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Fall 2019

Choice of Law

1 Vertical Choice of Law: Federal v. State

1.1 The Rules of Decision Act

28 U.S. Code § 1652

The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

1.1.1 Legal Naturalism

True law is right reason in agreement with nature; it is of universal application, unchanging and everlasting; ... It is a sin to try to alter this law, nor is it allowable to attempt to repeal any part of it, and it is impossible to abolish it entirely. We cannot be freed from its obligations by senate or people, and we need not look outside ourselves for an expounder or interpreter of it. And there will not be different laws at Rome and at Athens, or different laws now and in the future, but one eternal and unchangeable law will be valid for all nations and all times ...

Cicero, *De Re Publica* [Of The Republic], Book III Section 22 (trans. Clinton W. Keyes, 1928)

Implications of natural law theory for understanding common law:

- The common law is not specific to any time or place; it is uniform & unchanging.
- Differences in common law rules among jurisdictions merely reflect imperfect understanding of the true common law.

Swift v. Tyson (U.S. 1842)

Facts & Procedural History

- Tyson (NY) gave bill of exchange to speculators as payment for land.
  - Speculators didn't really own the land
  - Speculators gave Tyson's bill to Swift to pay off a pre-existing debt.
  - Swift had no involvement in nor knowledge of the swindle.
  - Swift sought to cash the bill and Tyson refused to pay.
- Swift sued Tyson for payment in federal court.
  - Swift argued that, as a bona fide holder who took the bill for valuable consideration without notice of the fraud, he was entitled to payment from Tyson.
  - Tyson argued that, under NY state court decisions, a pre-existing debt was not valuable consideration for a negotiable instrument.

Issue

- Whether, under the RDA, the federal court was obligated to follow NY state court decisions.

Analysis

- RDA: "the laws of the several states ... shall be ... the rules of decision in trials at common law"
  - "[I]t will hardly be contended that the decisions of Courts constitute laws. They are, at most, only evidence of what the laws are; and are not of themselves laws."
  - "The laws of a state are more usually understood to mean the rules and enactments promulgated by the legislative authority thereof, or long established local customs having the force of laws."
- Where the (unwritten) common law provides the rules of decision, the duty of a federal courts, like any court, is "to ascertain upon general reasoning and legal analogies" the "general principles and doctrines of ... jurisprudence".
  - Decisions by state courts offer guidance, "but they cannot furnish positive rules, or conclusive authority, by which our own judgments are to be bound up and governed".
- Policy concern: uniform law across the country to facilitate national commerce

Holding

- The correct rule is that a pre-existing debt is valuable consideration for a negotiable instrument.
  - Story questions whether the NY cases on which Tyson relies really support a contrary rule. But even if they do, they are not controlling and are at odds with the general view, reflected in decisions by other states' courts.

Black & White Taxicab v. Brown & Yellow Taxicab (U.S. 1928)

Facts & Procedural History

- Brown & & Yellow Taxicab (B&Y, a KY corp.) and the Louisville & Nashville RR (L&N, a KY corp.) wanted to enter contract giving B&Y exclusive rights to L&N's Bowling Green, KY, station.
  - The agreement would prevent Black & White Taxicab (B&W), a competitor of B&Y, from picking up and dropping off passengers at that station.
  - Agreement would be void under prior KY state court decisions
- All three companies were incorporated in KY and were thus citizens of that state.
  - At this time, only the state of incorporation counted for citizenship of a corporation.
- B&Y reincorporated in TN, then executed the contract with L&N in TN.
- B&Y (TN) then filed a suit in KY federal court against B&W (KY) and L&N (KY), seeking an injunction prohibiting B&W from interfering with contract between B&Y and L&N.
  - By changing its state of incorporation from KY to TN, B&Y created diversity of citizenship, allowing it to sue in federal court instead of state court.
  - It was necessary to include L&N in the lawsuit, since it was a party to the contract with B&Y.
  - L&N was included as a defendant, rather than as a co-plaintiff, to preserve diversity.
- Federal trial court declined to follow KY state court decisions, and determined that the contract was lawful under "general" common law.

