King & Spalding
Client Alert

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For more information, contact:

Matthew Bush
+1 212 790 5356
mbush@kslaw.com

Nina Trovato
+1 212 790 5348
ntrovato@kslaw.com

King & Spalding

New York
1185 Avenue of the Americas
New York, New York 10036-4003
Tel: +1 212 556 2100

Cassirer Argument: Ownership of Nazi-looted art to be determined by choice-of-law

A painting by Camille Pissarro hangs in a Spanish museum that the Nazis stole from a Jewish family in 1939. For fifteen years the parties have litigated who the rightful owner is: the museum or the family. The case may well turn entirely on whether California or Spanish law governs. It's not uncommon for the outcome of a case to be affected by the question of which jurisdiction's law controls. But the Supreme Court faces a question one step removed: Which rules do you apply to decide whose law controls? State choice-of-law rules or federal choice-of-law rules?

No, this is not a devious hypothetical invented by your civil procedure professor for your final exam. The Supreme Court heard argument on the question earlier this week in *Cassirer v. Thyssen-Bornemisza Collection Foundation*. And the painting's fate hangs in the balance. The Court's decision could affect choice-of-law procedures in a wide array of cases, particularly when a state-law claim is brought in federal court under a federal-question jurisdictional vehicle.

Factual Background

Camille Pissarro, *Rue Saint-Honoré, Afternoon, Rain Effect*

By 1939, German Jews had been deprived of their civil rights. Their German citizenship was revoked, their property was being "Aryanized," and the Kristallnacht pogroms had taken place throughout the country.

Lilly Cassirer—Jewish and living in Germany—decided that she had no choice but to leave the country. Both leaving and taking any belongings required permission from the government. And Lilly owned a prized Pissarro painting: *Rue Saint-Honoré, Afternoon, Rain Effect*.

The Nazi government appointed an "appraiser," who refused to permit Lilly to take the painting out of Germany. He demanded $360 in Reichsmarks for it. And she would never even have access to that money because it was to be deposited into a

"blocked account." Fearing that she would not be permitted to leave the country if she did not accede to these demands, she complied.

The painting changed hands numerous times over the decades, and was eventually purchased by the Spanish government as part of a collection of art totaling $327 million. The painting is currently on display at the Thyssen-Bornemisza Museum in Madrid.

Lilly's family believed that the painting was lost or destroyed, until discovering its location in 1999. After attempts to recover the painting through diplomatic channels proved unsuccessful, in 2005 the family brought state law claims against the Thyssen-Bornemisza Collection Foundation (the "Foundation") in federal district court in California under the Foreign Sovereign Immunities Act (FSIA). Nearly two decades later—after three trips to the Ninth Circuit—the litigation still has not been finally resolved.

In the most recent Ninth Circuit decision, the circuit court determined that federal common law choice-of-law rules applied. Under that test, the court ruled that the law of Spain governed the claims, and that the Foundation had rightful ownership of the painting pursuant to Spanish law. The family had argued that California choice-of-law rules apply. They claimed that (1) those California choice-of-law rules would point to California *substantive* law governing the claims, and (2) under California substantive law, the family would have ownership. The Ninth Circuit did not address either of those two arguments. Accordingly, the appeal turned entirely on which choice-of-law rules applied.

Legal Background

It has been long established that when a federal court hears state-law claims based on diversity jurisdiction, the court applies the choice-of-law rules of the forum state in which it sits. This is sometimes called the "*Klaxon* rule" based on the case in which it was decided.[1] In contrast, where a plaintiff brings federal-law claims, many courts conclude that federal common law choice-of-law rules apply.[2]

In this case, the family brought state-law claims. But the claims were brought under the Foreign Sovereign Immunities Act, which establishes federal court jurisdiction in cases against foreign states or their instrumentalities. It is the exclusive means to sue foreign sovereigns in the United States. In other words, though the claims are based on state law, the family brought the case under federal question jurisdiction.

The question before the Supreme Court is which approach to apply in this circumstance: the *Klaxon* choice-of-law rules for state-law claims or the federal common law choice-of-law rules for federal law-claims? Contrary to the Ninth Circuit's approach, the Second, Fifth, Sixth, and D.C. circuits have all followed *Klaxon* in this circumstance.

How the Supreme Court answers this question could affect choice-of-law issues in federal courts not just in the FSIA context, but also in a wide range of cases involving state-law claims when jurisdiction is based on a federal question.

The Oral Argument

The justices heard oral argument this past Tuesday, with the family arguing for state-choice-of-law rules and the Foundation arguing for federal common law choice-of-law rules. Some clear themes emerged regarding the justices' thinking.

