# Conflicts of Law
## Spring 2011

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*Introduction*

This course covers three major topics. The first topic is jurisdiction, which in this course will primarily involve international and foreign relations issues relating to personal jurisdiction and prescriptive jurisdiction (*i.e.*, jurisdiction to regulate, which includes issues relating to extraterritorial application of statutes and the U.S. Constitution). The second and most extensive topic is choice of law: for cases with connections to more than one state or country, or that involve both state and federal interests, whose law will be applied to resolve the case? The third topic is the enforceability of judgments rendered in another state's or nation's courts, which requires consideration of the U.S. Constitution's full faith and credit clause, as well as treaties and principles of international comity.

*Required Reading*

Currie, Kay, Kramer & Roosevelt, *Conflict of Laws: Cases—Comments—Questions* (8th ed. 2010) [hereinafter referred to as "CB"—for "casebook"]

The supplemental readings that follow the syllabus [hereinafter referred to as "Supp."]

*Recommended Reading*

There are a number of treatises and collections of articles that address the issues we will discuss in class. Perhaps the most straightforward are these:

Peter Hay, Patrick J. Borchers & Symeon C. Symeonides, Conflict of Laws (5th ed. 2010)

William M. Richman & William L. Reynolds, Understanding Conflict of Laws (LexisNexis, 3rd ed. 2002)

Kermit Roosevelt, *Conflict of Laws* [Concepts and Insights series] (Foundation Press 2010)

Clyde Spillenger, *Principles of Conflict of Laws* [Concise Hornbooks series] (West 2010)

All of these should be available at Boley Law Library. Let me know if you have trouble finding them. If you wish to do further reading, the casebook cites numerous secondary readings.

*Grading*

Your grade will be based on a limited open book final examination Limited open book means that you may use the casebook, supplemental materials, your notes, and personal outlines or group outlines to which you contributed. You will have 4 hours to complete the exam, and you may take the exam any time during the reading or exam periods.

*Instructions*

1) The syllabus assumes that we will cover each set of readings in one class, but that may change as the semester moves on. Unless I tell you otherwise, you should always assume that your assignment for the next class will be the next numbered set of readings on the syllabus.

2) Sometimes the casebook raises issues about how to apply the main cases in the readings. When it does so, you should assume that we will spend at least some time on those questions and hypotheticals.

*Syllabus*

**I. Jurisdiction**

**A. Personal Jurisdiction and Forum Non Conveniens**

1. Personal Jurisdiction in Multinational Cases (CB 377-85, Supp. 1-23)
**[this is the assignment for the first class]**

2. Tag Jurisdiction, European and International Law, and Forum Non Conveniens (CB 449-72)

**B. Prescriptive Jurisdiction and Extraterritoriality**

3. Prescriptive Jurisdiction in International Law and Extraterritoriality of Federal Statutes (CB 796-835 [through note 3], Supp. 24, CB 835-37 [notes 4 & 5])

4. Extraterritoriality and the Federal Constitution (CB 837-66)

**II. Choice of Law**

**A. The Traditional Approach and the First Restatement**

**1. Basic Rules**

5. Torts and Contracts (CB 2-26)

6. Property, Domicile, and Other Rules (CB 26-39)

**2. Escape Devices and Wrinkles in the Traditional Theory**

7. Characterization, Substance vs. Procedure, and Statutes of Limitation (CB 39-61)

8. Renvoi, Penal Laws, and Tax (CB 61-84)

**B. Newer or "Modern" Approaches**

**1. Interest Analysis**

9. Party Autonomy and Introduction to Interest Analysis (CB 99-135)

**B. Interactions among State, Federal, and International Proceedings**

25. CB 546-565, 896-909; Supp. 52-53

**C. Divorce and Child Custody**

26. Divorce (CB 566-585,590-598, 601-605 [nn. 8-11, 13-14], 613-626)

27. Interstate Child Custody (CB 626-662)

28. International Child Custody (CB 662-678)

# Personal Jurisdiction in Multinational Cases

**Edgar D. Brown, et al. v. Eric R. Meter, et al.**
681 S.E.2d 382 (North Carolina Court of Appeals 2009)

Ervin, Judge.

Goodyear Luxembourg Tires SA (Goodyear Luxembourg), Goodyear Lastikleri T.A.S. (Goodyear Turkey), and Goodyear Dunlop Tires France SA (Goodyear France) (collectively, Defendants) appeal from an order entered 1 May 2008 denying their motions to dismiss for lack of personal jurisdiction and concluding that the "[e]xercise of general jurisdiction over defendants comports with Due Process and does not offend traditional notions of fair play and justice." After a thorough review of the record and the applicable law, we affirm the trial court's order. * * *

On 1 May 2008, the trial court entered an order denying Defendants' dismissal motions. In denying Defendants' motions, the trial court made the following findings of fact:

> 1. Matthew Helms of Jacksonville and Julian Brown of Charlotte, two 13-year-old youth soccer players, died from injuries suffered in a bus wreck that occurred on April 18, 2004, near Paris, France. Plaintiffs have alleged that as the decedents rode on a bus headed to the airport in Paris to return home to North Carolina, one of the bus' tires, designed, manufactured and distributed by the Goodyear defendants, failed when its plies separated, causing the bus to leave the highway and overturn.
>
> 2. Defendants Goodyear [Luxembourg]; Goodyear [Turkey]; and Goodyear [**5] [France] (hereinafter "defendants") moved to dismiss for lack of personal jurisdiction, pursuant to Rule 12(b) (2) of the N.C. Rules of Civil Procedure and N.C.G.S. § 1-75.4.
>
> 3. The subject tire that allegedly failed was a Goodyear Regional tire, which was manufactured by defendant Goodyear [Turkey].
>
> 4. The subject tire contained information that was written entirely in English, including warnings and directions, U.S. Department of Transportation markings placed on the tire to allow it to be sold in the United States, and markings to show it was manufactured as qualified for sale in the United States.
>
> 5. The subject Goodyear Regional tire has a U.S. code listing load and pressure ratings that conform to United States standards set by the Tire and Rim Association, the standardizing organization for the tire industry in the United States. The tire also contains a "Safety Warning," written in English, which conforms to the warnings found on all tires for sale in the United States.
>
> 6. During the period from 2004 through a portion of 2007, at least 5906 tires made by Goodyear [Turkey] were shipped into North Carolina for sale, although not by the original manufacturer.
>
> 7. During the period from [**6] 2004 through a portion of 2007, at least 33,923 tires made by Goodyear [France] were shipped into North Carolina for sale, although not by the original manufacturer.
>
> 8. During the period from 2004 through a portion of 2007, at least 6402 tires made by

Goodyear [Luxembourg] were shipped into North Carolina for sale, although not by the original manufacturer.

9. The number of tires shipped into North Carolina from each of these manufacturers may actually be substantially higher, in that The Goodyear Tire and Rubber Company (hereinafter "Goodyear"), after being noticed for a 30(b)(6) deposition, failed to determine how many vehicles equipped with tires from these foreign defendant manufacturers are imported into the [*386] U.S. and shipped into North Carolina for sale each year.

10. The defendants, on a continuous and systematic basis, caused tires to be sent into the United States for sale, and knew or should have known that some of those tires were distributed for sale to North Carolina residents, and the defendants continue to send tires for sale into the United States and know or should know that some of those tires continue to be sold to North Carolina residents on a continuous and systematic [**7] basis.

11. The sale of these tires generates substantial revenue for Goodyear, these defendant companies and its related companies.

12. The defendants, as manufacturers, did not have their own distribution system for the sale of their tires, but instead used their Goodyear parent and affiliated companies to distribute the tires they manufactured to the United States and North Carolina.

13. The defendants knew or should have known that tires they manufactured were shipped to the United States through their Goodyear parent and affiliated companies and sold in North Carolina on a continuous and systematic basis.

14. The defendants purposefully and deliberately availed themselves of the North Carolina market for tires and substantially profited from sales of their tires in North Carolina.

15. The defendant companies have continuous and systematic contacts with North Carolina and are conducting substantial activity within North Carolina.

16. Defendant Goodyear [Turkey] is a wholly owned subsidiary of defendant, [t]he Goodyear Tire and Rubber Company, which is based in the United States. All three of the foreign defendant companies are subsidiaries of Goodyear in the United States and as such [**8] have additional, abundant ties to the United States.

17. The defendant companies have deliberately attempted to take advantage of the tire market in North Carolina by designing, manufacturing and causing tires to be distributed for sale to the North Carolina market, and those tires are sold in North Carolina.

18. Because all three companies have manufactured tires shipped into North Carolina for sale that by clear implication and inference are used on thousands of vehicles throughout North Carolina, they could reasonably anticipate being haled into court in North Carolina.

19. The quantity of the defendants' contacts with North Carolina, which includes sales of between 5,900 and 34,000 tires within the state, generating substantial revenues and substantial commercial activity in North Carolina, weighs in favor of a finding of general jurisdiction over the defendants.

20. The quality of those contacts, which include systematic and repeated contacts with the

state of North Carolina for the purpose of commerce, along with the defendants' ownership by U.S. corporations doing substantial business in North Carolina, weighs in favor of a finding of general jurisdiction over the defendants.

21. [**9] The cause of action in this case is closely related to the contacts with the defendants, in that the defendants are causing substantial quantities of tires they manufactured to be sold in [*387] North Carolina, and plaintiffs seek to exercise jurisdiction related to a defect in a tire designed, manufactured, distributed or sold by the defendants.

22. North Carolina has a substantial interest in allowing its citizens a forum for the redress of grievances, especially where two of its citizens have been killed, allegedly by the negligence of the defendants.

23. The foreign Goodyear defendants are not inconvenienced by the trial of this action in North Carolina, in that they do substantial and continuous business in North Carolina, they are subsidiaries of a United States corporation that does substantial and continuous business in North Carolina, and they are represented by the same attorneys as are representing their U.S. parent corporation.

24. The plaintiffs, parents of the deceased boys, would be substantially inconvenienced by litigating this case in foreign countries.

Based on the foregoing findings of fact, the trial court concluded as a matter of law that:

1. The defendants have continuous and systematic ties with the State of North Carolina.

2. The defendants' activities in North Carolina are substantial.

3. The quantity of the defendants' contacts with North Carolina; the nature and quality of those contacts; the source and connection of the cause of action to the contacts; the interest of North Carolina in this cause of action and the convenience of the parties, all weigh in favor of the exercise of general jurisdiction over the defendants.

4. Exercise of general jurisdiction over the defendants [**11] comports with Due Process and does not offend traditional notions of fair play and justice.

Based on these findings and conclusions, the trial court denied Defendants' dismissal motions. Defendants have noted an appeal to this Court from the trial court's ruling.

On appeal, Defendants contend that the trial court erred in denying their motion for lack of personal jurisdiction. We disagree.

When evaluating personal jurisdiction, the trial court must engage in a two-step inquiry: first, the trial court must determine whether a basis for jurisdiction exists under the North Carolina "long-arm statute," N.C. Gen. Stat. § 1-75.4 (2007), and second, if so, the trial court must determine whether the assertion of personal jurisdiction over the defendant is consistent with applicable due process standards. *Cameron-Brown Co. v. Daves*, 83 N.C. App. 281, 283, 350 S.E.2d 111, 113 (1986). * * *

According to N.C. Gen. Stat. § 1-75.4(1)(d), "[a] court of this State . . . has jurisdiction over a person" "[i]n any action, whether the claim arises within or without this State, in which a claim is as-

serted against a party" who "[i]s engaged in substantial activity within this State, whether such activity is wholly interstate, intrastate, or otherwise." *Id.* N.C. Gen. Stat. § 1-75.4(1)(d) was "intended to make available to the North Carolina courts the full jurisdictional powers permissible under federal due process." *Dillon v. Numismatic Funding Corp.*, 291 N.C. 674, 676, 231 S.E.2d 629, 630 (1977). "[B]y its plain [**14] language the statute requires some sort of 'activity' to be conducted by the defendant within this state." *Skinner v. Preferred Credit*, 361 N.C. 114, 119, 638 S.E.2d 203, 208 (2006), *rehearing denied*, 361 N.C. 371, 643 S.E.2d 591 (2007).

Similarly, "[d]ue process [considerations] prohibit[] our state courts from exercising [personal] jurisdiction unless the defendant has had certain 'minimum contacts' with the forum state such that 'traditional notions of fair play and substantial justice' are not offended by maintenance of the suit." *Cameron-Brown*, 83 N.C. App. at 284, 350 S.E.2d at 114 (citing *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95 (1945)). Although a determination of whether the required minimum contacts are present necessarily hinges upon the facts of each case, there are several factors a trial court typically evaluates in determining whether the required level of contacts exists: "(1) quantity of the contacts between the defendant and the forum state, (2) quality and nature of the contacts, (3) the source and connection of the cause of action to the contacts, (4) the interest in the forum state, and (5) convenience of the parties." *Cameron-Brown*, 83 N.C. App. at 284, 350 S.E.2d at 114.

Jurisdiction [**15] exercised under North Carolina's long-arm statute can be classified as either specific or general. "Specific jurisdiction exists when the cause of action arises from or is related to defendant's contacts with the forum." *Id.*, 361 N.C. at 122, 638 S.E.2d at 210. "General jurisdiction exists when the defendant's contacts with the state are not related to the cause of action but the defendant's activities in the forum are sufficiently continuous and systematic" to permit the General Court of Justice to exert personal jurisdiction over that defendant. *Skinner*, 361 N.C. at 122, 638 S.E.2d at 210 (quotation omitted). "[G]eneral personal jurisdiction" may be exercised pursuant to N.C. Gen. Stat. § 1-75.4(1)(d). *Lang v. Lang*, 157 N.C. App. 703, 706, 579 S.E.2d 919, 921 (2003). "The threshold level of minimum contacts sufficient to confer general jurisdiction is significantly higher than for specific jurisdiction." *Woods Intern., Inc.*, 436 F. Supp. 2d at 748 (quotation omitted).

The present dispute is not related to, nor did it arise from, Defendants' contacts with North Carolina. As a result, the issue raised in this case involves general rather than specific jurisdiction. For that reason, [**16] the relevant question before both the trial court and this Court is whether Defendants' "activities in the forum are sufficiently continuous and systematic[,]" *Skinner*, 361 N.C. at 122, 638 S.E.2d at 210, a "higher threshold" than that required to support the exercise of specific jurisdiction. *Bruggeman*, 138 N.C. App. at 618, 532 S.E.2d at 219. As a result, we must determine on appeal whether the trial court's findings of fact support its legal conclusion that Defendants had "continuous and systematic contacts with North Carolina," thereby justifying the exercise of general personal jurisdiction over Defendants.

The "continuous and systematic contacts" required for the assertion of general [*389] personal jurisdiction must result from actions by Defendant rather than from mere happenstance or coincidence or the actions of others. In order for nonresidents like Defendants to be subject to the general personal jurisdiction of the General Court of Justice, they "must engage in acts by which they purposely avail themselves of the privilege of conducting activities within the forum State[.]" *Lulla v. Effective Minds, LLC*, 184 N.C. App. 274, 279, 646 S.E.2d 129, 133 (2007) (quotation omitted). "The [**17] purposeful availment requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of random, fortuitous, or unilateral activity of another party or a third person." *Adams, Kleemeier, Hagan, Hannah & Fouts, PLLC v. Jacobs*, 158 N.C. App. 376, 381,

581 S.E.2d 798, 802, *rev'd on other grounds*, 357 N.C. 651, 588 S.E.2d 465 (2003) (quotation omitted). A "critical factor" in assessing "whether a nonresident defendant has made purposeful availment of the privilege of conducting activities within the forum State" is whether the party "initiat[ed] the contact[.]" *Banc of Am. Secs. LLC v. Evergreen Int'l Aviation, Inc.*, 169 N.C. App. 690, 698, 611 S.E.2d 179, 185 (2005), *motion denied*, 2006 NCBS 2 (2006). (quotation omitted).

The necessary "purposeful availment" has been found where a corporation "delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 298, 100 S. Ct. 559, 62 L. Ed. 2d 490, 502 (1980). In such cases, the United States Supreme Court has reasoned that:

> [I]f the sale of a product of a manufacturer or distributor . . . is not simply an [**18] isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve, directly or indirectly, the market for its product in other States, it is not unreasonable to subject it to suit in one of those States if its allegedly defective merchandise has there been the source of injury to its owner or to others. The forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State.

*World-Wide Volkswagen*, 444 U.S. at 297-98, 62 L.Ed.2d at 501-502. However, the Supreme Court disagreed over the proper interpretation of the principle enunciated in *World-Wide Volkswagen* in *Asahi Metal Ind. Co. v. Superior Court of California*, 480 U.S. 102, 107 S. Ct. 1026, 94 L. Ed. 2d 92 (1987).

In *Asahi Metal*, Justice O'Connor writing for herself, Chief Justice Rehnquist, and Justices Powell and Scalia, stated that:

> The placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State. Additional conduct of the defendant may indicate an intent [**19] or purpose to serve the market in the forum State, for example, designing the product for the market in the forum State, advertising in the forum State, establishing channels for providing regular advice to customers in the forum State, or marketing the product through a distributor who has agreed to serve as the sales agent in the forum State. But a defendant's awareness that the stream of commerce may or will sweep the product into the forum State does not convert the mere act of placing the product into the stream into an act purposefully directed toward the forum state.

*Asahi Metal*, 480 U.S. 102, 107 S. Ct. 1026, 94 L. Ed. 2d 92. On the other hand, in a concurrence joined by Justices White, Marshall, and Blackmun, Justice Brennan stated that:

> A defendant who has placed goods in the stream of commerce benefits economically from the retail sale of the final product in the forum State, and indirectly benefits from the State's laws that regulate and facilitate commercial activity. These benefits accrue regardless of whether the participant directly conducts business in the forum State, or engages in additional conduct directed toward that State.

*Asahi Metal*, 480 U.S. at 117, 94 L. Ed. 2d at 108, *Brennan, [**20] J., concurring in part and concurring in the judgment.* Justice Brennan described Justice [*390] O'Connor's stream of commerce "plus" standard as "a marked retreat from the analysis in *World-Wide Volkswagen*[.]" *Id.*, 480 U.S. at 118, 94 L. Ed. 2d at 107. According to Justice Brennan, a "forum State does not exceed

its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State." *Asahi Metal*, 480 U.S. at 119, 94 L. Ed. 2d at 107. As a result, Justice Brennan concluded that sufficient minimum contacts existed in *Asahi Metal* because "Asahi was aware of the distribution system's operation, and it knew that it would benefit economically from the sale in California of products incorporating its components." *Asahi Metal*, 480 U.S. at 121, 94 L. Ed. 2d at 107. This Court has addressed the issue debated in *Asahi Metal* on several occasions, and has expressly declined in those cases to follow the approach to the "purposeful availment" issue advocated by Justice O'Connor in that case.