Holding

- Following *Swift v. Tyson*, the Supreme Court held that the federal trial court properly applied "general common law" rather than following KY state court decisions.

The Problem with *Swift*

Black & White Taxi illustrates the problem with the *Swift* approach.

Assume B&W (KY corp.) sued to challenge the contract:

- B&Y (TN) and L&N (KY) would have to be joined as co-defendants.
- Since B&W and L&N are both KY citizens, the federal court would not have diversity jurisdiction.
- The KY state court would apply KY law and declare the contract void.

Now assume that the contract would be valid under KY law, but that a federal court applying "general law" would declare the contract void (i.e. the reverse of the actual case):

- If B&Y (TN) sues B&W (KY) and L&N (KY) in KY state court to enforce the contract, may B&W remove to take advantage of more favorable federal law?
  - There is complete diversity
  - But forum defendant rule would prevent removal

Under each scenario (i.e. the actual Black & White v. Brown & Yellow case and the two hypothetical versions), the outcome will be different in state v. federal court.

This makes law both unpredictable & inequitable:

- People can't be sure what their legal rights and duties are until they end up in one court or the other.
- Some people will be able to forum shop for more favorable law, but others won't (because of the requirements of diversity jurisdiction).

1.1.2 Legal Positivism

> *The common law is not a brooding omnipresence in the sky but the articulate voice of some sovereign or quasi-sovereign that can be identified;*

Southern Pac. Co. v. Jensen, 244 US 205, 222 (1917) (Holmes, J. dissenting)

> *It is very hard to resist the impression that there is one august corpus, to understand which clearly is the only task of any Court concerned. If there were such a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute, the Courts of the United States might be right in using their independent judgment as to what it was. But there is no such body of law. The fallacy and illusion that I think exist consist in supposing that there is this outside thing to be found. Law is a word used with different meanings, but law in the sense in which courts speak of it today does not exist without some definite authority behind it. The common law so far as it is enforced in a State, whether called common law or not, is not the common law generally but the law of that State existing by the authority of that State without regard to what it may have been in England or anywhere else. It may be adopted by statute in place of another system previously in force. But a general adoption of it does not prevent the State Courts from refusing to follow the English decisions upon a matter where the local conditions are different. It may be changed by statute, as is done every day. It may be departed from deliberately by judicial decisions, as with regard to water rights, in States where the common law generally prevails.... Whether and how far and in what sense a rule shall be adopted whether called common law or Kentucky law is for the State alone to decide.*

Black & White Taxicab v. Brown & Yellow Taxicab, 276 U.S. at 533-34 (Holmes, J., dissenting)

Erie RR Co. v. Tompkins (U.S. 1938)

Facts

- Tompkins injured by Erie's train, while walking along tracks in PA
- Tompkins sued in SDNY, based on diversity

Issue

- Substantive issue: What duty of care Erie owed to Tompkins.
  - Erie: Under PA law, as declared in decisions of the PA Supreme Court, Tompkins was a trespasser to whom Erie was not liable.
  - Tompkins: Under *Swift*, the federal court is not bound by PA state court decisions and under the general common law, Erie was liable for negligence.
    - Tompkins also disputed that the PA Supreme Court actually supported Erie's position.
- Procedural issue: Whether federal court may apply "general" common law, or must follow Pennsylvania common law.

