. Consider problems (5) (a)-(c) on pp. 15-16.
5. Assume that South Carolina uses the First Restatement to resolve choice of law problems in tort. Purnell is treated in South Carolina by Defendant Physician. Physician determines that Purnell is well enough to travel home to Pennsylvania for the holidays. The Physician prescribes an anti-coagulant medication for Purnell to take until he returns for his next appointment with the Physician. Purnell begins to experience pain in Pennsylvania. He starts to drive back to South Carolina, driving through Maryland and Virginia. Purnell is admitted to a hospital in North Carolina, where he dies. In a wrongful death action for medical malpractice, brought in South Carolina, against the South Carolina physician, which alleges that Purnell’s death was due to the physician’s failure adequately to monitor the dosage of the anti-coagulant, by which state’s law will tort issues be determined? Does the result to which you are directed by the First Restatement make sense in this case? Does it matter whether the issue is whether the physician’s conduct constituted malpractice or whether the decedent’s contributory negligence (in failing precisely to follow the physician’s instructions) bars the cause of action?
6. Does the court in *Carroll* reach the right result? What considerations are you taking into account in ascertaining what is the right result?
7. Of what utility in resolving the *Carroll* choice of law problem was Section 2590 of the Alabama Code (discussed at p. 7)? Are there circumstances under which a statute can be useful in resolution of a choice of law problem?
8. What are the advantages of a choice of law system that selects the jurisdiction whose law is to govern without reference to the content of that law? What are the disadvantages of such a “jurisdiction-selecting” rule?

Thursday, September 10: Contracts under the First Restatement

1. Read pp. 17-25 (*Milliken*).
2. Work problems 4, 5 and 7 on pp. 24-25. In problem 7(a), assume that Peters sues Davis in Indiana for breach of contract and Indiana follows the First Restatement. Consider problems 8 and 9 on p. 25.
3. What was the relevance, if any, to the *Milliken* decision, of the Massachusetts legislature's change in the rights of married women subsequent to the contract, but prior to the decision of the Supreme Court?
4. Are the advantages of a jurisdiction-selecting rule that were noted in discussion of tort problems present in resolving contracts problems? Why or why not?

Friday, September 11: Property under the First Restatement

1. Read pp. 26-30 (*Barrie*).
2. State the facts and procedural history of the *Barrie* case. Consider the statute that is quoted beginning in the third paragraph on p. 27 in the *Barrie* case. Is it a choice of law statute? The court concluded that the statute did not resolve the case before it. Do you agree?
3. It might be possible for all choice-of-law problems to be resolved by statutes, but choice-of-law statutes are relatively uncommon. Why do you think that is so?
4. Why didn't the decision of the Illinois court, holding the will invalid, resolve the issue in Iowa? Was not the Illinois decision entitled to full faith and credit in Iowa? See Note (1) on p. 28. See, also, the Full Faith and Credit Clause in Article IV, Section 1, of the Constitution on p. 897 and the statute implementing the provision, 28 U.S.C. § 1738, at p. 899. In the first paragraph on page 27, the Iowa Supreme Court states that full faith and credit does not require interstate enforcement of judgments concerning real property rendered by a state other than the one in which the real property is located. Although that may have been an accurate statement of constitutional law at the time it was made, it is no longer true. In *Underwriters National Assurance Company v. North Carolina Life and Accident and Health Insurance Guaranty Association*, 455 U.S. 691, 706 n. 11 (1982), the Supreme Court said that it had previously "explicitly refused to recognize an exception to the rule of jurisdictional finality for cases involving real property over which the State claims exclusive jurisdiction." Later in the course we will discuss full faith and credit in greater detail.
5. Did the *Barrie* court reach the right result? What is it that persuades you that a particular result in this case is "right"? Examine Notes (3) and (4) on pp. 28-29. Do you agree with the three reasons given by the Second Restatement drafters for contemporary retention of

the situs rule in real property cases? Do the three reasons justify application of Iowa law in *Barrie*?

6. In a part of the *Barrie* decision, not included in your text, the court noted that, under the terms of the will, the Iowa property was to be sold and the proceeds distributed to the named beneficiaries. Under these circumstances, should the issue in *Barrie* have been treated as a personal property question rather than a real property question?