After reviewing [several North Carolina] decisions, we conclude that the appropriate question that must be answered in order to determine whether Defendants are "subject to the jurisdiction of the courts of this state" is whether Defendants have "purposefully injected [their] product into the stream of commerce without any indication that [they] desired to limit the area of distribution of [their] product so as to exclude North Carolina." *Bush*, 64 N.C. App. at 51, 306 S.E.2d at 568. Thus, we must evaluate the validity of the trial court's decision that Goodyear France, Goodyear Luxembourg, and Goodyear Turkey were subject to the jurisdiction of the Onslow County Superior Court by examining whether the trial court's findings of fact, considered in their entirety, provide an adequate basis for a conclusion that Defendants had "continuous and systematic contacts with North Carolina" in light of the well-established legal principle outlined above.

As [**28] an initial matter, we note that several of the trial court's "findings of fact" are improperly classified, at least in part, as findings of fact rather than conclusions of law. In these improperly classified findings of fact, the trial court stated that:

> 14. The defendants purposefully and deliberately availed themselves of the North Carolina market for tires and substantially profited from sales of their tires in North Carolina.
>
> 15. The defendant companies have continuous and systematic contacts with North Carolina and are conducting substantial activity within North Carolina.

*See State ex rel. Utilities Com. v. Eddleman*, 320 N.C. 344, 351, 358 S.E.2d 339, 346 (1987), *later proceeding*, 322 N.C. 689, 370 S.E.2d 567 (1988) (stating that "[f]indings of fact are statements of what happened in space and time"). In light of the fact that these findings involve statements that Defendants "purposefully and deliberately availed themselves of the North Carolina market," "have continuous and systematic contacts with North Carolina," and "are conducting substantial activity within North Carolina," and the fact that these statements amount to determinations that the applicable legal standards have [**29] been met rather than "statements of what happened in space and time," we will not include these portions of finding of fact numbers 14 and 15 in our analysis of the sufficiency of the factual findings in the trial court's order to support its conclusion that Defendants were subject to the jurisdiction of the Onslow County Superior Court.

In addition, as another preliminary matter, the trial court stated in finding of fact numbers 17 and 21 that Defendants "caused" a certain number of tires to be shipped into North Carolina. However, the record appears to be devoid of evidence that Defendants took any affirmative action to cause tires which they had manufactured to be shipped into North Carolina. On the contrary, the available evidence tends to show that other entities were responsible for the shipment of tires manufactured by Defendants to the United States and, as a part of that process, the tires arrived in North Carolina. As a result, our analysis of the trial court's findings is informed by our understanding that Defendants, as separate corporate entities, were not directly responsible for the presence in North Carolina of tires that they had manufactured. * * *

The trial court's factual findings which were either undisputed by Defendant or supported by competent evidence indicate that the tire that Plaintiffs allege was involved in the accident resulting in Decedents' deaths "contained additional U.S. Department of Transportation markings that were placed there to allow the tire to be sold in the United States" and also "contained information showing [**33] that it was manufactured as qualified for sale in the United States." More particularly, the tire had "a U.S. code listing load and pressure ratings that conform to United States standards set by the Tire and Rim Association, the standardizing organization for the tire industry in the United States." Moreover, the tire contained "a 'Safety Warning,' written in English[.]" Although * * * the presence of "DOT specifications" on the relevant Goodyear Regional RHS tire "doesn't necessarily mean that the tire is destined to be used in the United States," the existence of these markings does indicate, as the trial court found, that the tire in question was manufactured in such a manner that it could, if business conditions supported such a move, be sold in the United States. Thus, at an absolute minimum, the manufacturer contemplated that the tire might be sold in this country.

Furthermore, the trial court's findings establish that tires manufactured by Defendants were shipped to the United States for sale and that there was no attempt to keep these tires from reaching the North Carolina market. The evidence tends to show that the extent to which tires manufactured by Defendants [**34] were sold in the United States depended on the extent to which Goodyear affiliates responsible for distributing tires in the United States exercised the option that was available to them of having tires needed for sale in the United States manufactured by one of the Defendants. In addition, the trial court found that tires manufactured by each Defendant were actually sold in North Carolina. From 2004 to 2007, 6,402 tires manufactured by Goodyear Luxembourg were ultimately shipped to locations in North Carolina. Similarly, 33,923 tires manufactured by Goodyear France reached North Carolina during the same period. Finally, 4,059 tires manufactured by Goodyear Turkey [*394] were shipped into North Carolina for sale during this interval. Furthermore, as the trial court noted, other tires manufactured by Defendants may have reached North Carolina during this time, since the figures set forth above do not include "vehicles equipped with tires from [Defendants] imported into the [United States] and shipped into North Carolina for sale each year." According to the trial court's findings, the distribution chain through which tires manufactured by Defendants were shipped into the United States and, [**35] eventually, into North Carolina, was "a continuous and systematic" process rather than a sporadic or episodic one. As a result, the trial court's findings indicated that, through a regular process employed within the Goodyear organization, a substantial number of tires manufactured by the Defendants were imported into the United States and distributed to various entities in North Carolina.

In addition to the evidence reflecting Defendants' contacts with North Carolina, the trial court's findings reflect that North Carolina has an interest in this proceeding given that Plaintiffs seek redress for injuries sustained by North Carolina citizens. In addition, the record reflects that requiring Plaintiffs, who have no ties to France, to litigate their claims in the French courts would impose a considerable burden on them. Although there is no question but that requiring Defendants to defend an action in the General Court of Justice would be burdensome as well, that burden is alleviated to some extent by the fact that Defendants have corporate affiliates in the United States with business interests in North Carolina, a fact which is simply not true of Plaintiffs.

* * *Defendants have, without question, purposefully and intentionally manufactured tires and placed them in the stream of interstate commerce without any limitation on the extent to which those tires could be sold in North Carolina. Defendants also knew or should have known that a Goodyear affiliate obtained tires manufactured by Defendants and sold them in the United States in the regular course of business. The record further demonstrates that several thousand tires manu-

factured by each of the Defendants eventually found their way into North Carolina markets through the operation of a continuous and highly-organized distribution process. The number of tires at issue in this case is much greater than the number of sales that have been deemed sufficient in other cases, such as *Dillon*, 291 N.C. 674, 231 S.E.2d 629 (deeming 27 sales in North Carolina sufficient to support a finding of general jurisdiction), and *Hankins v. Somers*, 39 N.C. App. 617, 251 S.E.2d 640, *cert. denied*, 297 N.C. 300, 254 S.E.2d 920 (1979) (deeming sales of "wire art" in North Carolina to a "substantial extent" sufficient to support a finding of general personal jurisdiction). Finally, North [**37] Carolina has a well-recognized interest in providing a forum in which its citizens are able to seek redress for injuries that they have sustained, and a greater burden would be imposed upon Plaintiffs in the event that they were required to litigate their claims in France compared to the burden that would be imposed upon Defendants in the event that they are required to defend Plaintiffs' claims in the General Court of Justice. In light of all these facts, Defendants could, consistently with considerations of due process and fundamental fairness, reasonably expect to be subject to the jurisdiction of the North Carolina courts, so that the exercise of personal jurisdiction over Defendants would not violate the due process clause.

Defendants' principal challenge to the trial court's order rests on the assertion that "stream of commerce" analysis simply does not apply in instances involving general, as compared to specific, jurisdiction. Defendants have not cited a North Carolina case to this effect, and we know of none. * * * Instead of adopting a general rule precluding the use of stream [**38] of commerce analysis to support a finding of general personal jurisdiction, we believe that the real issue is the extent to which Defendants' products were, in fact, distributed in North Carolina markets. Although we might agree with Defendants' contention in the event that the record demonstrated that only a few tires reached North Carolina through a limited [*395] distribution process, that is not the situation present here. Instead, the trial court's findings reflect that thousands of tires manufactured by each of the Defendants were distributed in North Carolina as the result of a highly organized distribution process that involved Defendants and other Goodyear affiliates. Thus, we believe that, on the facts of this case, sufficient basis exists to support a finding of general personal jurisdiction under N.C. Gen. Stat. § 1-75.4(1)d and the due process clause.

As a result, after a thorough review of the record, and consistent with the principles outlined by this Court in [prior cases], we hold that the facts found in [**39] the trial court's order support its conclusion that Defendants "purposefully injected [their] product into the stream of commerce without any indication that [they] desired to limit the area of distribution of [their] product so as to exclude North Carolina," *Bush*, 64 N.C. App. at 51, 306 S.E.2d at 568, and thereby purposefully availed themselves of the protection of the laws of this State. The trial court's findings are supported by competent evidence, and the findings in turn support the conclusion that the exercise of general personal jurisdiction over Goodyear Luxembourg, Goodyear Turkey, and Goodyear France was appropriate pursuant to N.C. Gen. Stat. § 1-75.4(1)(d) and the due process clause. As a result, the trial court did not err in exercising general jurisdiction over Defendants and denying their dismissal motions pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(2). Thus, the trial court's order should be, and hereby is, affirmed.

AFFIRMED.

*Note and Question*

The North Carolina Supreme Court denied review in this case, but the U.S. Supreme Court granted certiorari in September 2010. How should the Supreme Court rule in this case?

**Robert Nicastro, et al. v. McIntyre Machinery America, Ltd.**
201 N.J. 48, 987 A.2d 575 (New Jersey Supreme Court 2010)

JUSTICE ALBIN delivered the opinion of the Court.

Today, all the world is a market. In our contemporary international economy, trade knows few boundaries, and it is now commonplace that dangerous products will find their way, through purposeful marketing, to our nation's shores and into our State. The question before us is whether the jurisdictional law of this State will reflect this new reality. * * *

I.
A.

On October 11, 2001, plaintiff Robert Nicastro, an employee for thirty years of Curcio Scrap Metal, was operating the McIntyre Model 640 Shear, a recycling machine used to cut metal. Nicastro's right hand accidentally got caught in the machine's blades, severing four of his fingers. The Model 640 Shear was manufactured by J. McIntyre Machinery, Ltd. (J. McIntyre), a company incorporated in the United Kingdom, and then sold, through its exclusive United States distributor, McIntyre Machinery America, Ltd. (McIntyre America), to Curcio Scrap Metal.

In September 2003, plaintiff named J. McIntyre and McIntyre America as defendants in a product-liability action, N.J.S.A. 2A:58C-2, in the Superior Court, Law Division, Bergen County. * * * The focus of this product-liability lawsuit, as made clear from plaintiff's expert's report, is that the McIntyre Model 640 Shear did not have a safety guard that would have prevented the accident. Plaintiff is seeking damages for past and future medical expenses, lost wages, and physical pain and suffering.

B.

The trial court granted J. McIntyre's motion to dismiss the action[.] In an unreported opinion, the Appellate Division reversed, allowing the parties to engage in discovery to establish whether New Jersey has the authority to exercise jurisdiction over J. McIntyre on the basis of either a traditional minimum-contacts analysis or the stream-of-commerce theory[.] * * *

Here is the relevant information adduced during the discovery period. In either 1994 or 1995, Frank Curcio, the owner of Curcio Scrap Metal of Saddle Brook, New Jersey, attended a trade convention in Las Vegas, Nevada, sponsored by the Institute of Scrap Recycling Industries. While there, he visited the booth of McIntyre America and was introduced to the McIntyre Model 640 Shear.

In 1995, Curcio Scrap Metal purchased the machine from McIntyre America at a cost of $24,900. The machine was shipped from McIntyre America's headquarters in Stow, Ohio to Saddle Brook, and the invoice instructed that the check be made payable to "McIntyre Machinery of America, Inc." Affixed to the machine was a label with the following information: "J. McIntyre Machinery," its address, and the model and serial number of the machine. Curcio also received an information sheet listing J. McIntyre's address in Nottingham, England, as well as its telephone and fax numbers. An instruction manual that accompanied the shear machine referenced both United States and United Kingdom safety regulations. Based on documentation received with the machine, Curcio

concluded that "had we needed any repair parts, we would have called J. McIntyre Machinery Ltd. in England, which is where we would call today for repairs or parts."[3]

J. McIntyre's principal place of business is in Nottingham, England, where it designs and manufactures metal recycling machinery and equipment. It holds American and European patents in recycling technology. Michael Pownall, the president of J. McIntyre, attended the scrap metal conventions held in Las Vegas in 1994 and 1995, including the one where Curcio visited the McIntyre America booth. Additionally, from at least 1990 until 2005, J. McIntyre officials, including Pownall, attended trade conventions, exhibitions, and conferences throughout the United States in such cities as Chicago, Las Vegas, New Orleans, Orlando, San Diego, and San Francisco. During the period that McIntyre America was the exclusive United States distributor for J. McIntyre's products, McIntyre America fielded any requests for information about those products at the scrap metal conventions and trade shows in the United States.

J. McIntyre and its American distributor were distinct corporate entities, independently operated and controlled, without any common ownership. McIntyre America, however, "structured [its] advertising and sales efforts in accordance with [J. McIntyre's] direction and guidance whenever possible." Although J. McIntyre claimed that it sold its machines outright to McIntyre America, the correspondence between the two companies suggests that at least some of the machines were sold on consignment to its American distributor. For example, in a 1999 letter to McIntyre America, J. McIntyre's president noted: "[Y]ou still have new machines in stock, which you are presently unable to sell. Please note that those machines are our property until they have been paid for in full." Indeed, in a 1999 e-mail, McIntyre America reported to J. McIntyre that it had "no problem waiting for [J. McIntyre] to receive payment from the customer first before requesting our commission via a company invoice in the future."

At the conclusion of jurisdictional discovery, the trial court again granted J. McIntyre's motion to dismiss for lack of personal jurisdiction. * * *

II.

In an opinion authored by Judge Lisa, the Appellate Division reversed, concluding that the exercise of jurisdiction by New Jersey "would not offend traditional notions of fair play and substantial justice" and was justified "under the `stream-of-commerce plus' rationale espoused by Justice O'Connor in Asahi." Nicastro v. McIntyre Mach. Am., Ltd., 399 N.J. Super. 539, 545 (App. Div. 2008) (citing Asahi, supra, 480 U.S. at 112, 107 S. Ct. at 1032, 94 L. Ed. 2d at 104). The panel noted that in Asahi two different views of the stream-of-commerce doctrine of jurisdiction were advanced, one by Justice O'Connor and the other by Justice Brennan, with each view supported by four different members of the Court. Id. at 555-56. The panel held that the facts of this case met Justice O'Connor's more restrictive stream-of-commerce plus test, and therefore also satisfied Justice Brennan's framework for jurisdiction in stream-of-commerce cases. Id. at 557-58, 565. * * *

IV.

In determining whether our State courts have authority to exercise personal jurisdiction over J. McIntyre, we begin by dispensing with certain jurisdictional doctrines that do not apply in this

[3] Curcio's perception, at the time of purchase and today, is in no way altered by a J. McIntyre representative's claim that "[J.] McIntyre does not, and never did, provide maintenance or repair services for its products to businesses or individuals in New Jersey." (Emphasis added). The representative did not suggest that J. McIntyre was not servicing its machines in states other than New Jersey.

case. We do not find that J. McIntyre had a presence or minimum contacts in this State -- in any jurisprudential sense -- that would justify a New Jersey court to exercise jurisdiction in this case. Plaintiff's claim that J. McIntyre may be sued in this State must sink or swim with the stream-of-commerce theory of jurisdiction. Before turning to that claim, a brief history of the development of our law governing jurisdiction will help inform our analysis.

A.

The power of a state to subject a person or business to the jurisdiction of its courts has evolved with the changing nature of the American economy. Our country has grown from an agrarian/manufacture-based economy dominated by local markets to a national economy fueled by the forces of industrialization. See generally Walter Licht, Industrializing America: The Nineteenth Century 133 (1995) (documenting evolution of American businesses from "producer[s] of small batches of goods sold in local and regional markets" to "marketers of mass-produced items nationally and even internationally"). Now, our nation is part of a global economy driven by startling advances in the transportation of products and people and instantaneous dissemination of information. The expanding reach of a state court's jurisdiction, as permitted by due process, has reflected those historical developments.

In the nineteenth century, and earlier, a state court generally could not exercise personal jurisdiction over a non-resident defendant in accordance with due process unless the defendant was subject to process while physically present in the state. See Pennoyer v. Neff, 95 U.S. 714, 720-22, 24 L. Ed. 565, 568 (1878). That scheme emphasized the limits of a state's authority to subject a person outside its borders to the jurisdiction of its courts.

With the passage of time, technological progress in communications and transportation "increased the flow of commerce between States" and, correspondingly, "the need for [state courts to exercise] jurisdiction over nonresidents." Hanson v. Denckla, 357 U.S. 235, 250-51, 78 S. Ct. 1228, 1238, 2 L. Ed.2d 1283, 1296 (1958). That same technological progress has "made it much less burdensome for a party sued to defend [it]self in a State where [it] engages in economic activity." McGee v. Int'l Life Ins. Co., 355 U.S. 220, 223, 78 S. Ct. 199, 201, 2 L. Ed.2d 223, 226 (1957). With the changing nature of the economy evolved a more flexible standard of jurisdiction "from the rigid rule of Pennoyer v. Neff." Hanson, supra, 357 U.S. at 251, 78 S. Ct. at 1238, 2 L. Ed. 2d at 1296. "In a continuing process of evolution [the United States Supreme Court] accepted and then abandoned `consent,' `doing business,' and `presence' as the standard for measuring the extent of state judicial power over [foreign] corporations." McGee, supra, 355 U.S. at 222, 78 S. Ct. at 200-01, 2 L. Ed. 2d at 225. The Court "expand[ed] the permissible scope of state jurisdiction over foreign corporations and other nonresidents" due in large part "to the fundamental transformation of our national economy." Id. at 222, 78 S. Ct. at 201, 2 L. Ed. 2d at 226.

In the mid-twentieth century, in International Shoe Co. v. Washington, the Court held that the State of Washington's courts could exercise personal jurisdiction over a Delaware corporation in proceedings instituted "to recover [the corporation's] unpaid contributions to the state unemployment compensation fund." 326 U.S. 310, 311, 321, 66 S. Ct. 154, 156, 161, 90 L. Ed. 95, 99, 105 (1945). The Delaware corporation had no offices or stock of merchandise in Washington but it directed eleven to thirteen salesmen who resided there and filled orders for products shipped into the state. Id. at 313-14, 66 S. Ct. at 157, 90 L. Ed. at 100. Because of the salesmen's "systematic and continuous" activities in Washington, the Court found that the jurisdictional requirements of due process had been met in rendering the out-of-state corporation accountable in Washington's courts. Id. at 320, 66 S. Ct. at 160, 90 L. Ed. at 104. In words now familiar, the Court noted that

> due process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."

[Id. at 316, 66 S. Ct. at 158, 90 L. Ed. at 102 (second and third emphases added) (quoting Milliken v. Meyer, 311 U.S. 457, 463, 61 S. Ct. 339, 343, 85 L. Ed. 278, 283 (1940)).]