Holding

- PA law is controlling on federal court sitting in diversity.
  - Remanded for determination of what PA law is
- Brandeis opinion:
  - Legislative history of RDA
    - Early draft specified both "statute law" and "unwritten or common law"
    - Story's interpretation in *Swift* (limited to statutes and established local usages) was wrong
  - Perverse/undesirable consequences of *Swift*:
    - *Taxicab* case as example
      - *Swift* encourages forum shopping as between state and federal court.
      - *Swift* discriminates against parties unable to choose federal court.
    - Result is lack of uniformity, not the uniformity that supposedly justified the *Swift* rule
  - Constitutional concern
    - Problem is not the RDA itself, but the Court's interpretation of the RDA in *Swift*
    - Nothing in the Constitution gives federal courts the authority to come up with their own common law rules in areas of law that the Constitution leaves to the states
  - Positivism provides the way out
    - If all law is only the law of a particular sovereign, then the distinction between common law and statute, and the notion of "general" common law, makes no sense
    - The RDA must mean a federal court is supposed to apply some particular state's law, regardless of whether it is state common law or state statute.
- Reed's concurrance
  - "No one doubts federal power over procedure"
    - Why?

Guaranty Trust Co. of New York v. York (U.S. 1945)

Issue

- Whether, in an equity suit, a federal court must apply state statute of limitations if forum state's courts would do so

Holding & Rationale

- Where forum state's court would apply SOL to bar equitable remedy, federal court must do likewise

- Effect of SOL is that party no longer has any claim for which a court may grant relief.
- Erie does not turn on whether state courts characterize a state-law rule as "Substance" or "Procedure"
  - Pragmatic distinction
    - "Substantive" = "significantly affect the result of a litigation"
      - Federal court must follow state law rule
    - "Procedural" = "merely the manner and the means by which a right to recover, as recognized by the State, is enforced"
      - Federal courts may follow federal rules
- Frankfurter
  - "[A] federal court adjudicating a state-created right solely because of the diversity of citizenship of the parties is for that purpose, in effect, only another court of the State"
  - Therefore, federal court "cannot afford recovery if the right to recover is made unavailable by the State nor can it substantially affect the enforcement of the right as given by the State"
  - So, a rule is "substantive" if it defines or limits the rights/duties/liabilities of the parties

Ragan/Woods/Cohen trilogy (U.S. 1949)

Ragan v. Merchants Transfer & Warehouse Co.

- State law, not FRCP Rule 3, governs when action is "commenced" for purposes of tolling SOL

Woods v. Interstate Realty

- State rule, barring unqualified business from appearing in state court, applies in federal court diversity action

Cohen v. Beneficial Indust. Loan Corp.

- State rule, requiring bond in shareholder derivative suit, applies in federal diversity action, despite lack of bond requirement in FRCP Rule 23.1

Rationale

- Even though rule is "procedural" in the ordinary sense, it defines party's entitlement to relief, and is therefore classified as "substantive" in the *Erie* sense.
  - Sets conditions on party's right to assert a claim at all.

Byrd v. Blue Ridge Rural Elec. Coop., Inc. (U.S. 1958)

Facts

- Injured worker sued Blue Ridge in negligence

Issue

- Substantive: Whether plaintiff is an employee, barred from suit under SC workers' compensation statute
- Procedural: Whether employee status is a question for the court (as under SC law) or the jury

Holding

- Federal court may assign question to jury, contrary to state practice

- *Erie* does not require complete uniformity of practice as between state and federal court.
- Allocation of the decision is not "integral" to the state statutory scheme
  - Note that, whether the judge or the jury decides the issue of employee status, the same (substantive) rule for distinguishing an employee from an independent contractor will apply.
- Countervailing federal policy (7th Amendment) favors allocation to the jury

Reconciling Byrd *with* Guaranty Trust

- "Outcome determinative" means *certain* to produce a different outcome
  - Byrd & Blue Ridge presumably believed that having the jury rather than the judge decide if Byrd was a statutory employee would make some difference. Why else would they fight that issue all the way to the Supreme Court?
  - But the outcome wouldn't *necessarily* be different.

1.2 The Rules Enabling Act

28 U.S.C. § 2072

(a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrate judges thereof) and courts of appeals.

(b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

[***]

Hanna v. Plumer (U.S. 1965)

Facts

- Hanna (resident of Ohio) was injured in a car accident (in SC) involving another driver, Osgood (resident of Mass).
- Hanna filed a diversity suit in federal court (Mass).
  - Because Osgood was deceased by the time Hanna filed the suit, she named Plumer (resident of Mass.), the executor of Osgood's estate, as a defendant.
- Hanna served Plumer by leaving copies of the complaint and summons with Plumer's wife at their residence.
- Plumer argued that service was ineffective under Massachusetts law, which required "delivery in hand upon [the] executor".