Tuesday, September 15: Domicile

1. Read pp. 30-37 (*White* and Notes).
2. What is a domicile? What determines domicile at birth? How is domicile changed once acquired?
3. Consider problems (3)(a) and (3)(c) on pp. 34-35.
4. What is the function of domicile in determining distribution of moveable property at death? Why not use location of property, as with other personal property conflicts issues? Why not use place of death? Or the place where a person lived most of his or her life? Or the place of birth?
5. What concerns would be relevant in determining which state's law governs rights in personal property owned by a decedent without a will? What result do those concerns suggest would be appropriate in *White*?
6. Read pp. 37-39 (Miscellaneous Traditional Rules).
7. Consider Questions (4) and (6) on pp. 38-39.
8. There will be a brief lecture on the procedural requirements for providing notice in litigation of an intent to rely on the law of another jurisdiction and the methods of proving the content of another jurisdiction's law.

Wednesday, September 16: Characterization

1. Read pp. 39-48 (*Levy v. Daniels' U-Drive, Haumschild* and Notes).
2. Was there a characterization problem in *Carroll* (p. 6)? How was it resolved by the court? If the Connecticut court is correct that the vicarious liability of Daniels' is a contract issue, was the vicarious liability at issue in *Carroll* (employer responsibility for negligent acts of an employee) also properly seen as a contract issue? Was there a characterization problem in *Milliken* (p. 17)? How was it resolved by the court? In *Barrie* (p. 26), the terms of the will provided that the Iowa land was to be sold and the proceeds distributed to named beneficiaries.

Was there a characterization problem in *Barrie*? How should it have been resolved by the court?

3. How does the court in *Daniels' U-Drive* decide that the case is to be resolved as a matter of contract rather than tort? Of what relevance is the Connecticut statute quoted in the indented paragraph near the bottom of p. 39 to the court's determination? Might the statute be intended to effectuate policies other than those articulated by the court? What are they? Are they tort or contract policies? Is the statute a choice of law statute? Can we tell from its language whether it was intended to govern injuries suffered by a Connecticut resident in an auto accident in Massachusetts? What law would have been applied by the Connecticut court if the action had been brought by a Massachusetts resident who had been injured in the same accident, for example, a passenger in Maginn's car? What law would have been applied if a car rented in Massachusetts had an accident in Connecticut injuring a Connecticut resident?

4. Why did the court in *Haumschild* feel compelled to go so far as to reject the Restatement, the majority rule and its own precedent to reach its result? Is characterization of the interspousal immunity issue as one resolved by reference to domicile rather than place of wrong a better characterization? What method ought to be used for characterization? Would it help to ascertain the policies behind (1) immunity and (2) nonimmunity? What are those policies? How do they apply to the facts of this case?

5. How would the majority of the Wisconsin court decide a case in which a California spouse was injured in an accident in Wisconsin? In a concurring opinion in *Haumschild* omitted from the casebook, Justice Fairchild, accepting plaintiff's argument stated in the penultimate paragraph of the case on p. 43, wrote:

I would dispose of the present case upon the theory that California law governs the existence of the alleged cause of action and that in California the immunity question cannot be decided by resort to the law of torts but rather the law of status.

How would Justice Fairchild decide the case of the California spouse injured in the Wisconsin accident? What would be the right result in such a case?

6. Consider questions (6) (7) and (10) on pp. 46-48.

Thursday, September 17: Substance vs. Procedure

1. Read pp. 48-55 (*Grant* and Notes).
2. It may be helpful in distinguishing substance and procedure to articulate the functions that such categorization serves. What are the effects of categorization in one class or the other? Why would you want a particular issue to be treated as substantive? As procedural?
3. Would cases decided under *Erie v. Tompkins* be relevant in making the substance-procedure distinction in choice of law?

4. Consider the characterization issue addressed in the case of *Levy v. Steiger* in Note (2) on p. 52: Is burden of proof a question of substance or procedure? In *Levy*, the Massachusetts plaintiffs were injured in a car accident in Rhode Island. The defendant was also from Massachusetts. Under Massachusetts law, the defendant has the burden of showing contributory negligence on the part of the plaintiff. Under Rhode Island law, the burden of proof of the plaintiff's due care is on the plaintiff. The Massachusetts state court in *Levy* held that the issue of burden of proof was procedural and thus it applied the Massachusetts burden of proof. Was *Levy* correctly decided in light of the purposes of the substance-procedure distinction? Would it have been easier correctly to decide the case if no effort at characterization had been made?

5. Assume that in *Levy v. Steiger*, the defendant was a citizen of Rhode Island and that the lawsuit was brought in the *federal district court* in Massachusetts where personal jurisdiction was obtained over the defendant and subject matter jurisdiction was available because of diversity of citizenship. Outline the analytical steps you need to follow in order to determine which party will bear the burden of proof on the issue of the plaintiff's contributory negligence. See question (7) on p. 61.