In McGee v. International Life Insurance Co., the Court held that a California state court properly exercised personal jurisdiction over a Texas life insurance company, which reneged on paying the beneficiary -- a California resident -- the proceeds of a policy on the death of the insured. 355 U.S. at 221-23, 78 S. Ct. at 200-201, 2 L. Ed. 2d at 224-26. Although the Texas company was not technically "present" in California, "[t]he [insurance] contract was delivered in California, the premiums were mailed from there and the insured was a resident of that State when he died." Id. at 222-23, 78 S. Ct. at 200-01, 2 L. Ed. 2d at 225-26. For due-process purposes, it was sufficient "that the suit was based on a contract which had [a] substantial connection with [California]." Id. at 223, 78 S. Ct. at 201, 2 L. Ed. 2d at 226.

During the thirty-five years following International Shoe, a rapidly changing world economy required the United States Supreme Court to think anew about the limits of a state court's jurisdictional reach. In World-Wide Volkswagen Corp. v. Woodson, the Court addressed for the first time whether an international manufacturer or distributor that places in the stream of commerce a purportedly defective product could be subject to the jurisdiction of a state where the product was purchased or accident occurred. 444 U.S. 286, 297-98, 100 S. Ct. 559, 567, 62 L. Ed.2d 490, 501-02 (1980).

In that case, the Robinsons claimed that they were traveling through Oklahoma in their Audi when another vehicle struck their car in the rear, causing severe injuries due to a fire triggered by the "defective design and placement of the Audi's gas tank and fuel system." Id. at 288, 100 S. Ct. at 562, 62 L. Ed. 2d at 495. The Robinsons, who were residents of New York where the Audi was purchased, filed a product-liability action in Oklahoma. Ibid. The Court reaffirmed International Shoe's minimum-contacts test and pronounced that the Due Process Clause did not permit an Oklahoma court to exercise in personam jurisdiction over an Audi's retailer and wholesale distributor, both incorporated in New York, when their "only connection with Oklahoma [was] the fact that an automobile sold in New York to New York residents became involved in an accident in Oklahoma." Id. at 287-89, 299, 100 S. Ct. at 562-63, 568, 62 L. Ed. 2d at 495-96, 502.

However, the Court posited a new theory of state-court jurisdiction -- the stream of commerce -- to respond to the contemporary realities of modern commerce. The Court stated that

> [w]hen a corporation "purposefully avails itself of the privilege of conducting activities within the forum State," it has clear notice that it is subject to suit there, and can act to alleviate the risk of burdensome litigation by procuring insurance, passing the expected costs on to customers, or, if the risks are too great, severing its connection with the State. Hence if the sale of a product of a [foreign automobile] manufacturer or distributor . . . is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve, directly or indirectly, the market for its product in other States, it is not unreasonable to subject it to suit in one of those States if its allegedly defective merchandise has there been the source of injury to its owner or to others. The forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corpora-

> tion that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State.

[Id. at 297-98, 100 S. Ct. at 567, 62 L. Ed. 2d at 501-02 (emphasis added) (citation omitted).] That formulation of the stream-of-commerce theory did not afford jurisdiction to an Oklahoma court against the automobile's retailer and distributor. Id. at 298, 100 S. Ct. at 567, 62 L. Ed. 2d at 502.

Interestingly, in his dissent, Justice Brennan observed that "[t]he model of society on which the International Shoe Court based its opinion is no longer accurate" given the increased mobility of people and products due to the advances in transportation and communication. Id. at 308-09, 100 S. Ct. at 568, 62 L. Ed. 2d at 508-09 (Brennan, J., dissenting). He did not believe that if "a State [gave] a nonresident defendant adequate notice and opportunity to defend, . . . the Due Process Clause is offended merely because the defendant has to board a plane to get to the site of the trial." Id. at 310-11, 100 S. Ct. at 568, 62 L. Ed. 2d at 510. Nevertheless, Justice Brennan would require the plaintiff to bear the burden of "demonstrat[ing] sufficient contacts among the parties, the forum, and the litigation to make the forum a reasonable State in which to hold the trial." Id. at 312, 100 S. Ct. at 568, 62 L. Ed. 2d at 511.

In the wake of World-Wide Volkswagen, and in recognition of the complex international marketing schemes that bring products into our State, in Charles Gendler & Co. v. Telecom Equipment Corp., we "adopt[ed] the stream-of-commerce theory as a basis for asserting personal jurisdiction over a non-resident defendant." 102 N.J. 460, 477 (1986). In Charles Gendler, the defendant Japanese manufacturer opposed New Jersey's assertion of jurisdiction in a suit involving its sale of an allegedly defective telephone system through its New York subsidiaries to an independent New Jersey corporation, which then sold the defective product to the plaintiff, Charles Gendler & Co., Inc., a company with a business office in New Jersey. Id. at 467.

In adopting the stream-of-commerce theory, we took into account the contemporary reality of how companies in foreign countries market their products in the United States. See id. at 477-79. We observed that for a foreign manufacturer, "the sale of its product in a distant state is not simply an isolated event, but the result of the corporation's efforts to cultivate the largest possible market for its product." Id. at 477-78. We acknowledged that "[i]n today's complex business world, foreign manufacturers rarely deliver products directly to consumers in the United States," but instead "employ middlemen, many of whom are often independent, to act as their distribution arms." Id. at 479. With that understanding, we rejected the notion that foreign manufacturers should "be allowed to insulate themselves by using intermediaries in a chain of distribution or by professing ignorance of the ultimate destination of their products." Ibid. * * *

A year after Charles Gendler, the United States Supreme Court in Asahi Metal Industry Co. v. Superior Court of California, 480 U.S. 102, 107 S. Ct. 1026, 94 L. Ed.2d 92 (1987), elaborated on the stream-of-commerce theory in two competing four-member opinions. In that case, the plaintiff in a product-liability action sued the Taiwanese manufacturer of an allegedly defective motorcycle tire tube that exploded on a California roadway, causing an accident that severely injured the plaintiff-driver and killed his wife. Id. at 105-06, 107 S. Ct. at 1029, 94 L. Ed. 2d at 100. The Taiwanese manufacturer, in turn, sought indemnification from its codefendant, Asahi Metal Industry Co., Ltd., the Japanese manufacturer of the tube's valve assembly. Id. at 106, 107 S. Ct. at 1029, 94 L. Ed. 2d at 100-01. After the plaintiff's claims were settled and dismissed, the Taiwanese manufacturer's indemnification action against Asahi in California remained. Id. at 106, 107 S. Ct. at 1029, 94 L. Ed. 2d at 100. On one point all nine members of the Court agreed: the California state court could not, consistent with due process, exercise personal jurisdiction over Asahi in the indemnification action. Id. at 113-16, 107 S. Ct. at 1033-34, 94 L. Ed. 2d at 105-07.

In finding that the California court lacked personal jurisdiction, Justice O'Connor, writing for four members of the Court, construed the facts under a test that has become known as stream-of-commerce plus. Id. at 108-13, 107 S. Ct. at 1030-32, 94 L. Ed. 2d at 102-05 (plurality opinion). Under that test, the actions of a defendant must be "purposefully directed toward the forum State" for a court of that state to exercise personal jurisdiction. Id. at 112, 107 S. Ct. at 1032, 94 L. Ed. 2d at 104. In Justice O'Connor's view, "[t]he placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State." Ibid. The stream-of-commerce plus test requires that the defendant engage in "[a]dditional conduct . . . indicat[ing] an intent or purpose to serve the market in the forum State." Ibid. That "additional conduct" could be "designing the product for the market in the forum State, advertising in the forum State, establishing channels for providing regular advice to customers in the forum State, or marketing the product through a distributor who has agreed to serve as the sales agent in the forum State." Ibid. Justice O'Connor emphasized that "a defendant's awareness that the stream of commerce may or will sweep the product into the forum State does not convert the mere act of placing the product into the stream into an act purposefully directed toward the forum State." Ibid.

Within that framework, Justice O'Connor found that the Japanese corporation Asahi did not "purposefully avail itself of the California market" simply by selling component parts to a Taiwanese manufacturer, even if Asahi was aware that the completed product would be sold in California. Id. at 112, 114, 107 S. Ct. at 1032-33, 94 L. Ed. 2d at 104-06. Justice O'Connor reasoned that because Asahi had no offices or agents in California, did not advertise or solicit business in the state, and "did not create, control, or employ the distribution system that brought its valves" there, a California court could not exercise personal jurisdiction. Id. at 112-13, 107 S. Ct. at 1032, 94 L. Ed. 2d at 105. Justice O'Connor concluded that there was a lack of "minimum contacts" with California and therefore "the exercise of personal jurisdiction is [not] consistent with fair play and substantial justice." Id. at 116, 107 S. Ct. at 1034, 94 L. Ed. 2d at 107.

Joined by three other members of the Court, Justice Brennan did not believe that Justice O'Connor's opinion kept faith with the stream-of-commerce theory enunciated in World-Wide Volkswagen. Id. at 116-21, 107 S. Ct. at 1034-37, 94 L. Ed. 2d at 107-10 (Brennan, J., concurring in part and concurring in judgment). To trigger a court's power to exercise personal jurisdiction under the stream-of-commerce doctrine, Justice Brennan saw no need for a plaintiff to present "additional conduct" to establish that the defendant's acts were "purposefully directed toward the forum State." Id. at 116-17, 107 S. Ct. at 1034, 94 L. Ed. 2d at 107 (citation and internal quotation marks omitted). According to Justice Brennan, "[t]he stream of commerce refers . . . to the regular and anticipated flow of products from manufacture to distribution to retail sale." Id. at 117, 107 S. Ct. at 1034, 94 L. Ed. 2d at 107. Therefore, "[a]s long as a participant in this process is aware that the final product is being marketed in the forum State, the possibility of a lawsuit there cannot come as a surprise." Ibid. Thus, the burden of litigation in the forum state is an economic expense related to the cost of doing business. Id. at 117, 107 S. Ct. at 1034-35, 94 L. Ed. 2d at 107. Justice Brennan observed that the commercial benefits of selling a product in a state "accrue regardless of whether that participant directly conducts business in . . . or engages in additional conduct directed toward that State." Id. at 117, 107 S. Ct. at 1035, 94 L. Ed. 2d at 107. He noted that "most courts and commentators have found that jurisdiction premised on the placement of a product into the stream of commerce is consistent with the Due Process Clause, and have not required a showing of additional conduct." Id. at 117, 107 S. Ct. at 1035, 94 L. Ed. 2d at 107-08.

Although Justice Brennan concluded that Asahi had the necessary minimum contacts with California, id. at 121, 107 S. Ct. at 1036-37, 94 L. Ed. 2d at 110, he nevertheless agreed with Justice O'Connor that California's exercise of personal jurisdiction over Asahi would not comport with "fair

play and substantial justice," id. at 116, 107 S. Ct. at 1034, 94 L. Ed. 2d at 107 (citation and internal quotation marks omitted).

B.

After Asahi, some federal and state courts have applied Justice O'Connor's stream-of-commerce plus theory. Other courts have taken Justice Brennan's approach or have read World-Wide Volkswagen more expansively than Justice O'Connor's parsing of that opinion in Asahi. Yet, others simply have declined to choose between the views of the two Justices -- instead applying both, with some directing their analyses to Justice O'Connor's more restrictive approach without explicitly rejecting Justice Brennan's approach.

In some cases, courts have dodged the stream-of-commerce conflict entirely by deciding a jurisdictional issue on firmer and more traditional grounds. For example, in Lebel v. Everglades Marina, Inc., a contract-dispute case involving a claim of fraud, we saw no need to decide whether the defendant Florida company, which sold a luxury racing boat to a New Jersey resident, was subject to the jurisdiction of a New Jersey court based on the stream-of-commerce theory. 115 N.J. 317, 319-20 (1989) ("Rather than embark on a prediction of the future course of this stream of jurisprudence, we shall hew closely to the limited fundamentals about which there is little or no dispute or debate."). Instead, we turned to the traditional International Shoe standard, finding that the defendant's actions met the minimum-contacts requirement and that the exercise of jurisdiction by New Jersey would not offend "`traditional notions of fair play and substantial justice.'" Id. at 321-29 (quoting Int'l Shoe Co., supra, 326 U.S. at 316, 66 S. Ct. at 158, 90 L. Ed. at 102).

Here, unlike in Lebel, we cannot evade consideration of the stream-of-commerce theory for it is the only basis on which the English manufacturer could be subject to the jurisdiction of a New Jersey court.

V.

New Jersey has a long-arm rule that permits service of process on a non-resident defendant "consistent with due process of law." R. 4:4-4(b)(1). Therefore, our State courts may exercise jurisdiction over a non-resident defendant "to the uttermost limits permitted by the United States Constitution." Avdel Corp. v. Mecure, 58 N.J. 264, 268 (1971). There is no question that the United States Supreme Court in Asahi embraced the stream-of-commerce theory in one form or another. In the twenty-two years since Asahi, transnational commerce has accelerated, and we realize more than ever that we live in a global marketplace. In light of Asahi, and given what we know of the modern economic world, we must decide whether the stream-of-commerce test that we set forth in Charles Gendler comports with the Due Process Clause of the Fourteenth Amendment.

A.

Today, we reaffirm the reasoning of our decision in Charles Gendler, and hold that a foreign manufacturer that places a defective product in the stream of commerce through a distribution scheme that targets a national market, which includes New Jersey, may be subject to the in personam jurisdiction of a New Jersey court in a product-liability action. All in all, Charles Gendler, in pronouncing when a State court can exercise personal jurisdiction over a defendant based on the stream-of-commerce doctrine, gave a faithful and fair reading of World-Wide Volkswagen, one that is more reflective of Justice Brennan's views expressed in Asahi. * * *

The preeminent issue is whether we will read the Due Process Clause in a way that renders a state, such as New Jersey, powerless to provide relief to a resident who suffers serious injuries from a product that was sold and marketed by a manufacturer, through an independent distributor, knowing that the final destination might be a New Jersey consumer.

A number of significant policy reasons animate the approach articulated in Charles Gendler -- the approach we follow today. A state has a strong interest in protecting its citizens from defective products, whether those products are toys that endanger children, tainted pharmaceutical drugs that harm patients, or workplace machinery that causes disabling injuries to employees. A state also has a paramount interest in ensuring a forum for its injured citizens who have suffered catastrophic injuries due to allegedly defective products in the workplace. See Burger King Corp. v. Rudzewicz, 471 U.S. 462, 473, 105 S. Ct. 2174, 2182, 85 L. Ed.2d 528, 541 (1985) ("A State generally has a manifest interest in providing its residents with a convenient forum for redressing injuries inflicted by out-of-state actors." (citation and internal quotation marks omitted)); see also Charles Gendler, supra, 102 N.J. at 483 ("A state's interest in providing a forum for its residents is more compelling in a personal injury action than in commercial litigation.").

It would be strange indeed if a New Jersey manufacturer that makes a defective and dangerous product and is both subject to the jurisdiction of our courts and accountable under our product-liability laws would be able to move its plant to a foreign land and peddle its wares through an independent distributor across the nation, with some purchased by New Jersey consumers, and suddenly become beyond the reach of one of our injured citizens through this State's legal system. Our conception of jurisdiction must surely comport with traditional notions of fair play and substantial justice, but must also reflect modern truths -- the radical transformation of the international economy. Just as changing times led the United States Supreme Court to jettison "`consent,' `doing business,' and `presence' as the standard for measuring the extent of state judicial power over [foreign] corporations," McGee, supra, 355 U.S. at 222, 78 S. Ct. at 200-01, 2 L. Ed. 2d at 225, so too must we discard outmoded constructs of jurisdiction in product-liability cases, and embrace a modality that will provide legal relief to our citizens harmed by the products of a foreign manufacturer that knows or should know, through the distribution scheme it employs, that its wares might find their way into our State.

In today's world, foreign manufacturers, plying overseas markets, should be covered by insurance, accounting for the risks of doing business and providing a fund for consumers who may be injured by their products. See World-Wide Volkswagen, supra, 444 U.S. at 297, 100 S. Ct. at 567, 62 L. Ed. 2d at 501. Defending a suit in one of the United States, moreover, is not as burdensome as it once might have been, given that air transport can bring the principals of a business here within hours and instantaneous communication allows an ongoing dialogue with counsel in this country. See McGee, supra, 355 U.S. at 223, 78 S. Ct. at 201, 2 L. Ed. 2d at 226. If it is not inconvenient for the principals of a company to attend trade conventions and conduct business meetings with an independent distributor in this country for the purpose of marketing its products, then it should not be too great a burden to defend a lawsuit here when one of its defective products causes serious bodily injury. Although we cannot control manufacturing plants leaving this country or control a foreign manufacturer's employment policy, working conditions, or the quality of its operations, we can ensure that a manufacturer that targets its defective products at a wide geographic market that includes New Jersey will not be immune from suit in our State's courts. A manufacturer that wants to avoid being haled into a New Jersey court need only make clear that it is not marketing its products in this State. See Charles Gendler, supra, 102 N.J. at 481.

B.

Before addressing the facts in this case, we restate the governing stream-of-commerce principles in Charles Gendler that will apply in a product-liability case.[13] A foreign manufacturer will be subject to this State's jurisdiction if it knows or reasonably should know that through its distribution scheme its products are being sold in New Jersey. Id. at 480. A manufacturer that knows or reasonably should know that its products are distributed through a nationwide distribution system that might lead to those products being sold in any of the fifty states must expect that it will be subject to this State's jurisdiction if one of its defective products is sold to a New Jersey consumer, causing injury. Id. at 480-81. The focus is not on the manufacturer's control of the distribution scheme, but rather on the manufacturer's knowledge of the distribution scheme through which it is receiving economic benefits in each state where its products are sold. Ibid. A manufacturer cannot shield itself merely by employing an independent distributor -- a middleman -- knowing the predictable route the product will take to market. Id. at 479-80. If a manufacturer does not want to subject itself to the jurisdiction of a New Jersey court while targeting the United States market, then it must take some reasonable step to prevent the distribution of its products in this State. Id. at 481.[14]

C.

In light of those principles, we find that the record supports the exercise of jurisdiction over J. McIntyre under the stream-of-commerce doctrine. J. McIntyre, a company incorporated in the United Kingdom, targeted the United States market for the sale of its recycling products. It did so by engaging McIntyre America, an Ohio-based company, as its exclusive United States distributor for an approximately seven-year period ending in 2001. J. McIntyre knew or reasonably should have known that the distribution system extended to the entire United States, because its company officials, along with McIntyre America officials, attended scrap metal trade shows and conventions in various American cities where its products were advertised. Indeed, J. McIntyre's president was present at the Las Vegas trade convention where his exclusive distributor introduced plaintiff's employer to the allegedly defective McIntyre Model 640 Shear that severed four of plaintiff's fingers.