Holding

- FRCP Rule 4, not state law, governs the manner of service of a complaint and summons in a diversity suit in federal court.

Analysis

- *Erie* does not apply to conflicts between state law and the Federal Rules of Civil Procedure
  - *Erie* applies when the question is whether the Rules of Decision Act (RDA) reqauires a federal court to apply state law.
  - But the *Erie*/RDA analyis is inapplicable to federal rules adopted pursuant to the Rules Enabling Act (REA).

    - As long as an FRCP provision is valid under the REA, then (consistent with the supremacy clause) the FRCP rule, not contrary state law, applies.
- Inquiry under the REA:
    - Is there an applicable FRCP provision?
        - Is there a true conflict between the FRCP provision and state law?
        - i.e. Are the requirements of the FRCP and state law inconsistent?
            - In *Hanna*, the manner of service was valid under FRCP, but invalid under state law.
    - If so,
        - Was the FRCP provision properly adopted according to the process under the REA?
        - Is the FRCP provision "rationally capable of classification" as procedural?
            - i.e. does it "really regulate[] procedure—the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of [those rights and duties]"?

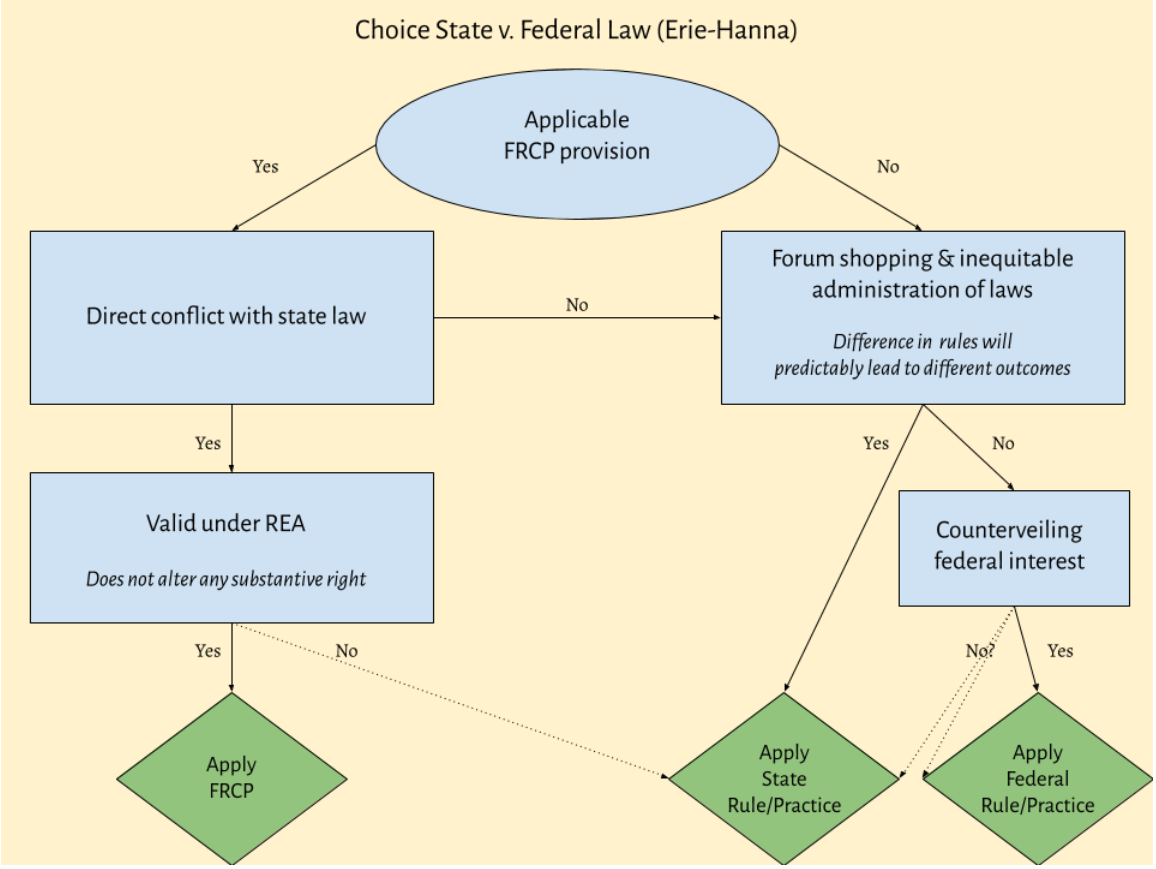
Rationale

- "Twin aims of the *Erie* rule"
    - Discourage forum shopping to obtain the benefit of more favorable (substantive) rules
    - Avoid inequitable administration of the laws, i.e. unfair differences in outcome
- If a Federal Rule "really regulates procedure" and does not alter substantive rights, following the Federal Rule rather than state law will not raise concerns about forum shopping and inequitable administration of law.

Harlan (concurring)

- Disagrees with majority's characterization of *Erie* policy
    - More than just a concern with forum shopping and inequitable administration of the laws
    - Fundamentally about federalism
- The appropriate inquiry (whether under the RDA or the REA) is whether the choice of law "substantially affect those primary decisions respecting human conduct which our constitutional system leaves to state regulation"?