The FSIA's Text. The FSIA states that the foreign state defendant "shall be liable in the same manner and to the same extent as a private individual under like circumstances."[3] The family's counsel opened the argument with the simple syllogism: (1) "Respondent is a foreign state;" (2) the statute provides that "such a foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances;" and (3) "if the Respondent were a private museum and every other circumstance were exactly the same, California choice-of-law rules would apply." He explained: "It necessarily follows from these three propositions, none of which is disputed, that California choice-of-law rules must apply to the Respondent."

Many justices seemed persuaded by this text-based argument. Justice Thomas began questioning of the Foundation by asking: "I don't quite understand how the sovereign can be treated in the same manner as a private individual if you apply different choice-of-law rules." Other justices expressed these same concerns. Justice Kagan said the Foundation's suggested approach was "really the opposite of the way that the FSIA instructs" courts to approach the case. Justice Breyer said, "I can't think of a private individual who would be treated" as the Foundation proposed it

should be treated. And Chief Justice Roberts said that after the FSIA provides a foreign state with other advantages, it says at the choice-of-law stage: "[W]e're going to treat you like a private party."

Taking Into Account Foreign Relations. The Foundation argued that federal common law choice-of-law rules were necessary to ensure that foreign-relations issues were taken into account, which state choice-of-law rules may not. This appeared to be a particular concern for Chief Justice Roberts, who asked both sides about this issue.

He asked the family that "if there is a federal interest in a state case," why would it make sense for a court to be "restricted in assessing the application of that principle" at the choice-of-law stage if state law did not account for it. He similarly told the United States—who supported the family's position—that it surprised him that "a representative of the federal government can't envision a situation where it may be contrary to their foreign policy to apply a particular state's choice of law."

At the same time, he also mused about whether those concerns could be addressed at the merits stage, which the United States had argued: "Can't the various considerations that you've been talking about be applied fully at the liability stage? Why is it necessary that the only way you can protect the foreign interests if the federal government, for example, has that interest is at the choice of law stage? Can't those be taken into account when you get to the substantive law?" Justice Sotomayor also referred to the argument that "the way to address those issues is not to change this rule about conflicts of law but to address those problems with other doctrines, like the act-of-state doctrine."

Predictability – "Welcome To The United States." The Foundation argued that a single federal choice-of-law rule would bring more predictability than the potential application of 50 states' choice-of-law rules, which might turn on where plaintiffs happened to move in their lives. To which Chief Justice Roberts responded: "[W]elcome to the United States. That's how the courts work. [If] a private citizen of the United States moves from New York to Ohio, the law that applies to him is going to change as well." The predictability argument did not appear to gain much transaction with the Court.

Justice Alito's Approach. Justice Alito seemed to want to take a different approach. He asked both sides whether a simpler analysis would be to apply the Rules of Decision Act. That statute provides: "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."[4] None of the other justices appeared keen on taking this route to resolve the case. A separate opinion from Justice Alito may be in his future.

The Court And The Blogosphere. The argument also shows the influence of the legal blogging community. The day before argument, a law professor put out a blog post on a highly technical component of the case. He believed that the parties' presentation of the question—"a choice between the 'forum state's choice of law rules' or a 'federal common law' choice of law rule"—is imprecise. In his view, "*Klaxon*, the source of the forum-state-choice-of-law doctrine, is *itself a federal common law rule*." [5]

Justice Kagan raised this issue with both sides, asking the family's counsel whether *Klaxon* "is itself an exercise of federal common law" and asking the Foundation's counsel, "what do you think Klaxon is" and whether it is "a federal common law rule." What makes Justice Kagan's curiosity particularly interesting is her admission: "I'm not sure my question matters at all. In fact, I suspect it doesn't."

Agreement. Justice Breyer ended the questioning on a high note: "Can everyone agree that this is a beautiful painting?" No one disagreed.

Conclusion

The justices appeared poised to rule that state choice-of-law principles would apply. Whatever the ultimate outcome, the Court's decision—and the reasoning it uses to get there—could affect which choice-of-law rules apply in a variety of cases. Like in the FSIA context, state law claims can be brought in other cases where a federal question serves as the jurisdictional hook. One example is supplemental jurisdiction. State law claims may also end up in federal court due to federal bankruptcy jurisdiction. These types of cases may all feel the effect of the Supreme Court's decision here depending on how broadly or narrowly the opinion is written.

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[1] *Klaxon Company v. Stentor Electric Manufacturing Company*, 313 U.S. 487 (1941).
[2] *See, e.g., Singletary v. United Parcel Serv., Inc.*, 828 F.3d 342, 351 (5th Cir. 2016).
[3] 28 U.S.C. § 1606.
[4] 28 U.S.C. § 1652.
[5] https://reason.com/volokh/2022/01/17/the-important-choice-of-law-questions-lurking-in-tomorrows-stolen-pissarro-argument/