It is clear that those attending the scrap metal trade shows and conventions came from areas other than the cities hosting those events, and that the joint appearances by J. McIntyre and McIntyre America were calculated efforts to penetrate the overall American market. Plaintiff's employer, a New Jersey businessman, is just one example of a person who traveled thousands of miles to a convention where, by dint of a sales effort, he purchased one of J. McIntyre's machines. J. McIn-

[13] In this case, we address the stream-of-commerce doctrine in a product-liability action in which an allegedly defective machine severely injured a New Jersey resident. We do not discount that there may be cases in which a plaintiff's injury may be so minor that an assertion of jurisdiction by a New Jersey court would not comport with traditional notions of fair play and substantial justice. See Charles Gendler, supra, 102 N.J. at 482 ("We recognize that the nature of the injury is relevant to the jurisdictional inquiry.").

[14] Given this detailed standard, taken from Charles Gendler, we are at a loss at how the dissent can claim that the majority has created "a new test that consists of but one inquiry: whether a product has found its way here." That mischaracterization is repeated in varying forms throughout the dissent. It is the dissent's narrow parsing of Charles Gendler, not our copious quotations from and analysis of that opinion, which "has contorted the stream of commerce theory." The dissent turns a blind eye to the language in Charles Gendler that does not fit into its constricted view of jurisdiction. For example, the dissent tellingly omits that, under Charles Gendler, supra, a manufacturer with a "nationwide distribution system should reasonably expect that those products would be sold throughout the fifty states and that it will be subject to the jurisdiction of every state." 102 N.J. at 481. Ultimately, the dissent does not accept the basic teachings of Charles Gendler and would convert the "stream of commerce" doctrine into a dry bed.

tyre may not have had access to McIntyre America's customer list, but J. McIntyre knew or reasonably should have known that its machines were being sold in states other than Ohio and in cities other than where the trade conventions were held. J. McIntyre may not have known the precise destination of a purchased machine, but it clearly knew or should have known that the products were intended for sale and distribution to customers located anywhere in the United States.

J. McIntyre and McIntyre America shared a common name that may have suggested to unwitting members of the public some form of corporate relationship, despite the fact that both companies were independent business entities with different owners and management. The information sheet that accompanied the 640 Model Shear included J. McIntyre's address and telephone number and, according to the New Jersey businessman who purchased that machine, "had we needed any repair parts, we would have called J. McIntyre Machinery Ltd. in England, which is where we would call today for repairs or parts." There can be little doubt that J. McIntyre and McIntyre America worked together to promote and sell J. McIntyre products in the United States as evidenced by their shared communications and joint participation at industry trade conventions. It bears mentioning that J. McIntyre maintained ownership of at least some of its products delivered to McIntyre America until the distributor sold the products to a United States customer. Under that product-consignment relationship, McIntyre America would earn a commission from its sale of J. McIntyre's products after J. McIntyre collected its payment.

Because J. McIntyre knew or reasonably should have known that its distribution scheme would make its products available to New Jersey consumers, it now must present a compelling case that defending a product-liability action in New Jersey would offend "`traditional notions of fair play and substantial justice.'" Lebel, supra, 115 N.J. at 328 (citing Burger King Corp., supra, 471 U.S. at 477, 105 S. Ct. at 2184, 85 L. Ed. 2d at 544). However, J. McIntyre cannot make out a case that travel to New Jersey is onerous or an unfair burden for it to bear. J. McIntyre's officials have visited various cities throughout the United States to promote its business interests, attending trade conventions and meeting with representatives of its exclusive distributor. Certainly, defending the product-liability action in Ohio, where J. McIntyre's now-defunct exclusive distributor conducted business, or in Nevada, the site of the 1994 and 1995 trade conventions, would be no more convenient than in New Jersey. Indeed, New Jersey is a shorter distance from England than those locales, and neither the Ohio nor Nevada courts would seem to have an interest in resolving a product-liability action in which an English manufacturer's product injured a New Jersey resident in New Jersey.

On the other hand, New Jersey has a strong interest in exercising jurisdiction. Plaintiff is a New Jersey resident; the allegedly defective product was purchased by a New Jersey consumer, plaintiff's employer; the injury occurred in a New Jersey workplace; plaintiff was treated for his injuries in the New Jersey regional area; the evidence -- the shear machine -- and most of the necessary witnesses are located in New Jersey; and last, the law of this State likely will govern the action. It would be unreasonable to expect that plaintiff's only form of relief is to be found in the courts of the United Kingdom, which may not have the same protections provided by this State's product-liability law. Under all the circumstances, New Jersey has a rightful claim to resolve the dispute between the parties and to assert jurisdiction over this product-liability action. We will not deny plaintiff a forum in the courts of this State.

VI.

The stream-of-commerce doctrine of jurisdiction is particularly suitable in product-liability actions. It will not necessarily be a substitute for other jurisdictional doctrines, i.e., minimum contacts, that will apply in contract and other types of cases. See McKesson Corp. v. Hackensack Med. Imaging,

197 N.J. 262, 266-67, 277-78 (2009) (applying minimum-contacts test in holding that Texas court properly exercised personal jurisdiction over defendant New Jersey corporation that entered into commercial transactions with plaintiff-corporation in Texas). Within the confines of due process, jurisdictional doctrines must reflect the economic and social realities of the day. The exercise of jurisdiction by New Jersey in this case is a reasoned response to the globalization of commerce that permits foreign manufacturers to market their products through distribution systems that bring those products into this State. With the privilege of distributing products to consumers in our State comes the responsibility of answering in a New Jersey court if one of those consumers is injured by a defective product.

For the reasons expressed, we affirm the judgment of the Appellate Division, which reinstated plaintiff's product-liability action, and remand this matter to the trial court for proceedings consistent with this opinion.

JUSTICE HOENS, dissenting.

I respectfully dissent. Quoting extensively from this Court's decision in Charles Gendler & Co. v. Telecom Equipment Corp., 102 N.J. 460 (1986), the majority asserts, indeed insists, that it is merely reaffirming and applying the bedrock jurisdictional principles this Court has long embraced. The majority purports as well to harmonize the Gendler holding with the analyses set forth in the competing plurality opinions of the United States Supreme Court, see Asahi Metal Indus. Co., Ltd., 480 U.S. 102, 107 S. Ct. 1026 (1987). In fact, the majority's opinion does nothing of the sort.

Instead, in place of utilizing any of the analytical frameworks found in those three precedents, the majority has created an entirely new and unbounded test for asserting jurisdiction over foreign entities. Indeed, it is only by ignoring the essential underpinnings shared by those three opinions that the majority can reach its result; it is only by the use of subtle and unspoken shifts in language and emphasis that the majority is able to transform Gendler from what it is to what the majority chooses to have it mean. And transform it is precisely what the majority does. Because where Gendler used the stream of commerce theory as but one part of a larger due process analysis, with its traditional focus on the foreign defendant's connection to this forum, the majority has effectively substituted any effort by a manufacturer to sell its product anywhere in the nation as the only act needed for assertion of our jurisdiction.

Repeated quotations and soaring language about the realities of the global marketplace might compel the casual reader to follow what appears to be the majority's relentless logic. But those rhetorical techniques cannot mask the fact that the majority today embarks on a path that stretches our notions about due process, and about what is fundamentally fair, beyond the breaking point. In doing so, the majority has, notwithstanding its protestations to the contrary, elected to forge a new and uncharted path. Because it is a path with which I cannot agree, I dissent.

I. * * *
A. * * *

The Court in Gendler pointed out that the United States Supreme Court, in World-Wide Volkswagen, had recognized the vitality of a stream of commerce theory, but described that theory as having two component parts. Quoting the United States Supreme Court, this Court described the theory as permitting the exercise of jurisdiction over a non-resident manufacturer if that manufacturer first, places its products into the stream of commerce and, second, does so "with the expectation that they will be purchased by consumers in the forum State." Id. at 474 (quoting World-Wide Volkswagen, supra, 444 U.S. at 298, 100 S. Ct. at 567, 62 L. Ed. 2d at 502). That second consid-

eration, that is, the manufacturer's expectation, was related to the Court's reliance on a foreseeability analysis, and remains entirely consistent with the traditional inquiry about whether defendant could reasonably anticipate being "haled into court." Id. at 475. Although this Court referred to the stream of commerce theory that had developed in the federal courts as "an independent basis to satisfy the minimum-contacts standard," id. at 476 (citing Burger King Corp. v. Rudzewicz, 471 U.S. 462, 473, 105 S. Ct. 2174, 2182, 85 L. Ed.2d 528, 541 (1985)), its quotations from the United States Supreme Court's opinion in Burger King make plain that this Court recognized that stream of commerce necessarily includes the element of expectation of purchase in this state. That is, by recognizing that there are two elements to the theory, this Court did not substitute mere usage of the stream of commerce as if it were a free-standing basis for jurisdiction, but instead included within it the fairness and foreseeability analyses that are essential to due process. Ibid.

Turning to an exhaustive analysis of both state and federal precedents in which the stream of commerce theory had been considered, this Court considered the exercise of jurisdiction over foreign manufacturers generally, finding that concepts such as the nature of the chosen chain of distribution, see id. at 477-78, and evidence of a manufacturer's "purposeful penetration of the [forum state's] market," id. at 478, were relevant to any consideration of the stream of commerce theory. In the end, however, the Court returned to fundamental concepts of due process, holding fast to considerations of purposeful availment, ibid., reasonable expectations of being haled into court, id. at 475, and receipt of benefits of the forum, id. at 480, as the guiding principles of our jurisdictional analysis. This Court described with precision the test to be applied: "The crucial question is whether [the foreign manufacturer] was aware or should have been aware of a system of distribution that is purposefully directed at New Jersey residents." Gendler, supra, 102 N.J. at 484 (emphasis added). * * *

B.

An analysis of the two competing plurality opinions of the United States Supreme Court in Asahi, supra, leads to a similar conclusion, that is, that in evaluating any state's exercise of long-arm jurisdiction, the Court's core concern is due process. On that point, both the plurality opinion authored by Justice O'Connor and the concurring opinion written by Justice Brennan agree. The basis for deciding all jurisdictional questions remains rooted in our traditional notions of due process, see Asahi, supra, 480 U.S. at 108-09, 107 S. Ct. at 1030, 94 L. Ed. 2d at 102 (O'Connor, J., plurality opinion); id. at 117, 107 S. Ct. at 1034-35, 94 L. Ed. 2d at 107-08 (Brennan, J., concurring), and must comport with "fair play and substantial justice," see id. at 113, 107 S. Ct. at 1033, 94 L. Ed. 2d at 105 (O'Connor, J., plurality opinion) (quoting Int'l Shoe, supra, 326 U.S. at 316, 66 S. Ct. at 158, 90 L. Ed. at 102); id. at 116, 107 S. Ct. at 1034, 94 L. Ed. 2d at 107 (Brennan, J., concurring) (quoting Int'l Shoe, supra, 326 U.S. at 320, 66 S. Ct. at 160, 90 L. Ed. at 104).

Each of the plurality opinions uses the same test, namely, whether the foreign manufacturer has done something to "purposefully avail itself of the market in the forum State." Asahi, supra, 480 U.S. at 110, 107 S. Ct. at 1031, 94 L. Ed. 2d at 103 (O'Connor, J., plurality opinion); id. at 116-17, 107 S. Ct. at 1034, 94 L. Ed. 2d at 107 (Brennan, J., concurring). Each, significantly, makes clear that it is inappropriate to define the stream of commerce theory in such a way that the label takes the place of an evaluation of purposeful availment. * * *

II.

Neither of the Asahi opinions abandoned due process as the essential underpinning of jurisdiction, or reliance on purposeful availment as the core of that analysis. Neither of the Asahi opinions, moreover, equated merely placing a product into the stream of commerce somewhere in the United

States with purposeful availment sufficient to comport with due process and to support jurisdiction. On the contrary, as those opinions and this Court's decision in Gendler make clear, this Court and the United States Supreme Court have never strayed from the recognition that due process is fundamental to the constitutional assertion of jurisdiction over a non-resident defendant. This Court and the United States Supreme Court have never varied from holding that due process demands that there be some connection between a defendant and the forum, whether that analysis is expressed in terms of minimum contacts, see Int'l Shoe, supra, 326 U.S. at 316, 66 S. Ct. at 158, 90 L. Ed. at 102, or purposeful availment, see Burger King, supra, 471 U.S. at 475-76, 105 S. Ct. at 2183-84, 85 L. Ed. 2d at 542-43, or an action purposefully directed toward the forum State, see Asahi, supra, 480 U.S. at 112, 107 S. Ct. at 1032, 94 L. Ed. 2d at 104 (O'Connor, J., plurality opinion), or awareness of regular and extensive sales of its product by another, see Asahi, supra, 480 U.S. at 121, 107 S. Ct. at 1036-37, 94 L. Ed. 2d at 110 (Brennan, J., concurring), or purposefulness demonstrated by the knowledge that one's products will be sold in the forum state, see Gendler, supra, 102 N.J. at 480.

Today, in the guise of reaffirming Gendler, the majority cuts all ties with precedent and does what Asahi warned against, equating the mere placement of a product into the stream of commerce somewhere with whatever due process would otherwise demand for assertion of jurisdiction anywhere. The majority does so by first conceding that nothing in this record would satisfy the traditional minimum contacts test. It then describes the stream of commerce as if it were an alternative rationale, proceeding thereafter to review the factual record in terms meant to match the ones used by this Court in Gendler.

As characterized by the majority, this case is about a foreign company that engaged in "purposeful marketing" of its product, that used a "distribution scheme," and that "targeted" a geographical market that included New Jersey. There can be little debate, of course, that if defendant in fact had a "distribution scheme" like the ones considered in Gendler and Asahi, and if it "targeted" this state in particular, our traditional notions of due process would support the exercise of jurisdiction. This record, however, has evidence neither of a "distribution scheme" nor of "targeting" consistent with what this Court in Gendler or the United States Supreme Court in Asahi discussed. Indeed, it is only through subtle and unspoken, but analytically significant, shifts in the meaning of those phrases that the majority is able to assert that it is applying those precedents faithfully. It is, however, the very real distinctions between what the earlier opinions meant and what the majority today means that demonstrate that there is no faithful adherence to those precedents at all.

First, the "distribution scheme" in Gendler included a foreign manufacturer's creation of a wholly-owned subsidiary that was authorized to do business in this state, Gendler, supra, 102 N.J. at 467, and that company's use of another wholly-owned subsidiary that sold its products to a New Jersey corporation for eventual sale to plaintiff. Ibid. Moreover, the foreign corporation in Gendler conceded that the sale in New Jersey was "not an isolated transaction," ibid., but was part of larger and "[d]eliberate sales efforts," id. at 469, aimed at this state. Likewise, in Asahi, the foreign manufacturer's distribution system resulted in what Justice Brennan described as "regular and extensive sales" of its product for use as a component part in products sold in the state seeking to assert jurisdiction. Asahi, supra, 480 U.S. at 121, 107 S. Ct. at 1037, 94 L. Ed. 2d at 110.

Nothing in this record approaches the sort of "distribution scheme" to which those precedents referred. Instead, we are confronted with a foreign manufacturer that chose an entirely distinct, unaffiliated Ohio corporation to serve as its distributor, that had little, if any, success in its efforts to control or direct that entity's activities, that sent a representative to trade shows somewhere in this country from time to time, and whose independent distributor made but one sale of a machine that ended up in this state. Notwithstanding that record, through clever repetition of phrases like "distri-

bution scheme," the majority transforms what might at most be described as a trickle of goods into a flood of products sufficient to meet the demands of due process when, in truth, the facts fall short. Apparently mindful of Justice Brennan's caution that we not equate stream of commerce with the "unpredictable currents and eddies, but to the regular and anticipated flow of its products," see id. at 117, 107 S. Ct. at 1034, 94 L. Ed. 2d at 107, the majority mischaracterizes the record to achieve precisely that end.

Second, the record is barren of the kind of targeting that this Court in Gendler and the United States Supreme Court in Asahi considered. In each of those opinions, the Courts evaluated the manufacturer's connection with the particular forum and utilized the stream of commerce to the extent that it played a role as the vehicle for getting the product to that forum. For example, in Gendler, one could conclude that there was an effort to access and exploit a market in New Jersey because the manufacturer utilized an alter ego, a wholly-owned subsidiary doing business here, and engaged in "[d]eliberate sales efforts" aimed at this state. Gendler, supra, 102 N.J. at 469. In Asahi, although the record was hardly extensive, both of the opinions are clear about what is required, at a minimum, for this element of the test. For Justice O'Connor, it remains purposeful availment as evidenced through conduct aimed at a particular forum's market, see Asahi, supra, 480 U.S. at 112, 107 S. Ct. at 1032, 94 L. Ed. 2d at 104; for Justice Brennan, it requires affirmative awareness that the stream of commerce is being used to market the product in the target state, id. at 117, 107 S. Ct. at 1034, 94 L. Ed. 2d at 107.

Nothing in this record rises to that level, for there is no evidence that the foreign corporation made any effort to send its products here; there is nothing more than a decision to market its product somewhere within this nation. Ignoring this Court's plain command in Gendler that the "crucial question" includes a "system of distribution that is purposefully directed at New Jersey residents," Gendler, supra, 102 N.J. at 484, the majority simply replaces targeting of this state, which would comport with due process, with a generic effort toward the whole of the United States, which does not. * * *

I part company with the majority's opinion because it fails to recognize that what gives content to the stream of commerce theory is the manufacturer's conduct, or knowledge, or awareness of what others were doing with its product. It is those elements that satisfy the traditional component of purposeful availment and that, therefore, permit an exercise of jurisdiction that does not offend the outermost bounds of due process. Any jurisdictional inquiry must contend with the accepted two-part test, through which we recognize that due process demands some act, some evidence, some proof of affirmative awareness, that one's actions will likely result in a sale in the forum state. Because the majority has substituted any act, or potentially no act at all, that can be equated with permitting one's product to enter generally into the stream of commerce for that essential component of our due process analysis, I cannot agree. * * *

JUSTICE RIVERA-SOTO, dissenting.

In all respects, I wholeheartedly join in Justice Hoens's thoughtful, comprehensive and scholarly dissent. I write separately, however, solely to urge explicitly a point implied in Justice Hoens's dissent.

The majority's decision implicates and, in large and sweeping swaths, upends established notions of constitutional decision making that form the bedrock of our federal system. In so doing, it offends those core federalist concepts that rightly and prudentially limit the exercise of any one state's judicial power via the invocation of long-arm jurisprudence. It, therefore, cannot be allowed to stand. Because the majority "has decided an important federal question in a way that conflicts with" set-

tled federal constitutional principles, Sup. Ct. R. 10(b), creates a new, insubstantial, and meaningless standard for the unbounded exercise of long-arm jurisdiction, and disturbs the careful balance that limits the exercise of judicial power between and among the several states, this decision is ripe for review and correction by the Supreme Court of the United States.

*Note and Question*

In September 2010, the U.S. Supreme Court took up Justice Rivera-Soto's suggestion and granted certiorari. How should the Supreme Court rule in this case?