    - Interest in predictability: Allow parties to make decisions on how to act, based on understanding of the legal consequences.
- Majority's REA test effectively means no Federal Rule will ever be found lacking
    - Advisory Committee, Judicial Conference, & Supreme Court, which draft and approve the FRCP, are presumably reasonable in their determination that rule really regulates procedure.

1.2.1 Erie-Hannah Hybrid Analysis



Gasperini v. Center for Humanities, Inc (U.S. 1996)

Issue

- Must federal court apply NY CPLR § 5501, under which an appellate court reviews a jury award against a "materially deviates" standard?

Analysis & Holding

- Applies Erie-Hanna Analysis
  - No applicable FRCP
  - Conflicting policy interests:
    - Applying contrary federal standard ("shocks the conscience") would promote forum shopping
    - But there is a strong federal policy (embodied in 7th Amendment) limiting appellate review of jury questions
- Split the difference:
  - Apply the substantive standard under NY law
  - Follow modified procedure to respect federal interest:
    - Trial court makes determination under NY standard
    - Appellate court reviews for "abuse of discretion"

Dissent (Scalia, Thomas)

- Majority misapplies *Erie*
  - RDA applies to "Rules of Law"
    - NY statute is "rule of review", not "substantive" in *Erie* sense
  - Federal policy concern:
    - Applying the state standard "materially disrupt[s] the federal system" and is contrary to "strong federal policy against allowing state rules to disrupt the judge-jury relationship in the federal court"
  - Should be a Hanna/REA case
    - FRCP Rule 59 (motions for new trial) applies
      - Under Rule 59, federal courts apply a "seriously erroneous result"/"miscarriage of justice" standard to review of jury verdict
    - Rule 59 is in direct conflict with NY rule
    - Rule 59 is valid under REA
    - Federal court should apply Rule 59, not NY rule

Shady Grove Orthopedic Assocs. v. Allstate Ins. Co. (U.S. 2010)

Issue

- Whether suit may be brought in federal court as class action where NY state law prohibits class action in that type of claim?