6. Is the *result* of the *Grant* case consistent with the 1934 Restatement's approach to substance and procedure? See also footnote 1 on p. 14. What *method* did Justice Traynor use to determine that the survival issue was procedural?

7. In *Grant*, in the paragraph beginning at the bottom of p. 49, Justice Traynor rejects *Cort v. Steen* as an appropriate precedent for characterization here. Was he correct to do so? While *Grant* rejected precedent in making the substance-procedure distinction, other courts have chosen to follow earlier cases. In *Levy v. Steiger*, the Massachusetts court characterized its burden of proof statute as procedural because in a prior case in which the constitutionality of the statute had been questioned (apparently on substantive due process grounds), the court had described it as a mere matter of procedure rather than a modification of fundamental rights. Under what circumstances should a prior case characterizing an issue as substantive or procedural govern the substantive-procedure question in a subsequent choice of law case? Compare the discussion of using precedent in deciding other characterization issues in Note (6) on pp. 46-47.

8. Did the *Grant* court reach the right result? Why or why not? If it did reach the right result, did it do so by the right method?

9. In light of what you have read so far, how many different methods are available to you as a litigator to argue to a court that a particular law is substantive or procedural?

CONFLICTS COURSE OUTLINE

1. Choice of Law Methods
 - a. The First Restatement
 - i. Jurisdiction-Selecting Rules
 - (1) Torts
 - (2) Contracts
 - (3) Real Property
 - (4) Matters Controlled by Domicile
 - ii. Escape Devices
 - (1) Characterization within Substantive Categories
 - (2) Substance-Procedure Distinction
 - (a) Alternative Methods of Characterization
 - (b) Statutes of Limitation and Statutes of Frauds
 - (3) Renvoi
 - (4) Public Policy
 - b. Alternatives to Judicial Determination of Choice of Law
 - i. Statutory Choice of Law
 - ii. Choice of Law by Contract
 - c. Interest Analysis
 - d. Second Restatement
 - e. Choice-Influencing Considerations
 - f. Complex Litigation
 - g. Conflicts in Cyberspace
2. Constitutional Limits on Choice of Law
3. Constitutional Obligation to Provide a Forum
4. Personal Jurisdiction
5. Recognition of Judgments
6. Choice of Law and Enforcement of Judgments in Divorce

National Diversity of Choice of Law Methods

From: Symeon C. Symeonides, *Choice of Law in the American Courts in 2008: Twenty-Second Annual Survey*, 57 AMERICAN JOURNAL OF COMPARATIVE LAW 269 (2009) (based on a review of the law of 52 jurisdictions—the 50 states plus the District of Columbia and Puerto Rico). No more than 37 jurisdictions use the same method for both torts and contracts. This survey is posted at <<http://www.willamette.edu/wucl/journals/wlo/conflicts/>> and the web site includes annual surveys since 1993.

	First Restatement	Significant Contacts	Second Restatement	Interest Analysis	Lex Fori	Leflar	Combined Modern
Torts	10	3	24	2	2	5	6
Contracts	12	5	23	0	0	2	10

Some Patterns in Individual States

State	Contracts	Torts
Minnesota and Wisconsin	Leflar	Leflar
Maryland (and 7 other states)	First Restatement	First Restatement
Florida	First Restatement	Second Restatement
West Virginia	Second Restatement	First Restatement
Iowa (and 18 other states)	Second Restatement	Second Restatement
New Hampshire	Second Restatement	Leflar
North Dakota	Combined Modern	Significant Contacts

[Note: This survey considered choice of law issues in torts and those issues in contracts not controlled by a contractual choice of law clause. With regard to choice of law clauses, regardless of the choice of law method a state uses for other contract issues, a state will generally follow the Second Restatement's approach to the enforcement of such clauses. In the area of real property, regardless of the method a state follows in other substantive areas, it is likely to follow a method that gives controlling significance, in most real property issues, to the location of the land.]

CONFLICTS REFERENCES

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Symeon C. Symeonides, *Choice of Law in the American Courts in 2008: Twenty-Second Annual Survey*, 57 *AMERICAN JOURNAL OF COMPARATIVE LAW* 269 (2009), available at <<http://www.willamette.edu/wucl/wlo/conflicts/>>. (The Conflicts Section of the Association of American Law Schools has, since 1987, published in the *American Journal of Comparative Law* an annual comprehensive essay reviewing the year's developments in choice of law. Past essays are cited in a footnote in the current essay. Look in the current Summer issue of the *Journal* for the latest version. The surveys since 1993 also appear online at <<http://www.willamette.edu/wucl/wlo/conflicts/>>).

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