## Extraterritoriality and Federal Securities Laws

Notes 2 and 3 at pages 832-33 of the casebook discusses a series of cases, primarily in the U.S. Court of Appeals for the Second Circuit, that have applied federal securities laws in cases in which wrongful conduct in another country has an effect in the United States, and cases in which the defendant engaged on more than merely preparatory conduct in the United States that has effects in other countries.

In *Morrison v. National Australia Bank Ltd.*, 130 S. Ct 2869 (2010), the Supreme Court rejected both tests and held that the *Aramco* presumption against extraterritoriality applied to federal securities laws. The case involved litigation under § 10(b) of the Securities and Exchange Act of 1934, and the Court found that "there is no affirmative indication in the Exchange Act that § 10(b) applies extraterritoriality, and we conclude that it does not."

## Proof of Foreign Law

What are the issues of foreign law in the following case? Are you satisfied with the court's handling of the foreign law issues?

**WEISS v. GLEMP**
792 F. Supp. 215 (SDNY 1992)

ROBERT P. PATTERSON, JR., U.S.D.J.

This is an action for damages brought by Rabbi Avi Weiss ("Rabbi Weiss") against Cardinal Jozef Glemp ("Cardinal Glemp") alleging slander and defamation. Cardinal Glemp moves to dismiss the Complaint pursuant to Rules 12(b)(2), 12(b)(5), and 12(b)(6) of the Federal Rules of Civil Procedure on the grounds that: (1) the Court lacks personal jurisdiction over the Defendant because service of process was insufficient; (2) Plaintiff is barred, under principles of res judicata and collateral estoppel, by a judgment on an identical claim entered in the Defendant's favor by the courts of Poland; and (3) under the doctrine of forum non conveniens, this Court is not an appropriate forum for resolution of this dispute.

The motion was returnable on November 6, 1991, but because both parties sought adjournments, the motion was not heard until February 11, 1992. At that time, the Court held an evidentiary hearing on the issue of service of process and heard oral argument on all three issues.

*BACKGROUND*

In July 1989, Rabbi Weiss, a New York rabbi, and six of his students traveled to Poland to protest the continued use of a building on the outskirts of the former Auschwitz concentration camp as a convent for Roman Catholic nuns of the Carmelite Order. The nuns had continued to use the convent despite an agreement entered into by certain Jewish leaders and Roman Catholic Bishops in Geneva in early 1987 to relocate the convent within two years.

On July 14, 1989, Rabbi Weiss and his students climbed over a seven-foot tall fence surrounding the convent grounds, knocked on the door, and camped out on the steps of the convent itself. The convent is cloistered, and church law prohibits its entrance by outsiders without the permission of the Mother Superior and the Bishop, permission which can be granted only for special cause. After Rabbi Weiss and his students had prayed for five hours, they were physically ejected from the convent grounds by maintenance workers at the convent who allegedly poured on them buckets of water mixed with urine. According to a published news account, Rabbi Weiss criticized his eviction from the convent grounds, accusing the nuns of being "silent while the workers beat on Jews -- reminiscent of the silence of the Church during the Holocaust." D.D. Guttenplan, "Rabbi Asks Support of O'Connor," *Newsday*, July 21, 1989 at 8.

On August 26, 1989, Cardinal Glemp, who is the Primate of Poland, delivered a homily during a mass at Jasna Gora in Czestochowa, Poland. . . . The translation indicates that in his homily Cardinal Glemp described the protest at the convent as follows:

> The Carmelite Sisters living beside the camp in Auschwitz wanted and want to be a sign of that human solidarity which includes the living and the dead. Do you not see, esteemed Jews, that intervention against them injures the feelings of all Poles and the sovereignty we gained with such difficulty? Your power is the mass media, which is at your disposal in many countries. Let them not serve to inflame anti-

Polish sentiment.

According to the translation, Cardinal Glemp then made the following statement upon which this libel and defamation action is grounded:

> Recently, a detachment of seven Jews from New York attacked the convent at Auschwitz. To be sure, because they were restrained, it did not result in the killing of the sisters or the destruction of the convent; but do not call the aggressors heroes.

The mass was attended by some 100,000 people, and Cardinal Glemp's remarks received attention in media reports throughout the world.

On September 5, 1989, Alan M. Dershowitz, Esq., a professor at Harvard Law School and Plaintiff's counsel in this action, sent a letter to Cardinal Glemp which informed him that if he arrived in the United States he would be served with a complaint and required to appear in court to answer charges that he had defamed Rabbi Weiss.

On November 21, 1989, Mr. Dershowitz, on behalf of Rabbi Weiss, brought a criminal charge of defamation against Cardinal Glemp in the Regional Court in Czestochowa, Poland, based on the above-quoted language as it appeared in the original Polish. Thereafter, Mr. Dershowitz met ex parte with the Chief Judge and the Magistrate Judge of the Regional Court. On June 19, 1990, the Regional Court issued an opinion which dismissed Rabbi Weiss's complaint, giving a number of reasons other than those related to jurisdiction. Rabbi Weiss appealed the Regional Court's decision to the Province Court in Czestochowa, and Mr. Dershowitz was permitted by the Province Court to submit additional material in support of Rabbi Weiss's claim. On May 13, 1991, the Province Court affirmed the Regional Court's dismissal and assessed costs against Rabbi Weiss.

As early as August 1991, Cardinal Glemp had planned a pastoral visit to various parts of the United States arranged in part through Archbishop Maida of Detroit.

On September 25, 1991, Cardinal Glemp visited the Catholic diocese in Albany, New York. Upon his arrival in Albany, Cardinal Glemp was scheduled to attend a prayer service in the Cathedral of the Immaculate Conception, and then to meet with Jewish leaders on the premises of Cathedral. At around 10:50 a.m., Cardinal Glemp left the Cathedral Rectory in a procession to the Cathedral itself. He was flanked by Bishop Howard Hubbard, the Bishop of the Albany Diocese and Father Randall Patterson, the Chancellor of the Diocese, and followed by a retinue of other prelates. As the procession turned onto the sidewalk, a process server, Aline M. Frisch, approached Cardinal Glemp and attempted to serve the summons and complaint in this action. The first part of this motion is addressed to that event.

## *DISCUSSION*

### *I. SERVICE OF PROCESS*

[The court held that, "because Cardinal Glemp was not properly served with process in this action, the motion to dismiss for insufficient process and lack of personal jurisdiction is granted."]

## *II. RES JUDICATA AND COLLATERAL ESTOPPEL*[5]

Defendant argues that because Rabbi Weiss chose to litigate his claim against Cardinal Glemp in the courts of Poland and lost his case on the merits, he is barred by principles of res judicata and collateral estoppel from relitigating his claim in this Court.

### *A. The Polish Action*

Rabbi Weiss, represented by Mr. Dershowitz, brought an action against Cardinal Glemp on November 21, 1989 in the Regional Court in Czestochowa, Penal Department, in Czestochowa, Poland. In his "Notice of Legal Claim," Rabbi Weiss sought to invoke the Polish penal code, accusing Cardinal Glemp of "the crime defined in Article 178, Section 1 or 2, of the Penal Code." Rabbi Weiss stated that Cardinal Glemp's statement in his homily "has caused a serious harm to my reputation as [I am] a man of peaceful character, and because of that I decided to defend my good name through means stipulated under Polish law." He stated his motivation in bringing the claim was not revenge and, "My only goal is to defend my reputation from a false allegation." Rabbi Weiss also noted, "I do not seek a punitive fine, and especially not a prison term," and he was "only interested in a court decision stating I have been falsely slandered."

The Regional Court dismissed the claim by opinion, finding that: Rabbi Weiss's accusation against Cardinal Glemp did not clearly infer Cardinal Glemp intended to slander Rabbi Weiss; "In the fragment of the homily noted by the Plaintiff, the fragment which became the cause of the claim, there is no statement describing the intentions"; Cardinal Glemp's statement of effects which in actuality did not take place was meant to protest against regarding the attackers as heroes; all descriptions and statements in the sentence were subordinated to the thought expressed in the last part of the sentence, *i.e*., regarding the attackers as heroes; and Cardinal Glemp's statement in Polish expresses the thought that the actual intentions of the attackers were not known and could not be learned because the attackers were stopped. In that portion of its opinion, the Court stressed Cardinal Glemp's use of the word "Lub" ["or"], as meaning that the statement of effects which did not take place were mentioned only by way of example, and thus to indicate that the real intentions of Rabbi Weiss and his students were not known to Cardinal Glemp.[8]

The Regional Court decision took the position that Cardinal Glemp's statements were statements either made within the bounds of his authority, made while performing his duties, or made with the purpose of explaining or defending the rights of others, in this case the rights of the Carmelite Sisters, and such statements do not constitute slander actionable under the Penal Code. Further, the Court found Rabbi Weiss's conduct amounted to disturbance of "the peace of the house," which appears to be a crime similar to criminal trespass, and was a violation of the Penal code. The Court also found that since Rabbi Weiss was not mentioned by name, his accusation that he was slandered did not match reality.[9]

The Province Court in Czestochowa reviewed the Regional Court's decision and Rabbi Weiss's "Statement in Supplement to the Appeal." In its decision, the Province Court summarized Rabbi

[5] The Court rules on the remaining parts of Defendant's motion only because of the likelihood of an appeal of its ruling that personal jurisdiction does not lie.

[8] Defendant argues that the Regional Court's analysis of Cardinal Glemp's statement is very similar to the analysis required in American courts for a finding of actual malice in statements made regarding a public figure. See *New York Times Co. v. Sullivan, 376 U.S. 254 (1964)*. He argues that Rabbi Weiss was, or by his actions at the convent caused himself to become, a public figure under *New York Times Co. v. Sullivan*.

[9] This finding itself seems to lack reality in view of the publicity attendant to Rabbi Weiss's acts at the convent.

Weiss's position on appeal as follows:

> In his conclusion, the author of the appeal states that the filed legal claim fulfilled all the requirements necessary "to initiate legal proceedings on the basis of Article 178, Section 1, of the Penal Code" and that "the decision to immediately dismiss" his "claim and dismiss the proceedings in the case of the claim of slander, filed against Cardinal Jozef Glemp, constitutes a violation of" his "right to avail himself of the justice system, because it [the decision] erroneously deprives" him "of the opportunity to provide evidence in support of" his "legal claim (formulated in accordance with the regulations) stating that Article 178, Section 1, of the Penal Code has been violated and to claim compensation for the damages" he "suffered."

In dismissing Rabbi Weiss' appeal, the Province Court held that the Regional Court Chief Justice had properly determined, under Article 299, Section 1, of the Penal Procedure Code, that Rabbi Weiss's claim lacked certain elements, and that he properly did not refer the case for a public trial, but referred it to a "session" for determination of whether there were grounds for judging the case at a trial. The Province Court held, for the reasons stated in the lower court's opinion, that the Regional Court was correct in finding Cardinal Glemp's acts did not bear the marks of an act prohibited by law. It stated that it fully supported those reasons, particularly because "Cardinal Glemp, as head of the Roman Catholic Church in Poland, had the right to express his position on the subject of the incident on the premises of the Carmelite convent in this case, when the 'peace of the house' has indeed been disturbed (Article 271 of the Penal code)."

*B. The Parties' Arguments*

Defendant argues that because Rabbi Weiss litigated the prior Polish action, the Uniform Foreign Country Money-Judgments Recognition Act ("the Act"), bars him from pursuing his claim before this Court. The Act provides for the recognition by New York courts, subject to certain exceptions, of:

> any judgment of a foreign state granting or denying recovery of a sum of money, other than a judgment for taxes, a fine or other penalty, or a judgment for support in matrimonial or family matters.

*CPLR § 5301(b)*. Defendant asserts the Polish action does not fall within any of the limited exceptions to the Act, and "mere divergence from American procedure does not render a foreign judgment unenforceable." *Pariente v. Scott Meredith Literary Agency, Inc.*, 771 F. Supp. 609, 616 (S.D.N.Y. 1991).

Defendant also argues that even though Rabbi Weiss invoked the Polish penal law, the Act still applies to bar his claim because his suit did not truly seek penal relief. "Essentially civil claims should never be denied extrastate enforcement merely because the epithet penal can be attached to them." Robert A. Leflar, *Extrastate Enforcement of Penal and Government Claims*, 46 Harv. L. Rev. 193, 202 (1932). As Judge Cardozo observed for the Court in *Loucks v. Standard Oil Co.*, 224 N.Y. 99, 102, 120 N.E. 198 (1918):

> The question is not whether the statute is penal in some sense. The question is whether it is penal within the rules of private international law. A statute that is penal in that sense is one that awards a penalty to the state, or to a public officer in its behalf, or to a member of the public, suing in the interest of the whole community to redress a public wrong.

Therefore, "actions brought by a private person or public body to recover compensation for a loss" are not penal actions for purposes of enforcement of foreign judgments. *Restatement (Second) of Conflict of Laws*, § 89, comment a.

Defendant points out that in his "Notice of Legal Claim," Rabbi Weiss stated his goal was "to defend my reputation." He also explicitly foreswore relief in the form of a punitive fine or a prison term. Thus, because the purpose of his claim was reparation to one aggrieved rather than vindication of the public interest, his claim was not penal in the private international law sense. See Barbara Kulzer, *Recognition of Foreign Money Judgments in New York: The Uniform Foreign Money-Judgments Act*, 18 Buff. L. Rev. 12 (1969).

Defendant also notes that in his "Statement in Supplement to the Appeal" to the Province Court, Rabbi Weiss asserted his right to receive "compensation for the damages caused to me." Defendant provides opinions of experts in Polish law stating that in the Polish legal system, a defamed individual may initiate a criminal or a civil proceeding, or he may join a civil claim for damages with a criminal complaint. Defendant argues that because Rabbi Weiss added a request for compensatory damages, the Province Court could have awarded damages had it concluded the claim had merit.

Alternatively, Defendant argues that even if Rabbi Weiss had not requested damages in the prior action, he is barred from pursuing a civil damages claim here because he had the right to demand damages and failed to do so. *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981) (holding res judicata bars the subsequent litigation not only of all claims that were in fact pursued in the prior litigation, but also of all claims that could have been raised in the earlier case based on the same facts).

Plaintiff denies application of the Act, arguing the prior Polish action was a penal proceeding, and the Act applies only to money judgments. Furthermore, he argues that common law rules of claim and issue preclusion give no preclusive effect whatsoever to a prior penal or criminal proceeding which ended in defendant's favor in a subsequent civil action. *Helvering v. Mitchell*, 303 U.S. 391 (1938); *Neaderland v. Commissioner*, 424 F.2d 639 (2d Cir.), cert. denied 400 U.S. 827 (1970); *Restatement (Second) of the Law of Judgments*, § 85, comment a at 295 (1982). The cases cited by Plaintiff, however, pertain to the preclusive effect of prior domestic criminal actions. They do not relate to the preclusive effect of foreign proceedings denominated penal which are brought by individuals in their own name rather than by the state, as is required in this country. Plaintiff fails to rebut Defendant's argument that merely attaching the label "penal" to a claim does not necessarily make it a penal action in the private international law sense.

Rabbi Weiss also argues that he sought only criminal penalties when he initiated the action in the Regional Court in Poland. In support of this, he provides affidavits from experts on Polish law which indicate that the statement "I am seeking compensation for damage to my reputation" in a "Notice of Legal Claim" does not convert a criminal proceeding to a civil proceeding. Plaintiff fails, however, to rebut Defendant's argument regarding the addition in his "Statement in Supplement to the Appeal" of the phrase "compensation for the damages caused to me."

Finally, Plaintiff claims that because he did not have a full and fair opportunity to contest the Polish decision now said to be controlling, he cannot be precluded from pursuing the instant action. *Gilberg v. Barbieri*, 53 N.Y.2d 285, 441 N.Y.S.2d 49, 51, 423 N.E.2d 807 (1981). Plaintiff claims he did not have a full and fair opportunity to litigate the prior action because: (1) in the face of intense pressure from Cardinal Glemp's supporters, he and his attorneys could not find a single law-

yer to assist them in Poland; (2) after waiting for months, he and his lawyers learned Cardinal Glemp was never required to respond to his accusations;[12] (3) the Polish courts never held any hearing on his claims; (4) the Polish courts did not request any evidence or argument related to his claims; and (5) Cardinal Glemp never submitted to the jurisdiction of the Polish courts. In light of this procedural inequity, Plaintiff argues the Polish proceedings were a "travesty," and should not have any bearing on this litigation. . . .

*C. Discussion*

If normal access to the courts prevailed during the prior litigation, and if it appeared Rabbi Weiss's claim was decided on the merits under a standard of proof for a civil action similar to that in this country, Rabbi Weiss's earlier choice of Poland as a forum in which to seek "compensation for the damages caused to me" would be binding. In such a situation, he would be precluded from bringing a slander claim here, at a time long past the one year period prescribed by the New York Statute of Limitations. *See* CPLR § 215. Nevertheless, the Court takes judicial notice that Cardinal Glemp is now an extremely important and powerful figure in Poland, that anti-semitism exists in Poland,[13] and that it might well be difficult for an American rabbi to initiate civil proceedings against Cardinal Glemp in that country. The Court also takes judicial notice that, in many countries from time to time, attorneys' and judges' fears have resulted in sham proceedings. Whether there is adequate evidence that such a situation existed in Poland in 1989-90 to the extent that court process was a travesty, however, is another question.

Foreign law is a question of fact which must be proved. *Werfel v. Zivnostenska Banka*, 287 N.Y. 91, 38 N.E.2d 382 (1941). Accordingly, because the affidavits of the experts on Polish law do not fully satisfy the Court, the motion to dismiss on grounds of preclusion is denied without prejudice, subject to a hearing being held if this Court is reversed on the issue of personal jurisdiction. At such a hearing, Defendant may present the evidence as to Polish substantive and procedural law, and Plaintiff may present evidence of the deprivations of proper process which he claims occurred in the prior Polish proceedings.

*III. FORUM NON CONVENIENS*

[The court denied the dismissal on forum non conveniens grounds because "the balance of convenience favors Plaintiff's choice of forum."]

*CONCLUSION*

Defendant's motion to dismiss for insufficiency of service of process is granted. The motions to dismiss on grounds of preclusion and forum non conveniens are denied.

[12] Whether the filing of a complaint of violations of the Polish penal code requires the accused to respond is unclear.

[13] See Konstanty Gebert, *Anti-Semitism in the 1990 Polish Presidential Election*, 58 Soc. Res. 723 (1991).

## Borrowing Statutes at Work

**Charles J. Givens v. Jane Bryant Quinn**
877 F. Supp. 485 (W.D. Mo. 1994)

DEAN WHIPPLE, UNITED STATES DISTRICT JUDGE

Defendant Jane Bryant Quinn asks this court to dismiss the first amended complaint. The court will deny the motion to dismiss the first amended complaint, but will dismiss the first count in the complaint for the reasons stated below.

### I. Background

Plaintiff Charles J. Givens is a resident of Florida who sells financial advice through books and seminars. Quinn is a resident of New York who gives financial advice in her books, magazine articles and a nationally syndicated newspaper column. An article attached to the first amended complaint notes Quinn's newspaper column is syndicated through the Washington Post.