Holding

- Class action is permitted, pursuant to FRCP Rule 23, notwithstanding state law prohibition, where Rule 23 regulates procedure, not substantive rights

Analysis

- FRCP Rule 23 applies to class actions
- Rule 23 is in direct conflict with NY statute?
  - Rule 23 gives plaintiff a right to bring case as class action as long as conditions enumerated in the Rule are satisfied.
  - NY statute prohibits class action even if the Rule 23 conditions are satisfied.
- Rule 23 is valid under the REA
  - Plurality and concurring opinions differ with regard to the focus of the REA analysis
    - Plurality: Focus is on FRCP only, not state rule.
      - Otherwise applicability of FRCP would vary depending on vagaries of state law
  - Concurrence: Consider both FRCP and state rule
    - NY rule applies to claims arising under any law, not just NY law.
    - This is plainly procedural, because it does not define rights & remedies under NY law.

Dissent

- There is no true conflict between FRCP Rule 23 and the NY statutes
  - Rule 23 merely establishes certification procedure in cases where a class action is permitted
  - State law may limit right to bring class action in the first place.

- The choice between allowing and prohibiting class actions is not merely procedural. It alters the stakes in the suit and thus affects the outcome.

2 Horizontal Choice of Law: State v. State

2.1 Choice of Law Rules

Various approaches to resolving choice of law questions:

- *Contacts test:* Apply the law of the state with which the parties have the most significant relevant contacts
  - Considers each party's contacts with the various states whose law might apply. Cf. Minimum contacts test (personal jurisdiction): Considers only the *defendant's* contacts with the *forum state*.
- *Relationship test:* Apply the law of the state with the most significiant connection to the parties' relationship giving rise to the claim.
- *Balance of interests test:* Apply the law of the state with the greatest interest in the matter.
  - Focus on the policy behind each state's law (which rights and parties does the state law aim to protect) and whether the state has an interest in its law being applied in the particular case.
- *Comparative impairment test:* Apply the law of the state whose interest would be most impaired if it's law does not apply.
  - Analysis is similar to "balance of interests", but takes a different approach to deciding which state's interests to favor.

When deciding a choice of law issue, a court always follows its own state's own choice of law approach.

- Otherwise, how would you ever decide which choice of law rules to choose?
- Choice of law rules are "substantive" in the *Erie* sense, because the choice of which state's (substantive) law to apply determines the rights & obligations of the parties. So federal courts in diversity cases must apply the choice of law rules of the forum state. *Klaxon Co. v. Stentor Elec. Mfg. Co.* (US 1941)

2.2 Contractual Choice of Law

A contractual choice of law clause specifies which state's (or country's) law will govern disputes between the parties. In effect, this is a shorthand way of including terms that the parties might otherwise have spelled out in the contract. *See* Restatement (2nd) of Conflicts of Law, § 187(1)

2.3 Restatement (2d) of Conflicts of Law

NC courts generally follow the Restatement approach, which combines aspects of the "contacts", "relationship", and "balance of interests" tests.

2.3.1 Torts

Restatement § 145

The General Principle

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

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

(a) the place where the injury occurred,

(b) the place where the conduct causing the injury occurred,

(c) the domicil, residence, nationality, place of incorporation and place of business of the parties, and

(d) the place where the relationship, if any, between the parties is centered.

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

2.3.2 Contracts

Restatement § 187

Law Of The State Chosen By The Parties

(1) The law of the state chosen by the parties to govern their contractual rights and duties will be applied if the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed to that issue.

(2) The law of the state chosen by the parties to govern their contractual rights and duties will be applied, even if the particular issue is one which the parties could not have resolved by an explicit provision in their agreement directed to that issue, unless either

(a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice, or

(b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of § 188, would be the state of the applicable law in the absence of an effective choice of law by the parties.

(3) In the absence of a contrary indication of intention, the reference is to the local law of the state of the chosen law.

Restatement § 188

Law Governing In Absence Of Effective Choice By The Parties

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

(2) In the absence of an effective choice of law by the parties (see § 187), the contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:

(a) the place of contracting,

(b) the place of negotiation of the contract,

(c) the place of performance,

(d) the location of the subject matter of the contract, and

(e) the domicil, residence, nationality, place of incorporation and place of business of the parties.

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

(3) If the place of negotiating the contract and the place of performance are in the same state, the local law of this state will usually be applied, except as otherwise provided in §§ 189-199 and 203.