Givens alleges Quinn defamed him by indicating in her syndicated column and in two Newsweek articles that Givens gives "biased dangerous advice" and leads "his students to financial ruin." The first amended complaint suggests Quinn defamed him because his book knocked Quinn's book off the Best Seller List.

In the original complaint, Givens only alleged Quinn defamed him in a syndicated column that first appeared on November 21, 1991 and appeared in the Kansas City Star on November 24, 1991. In the first amended complaint, Givens adds several other instances of allegedly libelous statements. The first amended complaint states Quinn next defamed Givens in a syndicated column that appeared in the Kansas City Star on April 27, 1993. Quinn allegedly defamed Givens again in a May 17, 1993 and a June 28, 1993 Newsweek article. In response to the May 17, 1993 Newsweek article, Givens questioned Quinn's honesty in a full-page advertisement in the May 27, 1993 edition of USA Today.

Givens filed the original complaint on November 23, 1992, in the Circuit Court of Jackson County, Missouri and on July 2, 1993, Givens served a copy of the summons and the complaint on Quinn. Quinn removed the case to this court. Quinn now asks this court to dismiss the case because the statute of limitations bars Givens' from suing.

### II. Statute of Limitations

Quinn does not dispute the syndicated column that appeared on April 27, 1991, in the Kansas City Star and the two articles that appeared in Newsweek survive statute of limitations analysis. Quinn does dispute that a claim for libel based on a syndicated column that first appeared on November 21, 1991 and appeared in the Kansas City Star on November 24, 1991 can survive statute of limitations analysis.

#### A. Single Publication Rule

Quinn argues the applicable statute of limitations is one year. Quinn correctly notes that Missouri courts apply the statute of limitations from the state where the libel was first published. Quinn argues that this court must apply a one-year and not Missouri's two-year statute of limitations be-

cause before the syndicated column appeared in Missouri, it appeared in states that apply a one-year statute of limitations.

Quinn's argument assumes Givens is limited to a single cause of action for a syndicated column that appeared in different newspapers throughout the country and not a cause of action for each newspaper edition. In short, Quinn assumes, without any analysis, the single publication rule applies. If the single publication rule applies, then Givens has one cause of action for the syndicated column that first appeared on November 21, 1991 and this court will use Missouri's borrowing statute to apply a non-Missouri statute of limitations. *Finnegan v. Squire Publishers, Inc.,* 765 S.W.2d 703, 704-05 (Mo. Ct. App. 1989) (In libel actions, Missouri will borrow the statute of limitations of the state where the allegedly libelous statement is first published.). If the single publication rule does not apply, then Givens has a cause of action for each newspaper edition the syndicated column appeared in. The syndicated column appeared on November 24, 1991, in the Kansas City Star, which is published in Missouri. Thus, if the single publication rule does not apply, Givens would have a cause of action that originated in Missouri and the court would apply Missouri's two-year statute of limitations.

English common law, later adopted by American courts, followed the multiple publication rule which provided a cause of action for each copy of a newspaper edition containing a defamatory statement. See, *Rinaldi v. Viking Penguin, Inc.*, 52 N.Y.2d 422, 420 N.E.2d 377, 380-81 (N.Y. 1981) (explaining the multiple publication rule and its evolution to the single publication rule in New York, the first state in the country to adopt the single publication rule). Thus, under the multiple publication rule, if a newspaper prints a hundred thousand copies of an edition containing libelous statements, a plaintiff can bring a hundred thousand causes of action against the newspaper. Cf. *Keeton v. Hustler Magazine, Inc.,* 465 U.S. 770, 777 (1984) (The single publication rule protects defendants from "harassment resulting from multiple suits.") (citing the *Restatement (Second) of Torts* § 577A, Comment f (1977)). Also, under the multiple publication rule, the statute of limitations does not run until the last copy of the edition is removed from sale -- providing the plaintiff with almost complete immunity from any statute of limitations. *Restatement (Second) of Torts* § 577A, Comment c (1977). Two problems thus exist with the multiple publication rule: the rule allows a plaintiff to bring numerous causes of action against a defendant simply to harass the defendant and it renders the statute of limitations in libel actions a nullity.

Missouri, for purposes of venue, judicially adopted the single publication rule presumably, to prevent these two problems. *State ex rel. Drake Publishers v. Baker,* 859 S.W.2d 201, 204 (Mo. Ct. App. 1993); *Litzinger v. Pulitzer Publishing Co.,* 356 S.W.2d 81, 84-87 (Mo. 1962). "The single publication rule requires a plaintiff to recover all of his or her damages arising from a libel published in any one edition or issue of a magazine in one action. *Restatement (Second) of Torts* § 577A (1977)." See also, *Patch v. Playboy Enterprises, Inc.,* 652 F.2d 754, 757 (8th Cir. 1981) (applying Missouri law).

This court recognizes Missouri courts only reluctantly extend cases interpreting venue to other contexts. *Finnegan,* 765 S.W.2d at 705. In a case interpreting Missouri's borrowing statute, the court explained why it refused to rely on venue cases:

> The borrowing statute is primarily designed to prevent a plaintiff from forum shopping to gain more time to initiate a cause of action. A purpose of statutorily specified venue is to protect the defendant against the risk that a plaintiff will select an unfair or inconvenient place of trial. Additionally, Missouri's venue statute prevents a plaintiff seeking damages for libel in a widely distributed publication from gaining privi-

> leges of venue not allowed by law to a plaintiff in tort actions other than libel, in which the cause of action could accrue only in one county.

*Id.* The court is mindful of this admonition, but does not believe these words of caution apply to determining whether Missouri would apply the single publication rule to multi-state defamation cases. This court is not interpreting either Missouri's venue or borrowing statute at this point. The single publication rule is not a choice-of-law rule. Instead, the single publication rule determines how many causes of action a plaintiff might have and when the statute of limitations begins to run. The court believes that Missouri will follow the majority of the states in applying the single publication rule in multi-state defamation actions. *Keeton,* 465 U.S. at 777 n.8 ("The great majority of the States now follow the 'single publication rule.'") But see, *Lewis v. Reader's Digest Ass'n, Inc.*, 162 Mont. 401, 512 P.2d 702, 706 (Mont. 1973) (refusing to follow the single publication rule for all purposes, including venue). Missouri already recognizes the single publication rule for venue purposes and nothing in the case law, dicta or otherwise, suggests Missouri would not apply the rule in other contexts.

Missouri courts have not decided whether the single publication rule applies to the facts of this case. For example, in *Finnegan, 765 S.W.2d at 704-05*, a Missouri plaintiff sued a newspaper printed in Kansas, but distributed in both Kansas and Missouri for libel. The plaintiff attempted to apply Missouri's two-year statute of limitations, but the court held the Kansas one-year statute of limitations applied instead. The court noted that the Missouri borrowing statute required the court to determine where the cause of action originated. The court held that in libel cases, the court would "borrow" the statute of limitations from the state where the allegedly libelous statements were first published. The defendant printed and originally distributed the newspaper in Kansas, thus the court applied the Kansas statute of limitations. In the present case, however, the court cannot determine where the cause of action originated until it determines how many causes of action exist. In Finnegan, the plaintiff only had one cause of action because under the single publication rule, a plaintiff does not obtain an additional cause of action simply because a newspaper published in Kansas circulates in Missouri. *Restatement (Second) of Torts,* § 577A, Comment d (1977). The allegedly libelous statements in the present case were published in not one newspaper, but in many newspapers. Finnegan will guide the court in determining where the cause of action originated, but it does not help the court in its efforts to determine if more than one cause of action exists.

The facts of a Pennsylvania Supreme Court case follow those in the present case more closely. *Graham v. Today's Spirit,* 503 Pa. 52, 468 A.2d 454 (Pa. 1983). Pennsylvania, like Missouri, follows the single publication rule although Pennsylvania adopted the rule legislatively, not judicially. In Graham, the plaintiff sued the two newspapers which printed allegedly libelous statements about him and also the reporter who wrote the newspaper articles. The article that appeared in the first newspaper was identical to that which appeared in the second newspaper. The reporter worked for both newspapers and the same publishing company owned both newspapers. The court in Graham held the plaintiff had two causes of action: one for when the first newspaper published the article and the other for when the second newspaper published the article. The court reasoned that under the Second Restatement, publishing a libelous statement in two separate editions of a newspaper constitutes two causes of action, but a plaintiff does not obtain an additional cause of action simply because one of the editions circulates in another state.

The court might follow the reasoning of the court in *Graham* if Givens sued not only Quinn, but also the newspapers such as the Kansas City Star, which published the allegedly defamatory statements. This court must distinguish between a republication and a repetition:

> The test of whether the article is a republication or a repetition should not depend on an interval of time, or a separate sale but upon the answer to the question. *Was the act of the defendant a conscious independent one?* The individual who sends the same letter to different persons at the same or another time, consciously and intentionally and independently does so. Each separate mailing is a separate *conscious* act. Each would then be provable as showing conscious intent. Whereas, in the case of a newspaper, as the circulation is considered one of the chief items of damage, and plaintiff recovers for all the distribution, no conscious intent arises until the defendant *consciously* as a second edition republishes the article. In each case it is the *conscious* act which determines.

*Wathan v. Equitable Life Assurance Soc'y,* 636 F. Supp. 1530, 1534 (C.D. Ill. 1986) (citation omitted).

The syndicated column is more like a repetition than a republication. Unlike Graham, Givens does not sue the Kansas City Star or any of the other newspapers that printed the column. Givens also choose not to sue Quinn's syndicator. The only defendant in the present case is Quinn. Quinn wrote the column that first appeared on November 21, 1991 and presumably submitted the column to her syndicator. At this point, Quinn's active role is complete and any additional role she may play at best, is passive. The syndicator distributed the column to various newspapers which choose whether to print the column. The conscious and independent decision of a newspaper to publish the column constitutes a separate cause of action, not against Quinn, but against a newspaper that publishes the column. Givens may only bring a single cause of action against Quinn. However, if Givens proves Quinn did libel him, Givens may collect damages for the harm the syndicated column caused to his reputation in each jurisdiction that the column appeared and circulated in. *Restatement (Second) of Torts* § 577A(4) (1977). In terms of the writer of a syndicated column, the syndicated column functions as a single edition of a nationally circulated magazine where a plaintiff may bring a single cause of action against the writer, but collect damages based on the number of issues of the magazine. *Restatement (Second) of Torts* § 577A, illustrations 3, 7 & 8 (1977).

More importantly, applying the single publication rule to the writer of a syndicated column also makes sense considering the policies surrounding the single publication rule. Recognizing the multiple publication rule did not make sense given the emergence of the mass media, courts and the legislatures in a majority of states adopted the single publication rule. E.g., *Rinaldi,* 420 N.E.2d at 380-82 (The single publication rule recognizes the "realities of a society in which mass distribution and nationwide communication now are norms."). If the court did not apply the single publication rule, the potential for Givens to bring multiple lawsuits simply to harass Quinn would exist because Givens could bring a separate cause of action against Quinn in each state where a newspaper published her syndicated column. The failure to apply the single publication rule would also frustrate the purpose of the statute of limitations because each time another newspaper published the syndicated column, Givens would have a new statute of limitations in which to bring a cause of action against Quinn. The whole purpose of the single publication rule is to prevent these problems. Thus, in terms of the writer of a syndicated column, the purposes of the single publication rule also dictate that this court treat a syndicated column as a single integrated publication.

Further, applying the single publication rule in these circumstances benefits a plaintiff who is not forum shopping. If the court did not apply the single publication rule, Givens would have to bring a separate law suit each time and in each state where the syndicated column containing defamatory statements appeared. This requirement would place a heavy burden on a plaintiff trying to recover damages for the harm to his or her reputation a syndicated column caused. The court refuses to place such a burden on a plaintiff who claims injury to his or her reputation for "the individual's

right to the protection of his own good name reflects no more than our basic concept of the essential dignity and worth of every human being -- a concept at the root of any decent system of ordered liberty." *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 757-58 (1985) (citation omitted). Thus, applying the single publication rule benefits a plaintiff who is not forum shopping.

**B. Borrowing Statute**

As explained earlier, because the single publication rule applies, Givens has one cause of action for the syndicated column that first appeared on November 21, 1991 and this court will use Missouri's borrowing statute[6] to apply a non-Missouri statute of limitations. *Finnegan*, 765 S.W.2d at 704-05 (In libel actions, Missouri will borrow the statute of limitations of the state where the allegedly libelous statement is first published.). The court must first determine where the allegedly libelous statements were first published.

Publication is a term of art in libel law. In the legal sense, publication is the intentional or negligent communication of defamatory statements to a person other than the one defamed. *Restatement (Second) of Torts* § 577 (1977). See also, *Herberholt v. dePaul Community Health Ctr.*, 625 S.W.2d 617, 624-25 (Mo. 1981) (discussing the general definition of publication in dicta). Thus, publication can occur before the printing of the newspapers. Given the realities of the mass media, however, the court believes *Summers v. The Washington Times*, 1993 U.S. Dist. LEXIS 13095, 21 Media L. Rep. 2127 (D. D.C. 1993), articulates a better approach. In *Summers*, a media advocacy group mailed a column to various newspapers that allegedly contained libelous statements. The media advocacy group and the other defendants argued that the one-year statute of limitations began to run at the time the media advocacy group mailed the column to the various newspapers. The court held instead that publication occurs on the date when the column becomes available to the general public." See also, *Fleury v. Harper & Row, Publishers, Inc.*, 698 F.2d 1022 (9th Cir. 1983) (applying the "available to the general public" approach to determining when a libel is published), overruled on other grounds, *In re Complaint of McLinn*, 739 F.2d 1395, 1397 (9th Cir. 1984).
The syndicated column appeared in six states before it appeared in Missouri on November 24, 1991. The syndicated column first appeared on November 21, 1991, in Arizona, Illinois, Kentucky, Louisiana and Michigan. Following the holding in Summers, the syndicated column was "available to the general public" on November 21, 1991. The court does not need to determine which state's statute of limitations applies because each of the five states in which the column appeared on November 21, 1991, applies a one-year statute of limitations to libel cases. Thus, the court will apply a one-year statute of limitations to the syndicated column that first appeared on November 21, 1991.

**C. Undue Delay**

The one-year statute of limitations for the November 21, 1991 syndicated column expired on Saturday, November 21, 1992. Givens filed the original complaint on November 23, 1992. Missouri Supreme Court Rule 44.01(a) states, in part, that if the last day of a period of time is a Saturday, Sunday or a legal holiday, the period of time "runs until the end of the next day which is neither a Saturday, Sunday nor a legal holiday." Monday, November 23, 1992, the day Givens filed the complaint, was the first day following November 21, 1991, that Givens could file the complaint. Thus, Givens filed the complaint within the one-year statute of limitations.

[6] Missouri's borrowing statute, *§ 516.190* of the Missouri Revised Code states: "whenever a cause of action has been fully barred by the laws of the state, territory or country in which it originated, said bar shall be a complete defense to any action thereon, brought in any of the courts of this state."

Quinn argues, however, that the filing of the complaint did not stop the running of the statute of limitations in the present case. Over seven months after filing the complaint, Givens served a copy of the complaint and the summons on Quinn. Quinn argues the filing of the complaint did not stop the running of the statute of limitations because of this failure to exercise "due diligence" in serving process.

The court will look to Missouri law to determine if Givens exercised due diligence in serving process because "in determining the validity of service prior to removal, a federal court must apply the law of the state under which the service was made." *Allen v. Ferguson,* 791 F.2d 611, 616 n.8 (7th Cir. 1986) (citing 4 C. Wright & A. Miller, *Federal Practice and Procedure* § 1082 (1969)). In Missouri, the filing of a complaint stops the running of the statute of limitations on the condition that plaintiff diligently serve a defendant with process. *Miller v. Agathen,* 804 S.W.2d 849, 850 (Mo. Ct. App. 1991). The factors this court must examine to determine if Givens diligently served process include: (1) the length of the delay; (2) the parties' participation in the case; (3) the length of the statute of limitations; (4) the available means of obtaining service; (5) any prejudice from the delay and (6) any other relevant factors. *U.S. Laminating Corp. v. Consolidated Freightways Corp.,* 716 S.W.2d 847, 849 (Mo. Ct. App. 1986).

In *Daniels v. Schierding,* 650 S.W.2d 337 (Mo. Ct. App. 1983), the plaintiff filed within the statute of limitations, but took five months to serve process. The plaintiff did not attempt to serve the defendant for three months. After the plaintiff attempted, unsuccessfully to serve process, plaintiff waited another two months before requesting an alias summons. The Daniels court also noted that the plaintiff should not have had any difficulty in serving process. Given these factors, the Daniels court held that the plaintiff did not exercise due diligence in serving process.

Similarly, in the present case, Givens filed a complaint on November 23, 1992 and for the next four to five months, he did not attempt to serve Quinn. Later, Givens' first attempt at serving Quinn was unsuccessful and process was returned on April 12, 1993. Givens made two more attempts and on July 2, 1993, Givens successfully served Quinn. It took Givens more than seven months to finally obtain service on Quinn. Quinn, like Givens, is known nationally and Givens should not have had a problem serving Quinn at either her work or home in New York. The court recognizes that Quinn does not complain that the undue delay in any way prejudiced her, but this is only one factor for the court to consider. If prejudice was the touchstone for determining whether a plaintiff exercised due diligence, the other factors would be irrelevant. Givens took over seven months to serve Quinn, did not provide the court for any reasons why he waited four to five months before even attempting service and should not have had great difficulty in serving a nationally known figure. Given these factors, Givens did not exercise due diligence in serving the original complaint and summons. Because Givens did not serve process with due diligence, the filing of the original complaint did not stop the running of the one-year statute of limitations. Thus, the statute of limitations now bars Givens from claiming that the November 21, 1991 syndicated column contain libelous statements.

## III. Conclusion

It is therefore ORDERED that Jane Bryant Quinn's Motion to Dismiss is DENIED. It is further ORDERED that the first count of the first amended complaint which alleges that the November 21, 1991 syndicated column contains libelous statements is DISMISSED. It is further ORDERED that this court will continue to exercise jurisdiction as to the remaining counts of the first amended complaint. It is further ORDERED that in any future motions asking the court to make substantive ruling on the remaining counts of the first amended complaint, the parties shall brief the court as to which state's law this court should apply to each of the remaining counts.

## Oregon Choice of Law Rules and the Search for Statutory Solutions

As the casebook suggests, some states have considered statutory solutions to choice of law problems. Louisiana is the most prominent example – but not the only one. Consider the following summary of Oregon's common law choice of law rules. Does it support the adoption of statutory solutions?

**James A.R. Nafziger, *Oregon's Project to Codify Choice of Law Rules*,**
60 La. L. Rev. 1189 (2000)

Since [1967], Oregon courts have fairly consistently paid lip service to the Restatement (Second) approach in both tort- and contract-related conflicts. The real questions are, however, whether the courts actually apply those rules faithfully and consistently and, if not, whether non-conformity to the stipulated methodology makes any difference.

Generally, the following characteristics of Oregon's approach emerged during the first two decades of judicial experimentation [1964-1985] with the new learning:

1. Oregon courts would follow a statutory directive on choice of law.

2. As in most states, Oregon courts continued to apply traditional, territorialist rules to resolve issues other than those involving contracts and torts. For example, interstate or international transfers of real property are governed by the law of the situs (*lex rei sitae*).

3. In tort and contract cases a forum preference which is characteristic of all modern approaches dominated decisions. Oregon courts almost always applied local law to resolve contract- and tort-related conflicts. [Two cases,] the latter a case involving co-domiciliaries of a foreign jurisdiction, are the major exceptions; they not only chose foreign law but cautioned against forum chauvinism.

4. The appellate courts have adopted an eclectic approach in contract and tort cases. In the well-known words of *Lilienthal* [*v. Kaufman*, 395 P.2d 543 (Or. 1964)], Oregon courts continue to "refrain from making any pronouncements which might in the future restrain [them] from taking [a new course]." Although the courts have usually described the applicable methodology to be some variant of the Restatement (Second), the overall approach taken has been more of a hybrid of gravity of contacts enumeration, governmental interest analysis, and Restatement (Second) methodology.

5. Leading decisions are often difficult to reconcile with each other. Take, for example, the three formative cases of *Lilienthal, Casey* [*v. Manson Constr. & Eng'g*, 428 P.2d 898 (Or. 1967)], and *Erwin* [*v. Thomas*, 506 P.2d 494 (Or. 1973)]. Why should an unsuspecting California party in a California-based transaction be subject to Oregon's unusual spendthrift law while a Washington party affected by an Oregon defendant's activity within Washington cannot avail herself of Oregon's more normal rule of recovery for loss of consortium? Comparing the same cases, why should the court be decisively concerned about the expectations of outsiders in tort cases *(Casey)* but not in contracts cases *(Lilienthal)* when the expectations of parties are incidental to tort law and paramount in contract law? Why are the interests of a foreign jurisdiction in protecting persons (and prospective defendants) doing business there so important in *Casey* but largely devalued in *Erwin?* Why, after reversing the domiciles of the defendants as between *Casey* and *Erwin*, is Oregon more interested in protecting a Washington plaintiff whom the Oregon law did not seek to protect (*Erwin*) than an Oregon plaintiff' whom the Oregon law did seek to protect *(Casey)*? Why is Washington's protective interest interpreted to extend only to its own resident defendants *(Casey)* and not to nonresidents licensed and perhaps even encouraged to do business there, ostensibly for the benefit

of Washingtonians *(Erwin)*?

If any rules can be drawn from the first twenty years of Oregon's experiment with modem choice-of-law methodology, they seem to be as follows:

1. The status of persons as residents or domiciliaries, particularly Oregonians, is of greater interest than the territoriality of events or actions.

2. Where neither jurisdiction has a substantial interest in the outcome of litigation, the *lex fori* will be applied.

3. Where only Oregon's interests and policies are involved, or the parties are both Oregon domiciliaries, the *lex fori* will be applied.

4. Where the foreign jurisdiction, but not Oregon, has an interest, the foreign law will be applied.

5. Where there is an actual or true conflict between the laws of Oregon and another jurisdiction, and the laws are of substantial interest and equal importance to each jurisdiction, Oregon's law will be applied, at least in contracts cases. In tort cases it may be that the most significant relationship test of the Restatement (Second) will be applied. . . .

Oregon conflicts decisions since 1986 . . . generally confirm the homeward trend and other characteristics of the state's choice-of-law jurisprudence as it emerged during the first two decades of the new learning. Although Oregon courts have chosen foreign law on several occasions in recent years, in one of those cases they did so when Oregon law was not at issue and, in two others, when the foreign law clearly favored Oregon parties. Formally, Oregon courts have continued to look to the Restatement (Second) for guidance, but the methodology applied has been extraordinarily varied.

The most common methodology has involved a two-step test, according to which the courts are to determine whether there is an *actual* conflict before proceeding to ask which legal system has the most (or more) significant relationship to the case. Although the courts fairly consistently phrase the test that way, they typically undertake the first step only to determine whether there is an *ostensible* conflict. After all, if the analysis is to rely on some sort of most significant relationship or governmental interest analysis, the court could hardly conclude in the first step that there is an "actual" conflict before determining, in the second step, where the most significant relationship or interests lie.

Sometimes the court's analysis is indistinguishable from a more or less mechanical gravity of contacts approach. Sometimes the opinions weigh opposing governmental interests, typically finding a false conflict, during an analysis of the most significant "contacts" or "relationships," but seldom do the opinions reveal careful attention to the complex policies underlying conflicting laws. Indeed, the role assigned by *Lilienthal* to public policy as a critical factor in the analysis remains vague. Sometimes it dominates the analysis from start to finish as a sort of parochial *ordre public* exception to a normal choice of foreign law; at other times, it serves (as it should) to define significance of a particular contact or territorial relationship. At still other times, Oregon's public policy serves as the so-called third step in a three-step test that was derived, it is said, from *Lilienthal.* According to this methodology, public policy may serve either as a tie-breaker to resolve a true conflict, as in *Lilienthal* itself, or, even more expansively, to trump foreign law even when the foreign jurisdiction is deemed to have the most significant relationship with a case or particular issue in a case. Finally, the courts have occasionally abandoned any pretense of policy-and-interests metho-

dology in favor of a form of neoterritorialism. . . .

The methodological eclecticism and resulting ambiguity, or perhaps confusion, of the Oregon case law is not necessarily bad. After all, a foolish consistency may be the hobgoblin of little minds. Material justice is ultimately what matters most. In any event, some inconsistency should not be surprising insofar as the modern approaches encourage judicial discretion and experimentation. Nor is Oregon unique; eclectic, hybrid methodologies have developed throughout the United States. Moreover, even strict adherence to a particular methodology or approach would not ensure consistency, as the long experience with territorialist rules certainly demonstrated. Reasonable judicial minds may differ on both the integrity of the court's use of the methodology and the justice of the result. Thus, the debate over eclecticism is far from over.

The real question is whether methodological eclecticism produces unexpected or doubtful results in a substantial percentage of conflicts decisions. Unfortunately, the answer seems to be "yes" in Oregon. . . .

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## ORS Chap. 81 – CHOICE OF LAW FOR CONTRACTS

(adopted in 2001)

### 81.100 Definitions for ORS 81.100 to 81.135.

For the purposes of ORS 81.100 to 81.135:

(1) "Law" means any rule of general legal applicability adopted by a state, whether that rule is domestic or foreign and whether derived from international law, a constitution, statute, other publicly adopted measure or published judicial precedent. Except for references to the law of Oregon, "law" does not include rules governing choice of law.

(2) "State" means the United States, any state of the United States, any territory, possession or other jurisdiction of the United States, any Indian tribe, other Native American group or Native Hawaiian group that is recognized by federal law or formally acknowledged by a state of the United States, and any foreign country, including any territorial subdivision or other entity with its own system of laws.

### 81.102 Applicability.

ORS 81.100 to 81.135 govern the choice of law applicable to any contract, or part of a contract, when a choice between the laws of different states is at issue. ORS 81.100 to 81.135 do not apply if another Oregon statute expressly designates the law applicable to the contract or part of a contract. ORS 81.100 to 81.135 do not apply to any contract in which one of the parties is a financial institution, as defined by 15 U.S.C. 6827, as in effect on January 1, 2002.

### 81.105 Specific types of contracts governed by Oregon law.

Notwithstanding any other provision of ORS 81.100 to 81.135, but subject to the limitations on applicability imposed by ORS 81.102, the law of Oregon applies to the following contracts:

(1) A contract for services to be rendered in Oregon, or for goods to be delivered in Oregon, if Oregon or any of its agencies or subdivisions is a party to the contract. The application of Oregon's

law pursuant to this subsection may be waived by a person authorized by Oregon's law to make the waiver.

(2) A contract for construction work to be performed primarily in Oregon.

(3) A contract of employment for services to be rendered primarily in Oregon by a resident of Oregon.

(4) (a) A consumer contract, if:

(A) The consumer is a resident of Oregon at the time of contracting; and

(B) The consumer's assent to the contract is obtained in Oregon, or the consumer is induced to enter into the contract in substantial measure by an invitation or advertisement in Oregon.

(b) For the purposes of this subsection, a consumer contract is a contract for the supply of goods or services that are designed primarily for personal, familial or household use.

**81.110 Validity of form.**

A contract is valid as to form if the contract meets the requirements prescribed either by the law chosen by the parties under ORS 81.120 and 81.125, the law applicable under ORS 81.105, 81.130 or 81.135, or the law of the state from which any party or the party's agent has assented to the contract unless that state has no other connection to the parties or the transaction.

**81.112 Capacity to contract.**

(1) A party has the capacity to enter into a contract if the party has that capacity under the law of the state in which the party resides or the law applicable to this issue under ORS 81.105, 81.130 or 81.135.

(2) A party that lacks capacity to enter into a contract under the law of the state in which the party resides may assert that incapacity against a party that knew or should have known of the incapacity at the time the parties entered into the contract. If a party establishes lack of capacity in the manner provided by this subsection, the consequences of the party's incapacity are governed by the law of the state in which the incapable party resides.

**81.115 Consent.**

(1) A party has consented to a contract if the law applicable under ORS 81.105, 81.130 or 81.135 so provides.

(2) In a consumer contract or employment contract, the consumer or employee whose assent to a contract was obtained in the state of the party's residence, or whose conduct leading to the contract was primarily confined to that state, may invoke the law of that state to establish that the party did not consent to the contract or that the consent was not valid by reason of fraud or duress.

**81.120 Choice of law made by parties.**

(1) Except as specifically provided by ORS 81.105, 81.110, 81.112, 81.115 or 81.125, the contractual rights and duties of the parties are governed by the law or laws that the parties have chosen. The choice of law may extend to the entire contract or to part of a contract.

(2) The choice of law must be express or clearly demonstrated from the terms of the contract. In a standard-form contract drafted primarily by only one of the parties, any choice of law must be express and conspicuous.

(3) The choice of law may be made or modified after the parties enter into the contract. Any choice of law made or modified after the parties enter into the contract must be by express agreement.

(4) Unless the parties provide otherwise, a choice of law or modification of that choice operates retrospectively to the time the parties entered into the contract. Retrospective operation under the provisions of this subsection may not prejudice the rights of third parties.

**81.125 Limitations on choice of law by parties.**

(1) The law chosen by the parties pursuant to ORS 81.120 does not apply to the extent that its application would:

(a) Require a party to perform an act prohibited by the law of the state where the act is to be performed under the contract;

(b) Prohibit a party from performing an act required by the law of the state where it is to be performed under the contract; or

(c) Contravene an established fundamental policy embodied in the law that would otherwise govern the issue in dispute under ORS 81.130.

(2) For purposes of subsection (1)(c) of this section, an established policy is fundamental only if the policy reflects objectives or gives effect to essential public or societal institutions beyond the allocation of rights and obligations of parties to a contract at issue.

**81.130 General rule.**

To the extent that an effective choice of law has not been made by the parties pursuant to ORS 81.120 or 81.125, or is not prescribed by ORS 81.105, 81.110, 81.112, 81.115 or 81.135, the rights and duties of the parties with regard to an issue in a contract are governed by the law, in light of the multistate elements of the contract, that is the most appropriate for a resolution of that issue. The most appropriate law is determined by:

(1) Identifying the states that have a relevant connection with the transaction or the parties, such as the place of negotiation, making, performance or subject matter of the contract, or the domicile, habitual residence or pertinent place of business of a party;

(2) Identifying the policies underlying any apparently conflicting laws of these states that are relevant to the issue; and

(3) Evaluating the relative strength and pertinence of these policies in:

(a) Meeting the needs and giving effect to the policies of the interstate and international systems; and

(b) Facilitating the planning of transactions, protecting a party from undue imposition by

another party, giving effect to justified expectations of the parties concerning which state's law applies to the issue and minimizing adverse effects on strong legal policies of other states.

**81.135 Presumptive rules for specific types of contracts.**

(1) To the extent that an effective choice of law has not been made by the parties pursuant to ORS 81.120 or 81.125, or is not prescribed by ORS 81.105, 81.110, 81.112 or 81.115, contracts described in subsection (2) of this section are governed by the law of the state specified in subsection

(2) of this section unless a party demonstrates that the application of that law would be clearly inappropriate under the principles of ORS 81.130.

(a) Contracts involving the occupancy of real property, the land use of property or the recording of interests in real property are governed by the law of the state where the property is situated.

(b) Contracts for personal services are governed by the law of the state where the services are to be primarily rendered pursuant to the contract.

(c) Contracts for franchises, as defined in ORS 650.005, except for licensing clauses in such contracts, are governed by the law of the state where the franchise is to operate pursuant to the contract.

(d) Licensing contracts and licensing clauses in contracts for franchises, as defined in ORS 650.005, are governed by the law of the state where the licensor has its place of business or residence with the closest connection to the transactions between the parties. For purposes of this subsection, "licensing" means a grant of a privilege, created by contract, that allows one party, the licensee, to use the property or right of another party, the licensor.

(e) Agency contracts are governed by the law of the state where the agent's duties are to be primarily performed.

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**ORS Chap. 31 – TORT ACTIONS**
Choice of Law for Torts and Other Noncontractual Claims
(adopted 2009)

**31.850.** ***Definitions.***

For the purposes of ORS 31.850 to 31.890:

(1) "Conduct" means an act or omission that has occurred or that may occur in the future.

(2) "Domicile" means the place identified under ORS 31.865.

(3) "Injury" means physical or non-physical harm to a person or property caused by the conduct of another person.

(4) "Law," when used in reference to the law of another state, does not include that state's choice-of-law rules.

(5) “Non-contractual claim” means a claim, other than a claim for failure to perform a contractual or other consensual obligation, that arises from a tort as defined in ORS 30.260(8), or any conduct that caused or may cause injury compensable by damages, without regard to whether damages are sought.

(6) “Person” means a person as defined in ORS 174.100 and a public body.

(7) “Public body” means a public body as defined in ORS 174.109, the Oregon Health and Science University, and the Oregon State Bar.

(8) “State” means, unless the context requires otherwise, the United States, any state, territory, possession, or other jurisdiction of the United States, any Indian tribe, other Native American, Hawaiian, or Alaskan group recognized by federal law or formally acknowledged by a state of the United States, and any foreign country, or territorial subdivision of such country that has its own system of laws.

**31.855.** ***Applicability***.

ORS 31.850 to 31.890 govern the choice of law applicable to non-contractual claims when a choice between or among the laws of more than one state is at issue. ORS 31.850 to 31.890 do not supersede the provisions of other Oregon statutes that expressly designate the law governing a particular non-contractual claim.

**31.860.** ***Characterization***.

(1) The law of Oregon determines the scope and meaning of terms used in ORS 31.850 to 31.890, including whether a claim is a non-contractual claim.

(2) The law of the state determined to be applicable under ORS 31.850 to 31.890 determines the scope and meaning of terms used in that law.

**31.862.** ***Localization and other factual determinations***.

For the purposes of ORS 31.850 to 31.890, the following issues are determined under the law of Oregon:

(1) What *conduct caused the injury, and where the conduct occurred*. If injurious conduct occurs in more than one state, the state where the conduct occurred that is primarily responsible for the injury is the state where the injurious conduct occurred.

(2) *Who caused the injury*. If a person is liable for the conduct of another person, both persons are considered to have caused the injury.

(3) *Where the injury occurred*. If the same conduct causes injury in more than one state, the place of injury is in the state in which most of the injurious effects occur or may occur. If different persons suffer injury in different states by reason of the same conduct, the place of injury is determined separately for each person. If a person suffers loss by reason of injury or death of another person, the place of injury is determined based on the injury to the other person.

(4) *Who suffered the injury*. If a claim is made for loss caused by injury or death of another person, both the claimant and the other person are considered to be injured persons.

**31.865.** ***Determining domicile***.

For the purposes of ORS 31.850 to 31.890:

(1) (a) The domicile of a natural person is in the state in which the person resides with the intent to make it the person's home for an indefinite period of time.

(b) A domicile once established continues until it is superseded by the acquisition of a new domicile. If a person's intent to change domicile is legally ineffective, the previously established domicile continues to be the person's domicile.

(c) If a person's intent to have a domicile in a given state would be legally effective but cannot be ascertained, the state in which the person resides is the person's domicile, and if the person resides in more than one state, the residence state that has the most pertinent connection to the disputed issue is deemed to be the domicile with regard to that issue.

(2) The domicile of a person other than a natural person is located in the state in which the person maintains its principal place of business. If the dispute arises from activities directed from another state in which the legal person maintains a place of business other than the principal place of business, either state may be considered as the domicile at the choice of the other party.

(3) The domicile of a person is determined as of the date of the injury for which the noncontractual claim is made.

**31.870.** ***Claims governed by Oregon law.***

Notwithstanding ORS 31.875, 31.878, and 31.885, the law of Oregon governs non-contractual claims in the following actions:

(1) Actions in which, after the events giving rise to the dispute, the parties agree to the application of the law of Oregon.

(2) Actions in which none of the parties raises the issue of applicability of foreign law.

(3) Actions in which the party or parties who rely on foreign law fail to assist the court in establishing the relevant provisions of foreign law after being requested by the court to do so.

(4) Actions filed against a public body of the State of Oregon, unless the application of Oregon law is waived by a person authorized by Oregon law to make the waiver on behalf of the public body.

(5) Actions against an owner, lessor, or possessor of land, buildings, or other real property situated in Oregon that seek to recover for, or to prevent, injury on that property and arising out of conduct that occurs in Oregon.

(6) Actions between an employer and an employee who is primarily employed in Oregon that arise out of injury that occurs in Oregon.

(7) Actions for professional malpractice arising from services rendered entirely in Oregon by personnel licensed to perform those services under Oregon law.

**31.872.** ***Product liability civil actions.***

(1) Notwithstanding ORS 31.875 and 31.878, the law of Oregon applies to product liability civil actions, as defined in ORS 30.900, if:

(a) The injured person was domiciled in Oregon and the injury occurred in Oregon; or

(b) The injured person was domiciled in Oregon or the injury occurred in Oregon, and the product:

(A) Was manufactured or produced in Oregon; or

(B) Was delivered when new for use or consumption in Oregon.

(2) Subsection (1) of this section does not apply to a product liability civil action if a defendant demonstrates that the use in Oregon of the product that caused the injury could not have been foreseen and that none of defendant's products of the same type were available in Oregon in the ordinary course of trade at the time of the injury.

(3) If a party demonstrates that the application of the law of a state other than Oregon to a disputed issue is substantially more appropriate under the principles of ORS 31.878, that issue shall be governed by the law of the other state.

(4) All non-contractual claims or issues in product liability civil actions not provided for or not disposed of under this section are governed by the law of the state determined under ORS 31.878.