2.4 Application

Dessault Falcon Jet Corp. v. Oberflex, Inc. (M.D.N.C. 1995)

Facts

- Dessault (Ark. corp.) sued SIO (French corp.) & Oberflex (US subsidiary of SIO) for breach of contract & breach of warranty, alleging defects in goods made by SIO & sold by Oberflex.
  - Dessault's contract was with Oberflex, which was insolvent; Dessault sought to hold SIO (100% owner of Oberflex) liable on "veil piercing" theory.
- Purported contractual choice of law:
  - Oberflex shipped the material, with an invoice stating that N.C. law applied to the sale
  - Dessault then sent a written purchase order stating that Ark. law applied to the purchase
  - Neither side notified the other, nor objected to, the competing choice of law provisions

Issue

- Whether N.C. or Ark. law should apply to
  - Veil Piercing
  - Breach of Warranty

Holding

- NC law governs veil piercing issue
- Ark. law governs breach of warranty issue

Analysis

- Veil Piercing
  - Contractual choice of law is not binding on applicable law for veil piercing, because piercing would impose liability on shareholders, who are not themselves parties to the contract
  - Absent decisions from NC courts, federal court looks to Restatement to predict how NC Supreme Court would decide the issue.
    - Restatement applies law of state of incorporation, in this case NC
- Breach of Warranty
  - Specific issue was whether Dassault could sue SIO absent privity of contract
    - N.C. law requires privity for warranty claims; Ark. law does not
  - Competing choice of law clauses are not binding
    - Contract was an oral agreement
    - Choice of law provisions in invoice and purchase order are treated as proposed additional terms, neither of which was accepted in this case
  - Absent a valid choice of law clause, N.C. follows the "most significant relationship" test.
    - Factors:
      - Place of contracting
      - Place of negotiation
      - Place of performance
      - Location of subject matter of contract
      - Domicile, residence, nationality, place of incorp., & place of business of the parties
      - Justifiable expectations of the parties

        - Where payment is only issue: place of delivery is most significant contact
            - Under contract between Dessault & Oberflex, NC was place of delivery
        - Where issue is existence of warranty, other factors may outweigh place of delivery:
            - Ultimate destination of goods
            - Place of use
            - Nature of goods
            - Place of injury
    - These factors favor application of Ark. law

Harco Nat'l Ins. Co. v. Grant Thornton LLP (NC App. 2010)

Facts

- Grant Thornton audited financial statements for Capital Bonding (PA corp.), with which Harco (IL corp.) contracted to serve as agent for sale of Harco's bail bonds in NC & other states.
- Capital was based in PA, and that's where Grant Thornton performed the audit.
- Harco relied on audit in deciding to enter into contract with Capital.
- Capital failed to make payments on forfeited bonds, which left Harco liable for payment, including bonds issues in NC.
- Harco sued for negligence & negligent misrepresentation in NC state court.

Issue

- Which state's law should apply to claims?
    - Choices: NC, IL, PA
        - Harco argued that NC law should apply
        - Grant Thornton argued that IL law should apply
    - Trial court applied "audit state test" (analogy to "place of performance" for contract claims)
        - 3d party claims against auditor are governed by law of "the state where the audit was performed, delivered, and disseminated", in this case PA.

Analysis

- Accounting liability bridges tort & warranty claims
    - For tort claims, NC applies "lex loci delecti" rule
        - Law of state where the injury occurred
    - For warranty claims, NC applies "most significant relationship" test
        - Because warranty claims are governed by UCC under NC statute
- Court of Appeals rejects "audit state test"
    - Nature of the claim, not occupation of the defendant, controls the choice of law
- Negligence & negligent misrepresentation are tort claims
    - Harm occurred in NC, where misrepresentation was discovered and resulted in loss.
        - Cites *Lloyd v. Carnation Co.* (NC App. 1983): Plaintiff, distributor of bull semen, suffered harm in VA where defendant deprived plaintiff of exclusive right to distribute in VA.