**31.875.** ***General Rules.***

(1) Non-contractual claims between an injured person against the person whose conduct caused the injury are governed by the law of the state designated in the following subsections.

(2) (a) If the injured person and the person whose conduct caused the injury were domiciled in the same state, the law of that state governs. However, the law of the state in which the injurious conduct occurred determines the standard of care by which the conduct is judged. If the injury occurred in a state other than the one in which the conduct occurred, the provisions of subsection (3)(c) apply.

(b) For the purposes of this section, persons domiciled in different states shall be treated as if domiciled in the same state to the extent that the laws of those states on the disputed issues would produce the same outcome.

(3) If the injured person and the person whose conduct caused the injury were domiciled in different states and the laws of those states on the disputed issues would produce a different outcome, the law of the state designated below governs:

(a) If both the injurious conduct and the resulting injury occurred in the same state, the law of that state governs if either the injured person or the person whose conduct caused the injury was domiciled in that state.

(b) If both the injurious conduct and the resulting injury occurred in a state other than the state in which either the injured person or the person whose conduct caused the injury were domiciled, the law of the state of conduct and injury governs. If a party demonstrates that, under the circumstances of the particular case, the application of that law to a disputed issue will not serve the objectives of that law, that issue will be governed by the law selected under section 9 of this 2009 Act.

(c) If the injurious conduct occurred in one state and the resulting injury in another state, the law of the state of conduct governs. However, the law of the state of injury governs if:

(A) The activities of the person whose conduct caused the injury were such as to make foreseeable the occurrence of injury in that state; and

(B) The injured person formally requests the application of that state's law by a pleading or amended pleading. The request shall be deemed to encompass all claims and issues against that defendant.

(4) If a party demonstrates that the application to a disputed issue of the law of a state other than the state designated by subsections (2) and (3) of this section is substantially more appropriate under the principles of ORS 31.878, that issue is governed by the law of the other state.

**31.878.** ***General and Residual Approach.***

Except as provided in ORS 31.870, 31.872, and 31.885, the rights and liabilities of the parties with regard to disputed issues in a noncontractual claim are governed by the law of the state whose contacts with the parties and the dispute and whose policies on the disputed issues make application of the state's law the most appropriate for those issues. The most appropriate law is determined by:

(1) Identifying the states that have a relevant contact with the dispute, such as the place of the injurious conduct, the place of the resulting injury, the domicile, habitual residence or pertinent place of business of each person, or the place in which the relationship between the parties was centered;

(2) Identifying the policies embodied in the laws of these states on the disputed issues; and

(3) Evaluating the relative strength and pertinence of these policies with due regard to:

(a) The policies of encouraging responsible conduct, deterring injurious conduct, and providing adequate remedies for the conduct; and

(b) The needs and policies of the interstate and international systems, including the policy of minimizing adverse effects on strongly held policies of other states.

**31.880.** ***Joint tortfeasors and third parties.***

Notwithstanding ORS 31.870, 31.872, and 31.875, if two or more persons are liable for the same claim, the rights and liabilities between those persons are governed by the law determined for the particular issue under ORS 31.878. If a third party pays compensation to a person injured by the conduct of another person, the right of the third party to recoup the amount paid is governed by the law determined for the particular issue under ORS 31.878.

**31.885.** ***Agreements on applicable foreign law***.

Notwithstanding ORS 31.875, 31.878, and 31.880, but subject to ORS 81.100 to 81.135, an agreement providing that an issue or issues falling within the scope of ORS 31.850 to 31.890 will be governed by the law of a state other than Oregon is enforceable in Oregon if the agreement was entered into after the parties had knowledge of the events giving rise to the dispute. . . .

**31.890. Commentary**

The Oregon Law Commission shall make available on the website maintained by the commission a copy of the commentary approved by the commission for the provisions of ORS 31.850 to 31.890.

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*Question*: Do these Oregon choice of law statutes reflect a First Restatement approach, a Second Restatement approach, one of the other contemporary approaches, or a hybrid of some kind? To the extent these statutes adopt a version of interest analysis, what is the point of codification?

## WHAT STATES DO WHAT?
## THE METHODOLOGICAL LANDSCAPE

After studying the various choice-of-law methodologies, one may be curious to know which of them are followed in the states of the United States. The table and maps reproduced below[1] should be used with caution. Drawing a "methodological map" of American conflicts law presents difficulties, ranging from the occasional lack or dearth of authoritative precedent, to precedents that are either equivocal or exceedingly eclectic.

For example, for more than sixty years, the Supreme Court of New Hampshire has not had an opportunity to reconsider its last precedent to apply the *lex loci contractus* rule. In some states, the available supreme court precedents are equivocal, or even irreconcilable. For example, in contract conflicts, the precedents from Oklahoma and West Virginia are equivocal enough as to raise legitimate doubts on whether these states securely belong in the *Restatement (Second)* column. Similar doubts exist regarding Arkansas' classification as a significant-contacts state, because Arkansas precedents are virtually irreconcilable.

When methodological equivocation is intentional and appears in the same precedent, it can be described as eclecticism. This phenomenon, which appeared in the first years of the revolution, has become even more frequent in recent years.

Whatever its intrinsic virtues, eclecticism is another obstacle to an accurate methodological classification. The column called "combined modern" that appears in Table 1 reflects this eclecticism only to some extent – it includes only those states that overtly, knowingly, and repeatedly combine more than one modern methodology. If one were to include instances of unknowing, latent, or occasional eclecticism, that column would absorb most other columns. In this sense eclecticism may well be *the* dominant choice-of-law methodology in the United States today.

Additional limitations stern from the simplification that graphic technology dictates. For example, the maps below lump together the *Restatement (Second)* and "significant contacts" states, the interest-analysis and *lex-fori* states, and the states that follow a "combined modem" approach. Although the approaches grouped together are either ideologically or methodologically akin, they are not identical. In fact, even if one were to focus solely on the states following the *Restatement (Second)*, the use of a single color for all of those states gives the misleading impression that they share the same degree of commitment to the Restatement. They do not. Some states use the *Restatement* solely as an escape from a traditional choice-of-law rule that co-exists with the *Restatement*. Some states use the *Restatement* as a camouflage for a "grouping of contacts" approach, while other states use it as a vehicle for restraining interest analysis. One can find examples of such disparate treatment of the *Restatement* even in the same jurisdiction. Finally some states prefer to use only the general open-ended and flexible sections of the *Restatement* (such as §§ 145, 187 and especially §6) and avoid using the specific sections that contain mildly confining presumptive rules.

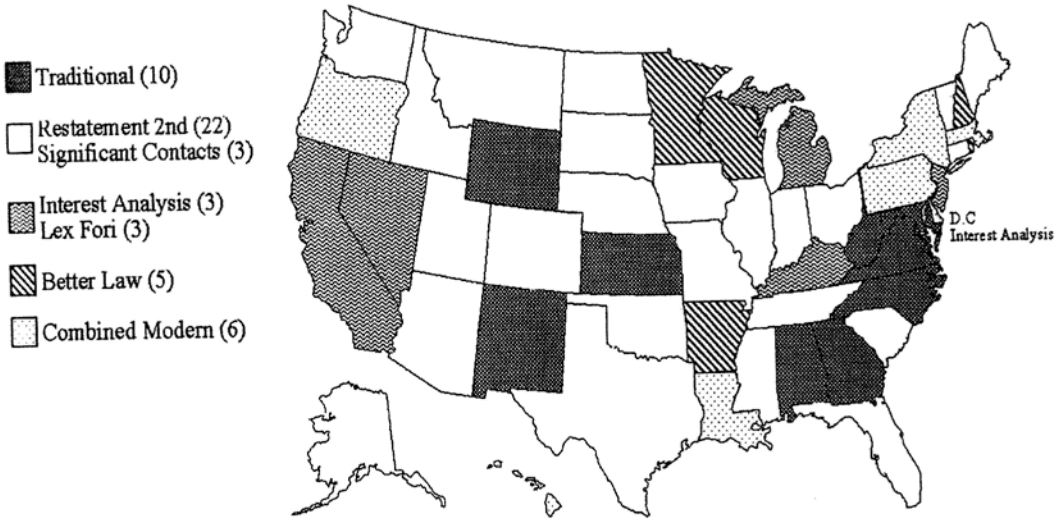
Even the use of the black color to indicate the states that follow the traditional approach may be misleading to the extent it suggests that these states are equally committed to that approach. They are not. For example, some of those states (*e.g.*, Alabama, Georgia, Maryland and Wyoming) have recently reaffirmed their commitment to the traditional approach, other states (*e.g.*, South Carolina and Maryland for contracts) have made small steps in the direction of abandoning it, while other states (*e.g.* Rhode Island and Tennessee with regard to contract conflicts) appear ready to abandon it on the first available opportunity. Unfortunately, maps cannot show these gradations of commitment without

[1] The tables and maps are taken from Symeonides, *The Revolution Today* §§ 42, 58-103 . . . .

using all the colors of the spectrum.

Be that as it may, with all the above caveats and qualifications, the following maps and table purport to show how the various states congregated in the various methodological camps in 2003.

## Map 1. Torts




## Map 2. Contracts

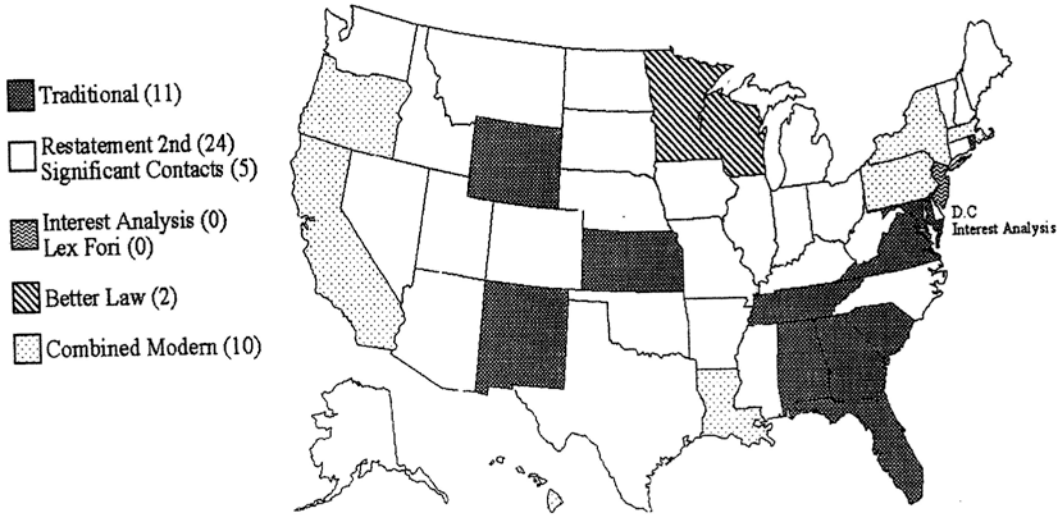


TABLE 1. ALPHABETICAL LIST OF STATES AND CHOICE-OF-LAW METHODOLOGIES

| Stares | Traditional | Significants | Restatement 2d | Interest Analysis | Lex Fori | Better Law | Combined Modern |
|---|---|---|---|---|---|---|---|
| Alabama | T+C | | | | | | |
| Alaska | | | T+C | | | | |
| Arizona | | | T+C | | | | |
| Arkansas | | C | | | | T | |
| California | | | | T | | | C |
| Colorado | | | T+C | | | | |
| Connecticut | | | T+C? | | | | |
| Delaware | | | T+C | | | | |
| District of Columbia | | | | T | | | C |
| Florida | C | | T | | | | |
| Georgia | T+C | | | | | | |
| Hawaii | | | | | | | T+C |
| Idaho | | | T+C | | | | |
| Illinois | | | T+C | | | | |
| Indiana | | T+C | | | | | |
| Iowa | | | T+C | | | | |
| Kansas | T+C | | | | | | |
| Kentucky | | | C | | T | | |
| Louisiana | | | | | | | T+C |
| Maine | | | T+C | | | | |
| Maryland | T+C | | | | | | |
| Massachusetts | | | | | | | T+C |
| Michigan | | | C | | T | | |
| Minnesota | | | | | | T+C | |
| Mississippi | | | T+C | | | | |
| Missouri | | | T+C | | | | |
| Montana | | | T+C | | | | |
| Nebraska | | | T+C | | | | |
| Nevada | | C | | | T | | |
| New Hampshire | | | C | | | T | |
| New Jersey | | | | T | | | C |
| New Mexico | T+C | | | | | | |
| New York | | | | | | | T+C |
| No. Carolina | T | C | | | | | |
| Ohio | | T | T+C | | | | C |
| Oklahoma | | | T+C? | | | | |
| Oregon | | | | | | | T+C |
| Pennsylvania | | | | | | | T+C |
| Puerto Rico | | T+C | | | | | |
| Rhode Island | C | | | | | T | |
| So. Carolina | T+C | | | | | | |
| So. Dakota | | | T+C | | | | |
| Tennessee | C | | T | | | | |
| Texas | | | T+C | | | | |
| Utah | | | T+C | | | | |
| Vermont | | | T+C | | | | |
| Virginia | T+C | | | | | | |
| Washington | | | T+C | | | | |
| West Virginia | T | | C | | | | |
| Wisconsin | | | | | | | |
| Wyoming | T+C | | | | | T+C | |
| | | | | | | | |
| TOTAL 52<br>52 | Torts 10<br>Contr. 11 | Torts 3<br>Contr. 5 | Torts 22<br>Contr. 24 | Torts 3<br>Contr .0 | Torts 3<br>Contr.0 | Torts 5<br>Contr. 2 | 'Torts 6<br>Contr. 10 |

As the above table indicates, the *Restatement (Second)* group is the largest, while the interest-analysis group is the smallest. The interest-analysis cola is completely blank in contract conflicts, and lists only three jurisdictions in tort conflicts. In light of the pivotal role that interest analysis played in the conflicts revolution, this development is nothing short of astonishing. Worse yet, a more literal classification might place even these three jurisdictions elsewhere, insofar as they engage in the very weighing of state interests that Currie proscribed. Thus, a more technical classification might move these states to different columns, leaving completely blank the interest-analysis column$_s$ four decades after Currie's death.

However, this should not suggest that Currie's influence has disappeared. First, an interest analysis traceable to Currie forms the core of most of the "combined modern" approaches followed in other states. Second, interest analysis is often heavily employed in states that generally follow the *Restatement (Second),* especially in cases in which the factual contacts are evenly divided between the involved jurisdictions. Thus, in the same manner that the high numerical following the *Restatement (Second)* tends to inflate its importance in deciding actual cases, the low numerical following of Currie's original approach tends to undervalue the importance of this approach in influencing judicial decisions.

The states listed under the "combined-modem" approach follow a combination of approaches other than the traditional one. In tort conflicts, California follows interest analysis with the addendum of Baxter's comparative impairment. However, in contract conflicts, at least those involving choice-of-law clauses, the California Supreme Court tends to rely heavily on the *Restatement (Second)* and to combine it with comparative impairment. New Jersey and the District of Columbia do likewise in contract conflicts, combining interest analysis with the *Restatement (Second).* Hawaii follows a combination of interest analysis, the *Restatement (Second),* and Leflar's choice-influencing considerations. North Dakota follows the same combination, but perhaps in different dosages, in contract conflicts. Massachusetts and Oregon follow a combination of interest analysis and the *Restatement (Second).* Pennsylvania does likewise, but in addition draws from Professor Cavers's principles of preference. Louisiana has its own comprehensive codification that draws from the general American conflicts experience, but also goes beyond that experience. Finally, New York is New York!

## The United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards

Many international commercial transactions, including transactions involving a governmental party, are carried on through contracts that contain a provision for arbitration. Typically, arbitration is held at a "neutral" forum, *i.e.*, in neither party's home state. While an agreement to arbitrate nearly always avoids problems of jurisdiction, arbitration in a state where neither party is domiciled obviously raises questions of enforcement.

A traditional way to enforce arbitral awards was to convert the award into a judgment (sometimes called "confirming the award"). If the losing party did not pay the award, the resulting judgment could then be enforced like any other judgment, both at the situs and in other states. However, this process was uncertain and time consuming, and as early as the 1920's the states of western Europe (but not the U.S.) joined two conventions designed to facilitate enforcement both of agreements to arbitrate and arbitral awards. In 1958, after years of effort spurred by the International Chamber of Commerce but conducted largely under the auspices of the United Nations, a conference held in New York produced a Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

At first the U.S. was reluctant to adhere to the New York Convention, but in 1970— more than ten years after the Convention had entered into force— the Senate gave its advice and consent to U.S. participation, and Congress adopted implementing legislation (Title II of the Federal Arbitration Act, 9 U.S.C. § 201-208). The United Kingdom, which had also been reluctant, joined in 1975, and by 1980 all the major commercial states, most of the states of Eastern Europe (including the Soviet Union), and a respectable number of developing countries had become parties to the Convention. As of year-end 1997, well over 100 states were parties to the Convention, including Russia and most of the former members of the Soviet Union, China, and most of the states of Latin America that had long resisted international arbitration.

Without going into detail about the Convention, a brief description of the Convention's provisions for recognition and enforcement of awards is useful, both for comparison with enforcement of judgments of courts, and for its treatment of choice of law.

First, all Contracting States must recognize and enforce arbitral awards to which the Convention applies, without need for resort to the courts of the state where the award was rendered (Art. III), subject only to very limited defenses (Art. V).

Second, for some states, the Convention applies to all arbitral awards considered foreign regardless of where the award was rendered (Art. I(l )); the majority of state parties, however, have made the first reservation provided for in Article I(3), so that the Convention applies only to awards made in another Contracting State. The nationality or domicile of the parties to an arbitration, however, is not significant, nor is the place of performance of the contract subject of the arbitration or the applicable law: an award rendered in an arbitration held in Geneva between a Libyan and a Brazilian party, for example, will be enforceable in the United States, the United Kingdom, France, etc., because those states are parties to the Convention and so is Switzerland.

Third, arbitrators in international commercial disputes are generally required to decide according to law, but unless the contract in question or the agreement to arbitrate specifies the law to be applied, they apparently decide on the basis of any law they choose. Some arbitrators choose the law applicable where the arbitration is held, some choose the law to which the conflict of laws rule of the situs of the arbitration points, some choose according to their own views on choice of law, and

some try to avoid the choice of law question by determining, for example, that whether seller's or buyer's law is chosen, the result would be the same (*i.e.*, that there is no conflict of laws). At all events, whatever law the arbitrators apply and however they reach their decision (absent corruption), error in choice of law or in interpreting the applicable law is not a ground for refusing enforcement of the award.

Fourth, the New York Convention draws no distinction between contested proceedings and awards rendered on default. Even if one party fails to appoint an arbitrator, or fails to participate in the proceedings, an award can be made effective and enforceable, provided proper notice was given and the arbitrators did not exceed the authority conferred on them by the agreement to arbitrate (Article V (1)).