Choice of Law in the American Courts in 2011: Twenty-Fifth Annual Survey

By
Symeon C. Symeonides

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TABLE OF CONTENTS

I. INTRODUCTION. .................................................. 2
   1. Twenty-Five Years. .............................................. 2
   2. This Year. ...................................................... 4

II. JURISDICTION. ................................................... 7
   1. General Jurisdiction: Goodyear .................................. 8
   2. Specific Jurisdiction: McIntyre .................................. 10
   3. Jurisdiction Based on Nationwide Contacts. ......................... 15
   4. Pending Legislation. ............................................. 16

III. CHOICE-OF-LAW METHODOLOGY. ......................... 19

IV. TORTS. .......................................................... 20
   1. Schultz Reappears in New York. .................................. 20
   2. Other New York Cases. .......................................... 24
   3. Cases from Other States. ....................................... 26
   4. Products Liability. ............................................. 29
   5. Employment Cases. ............................................. 32
   6. Other Torts. ................................................... 34
   7. Substance vs. Procedure ....................................... 34

V. CONTRACTS. .................................................... 35
   1. Arbitration Clauses. .......................................... 35
      a. Domestic Cases. ............................................. 35
         (1) The Supreme Court’s Concepcion .......................... 35
         (2) State Court Resistance. .................................. 41
      b. International Cases. ....................................... 44
   2. Arbitrability. ................................................ 47
   3. Choice-of-Law Clauses ....................................... 48
   4. Choice-of-Forum Clauses. ................................... 50

* Dedicated to the memory of Professor Phaedon John Kozyris.

** Dean Emeritus & Alex L. Parks Distinguished Chair in Law, Willamette University College of Law; LL.B. (Priv. L.), LL.B. (Publ. L.), Aristotelian University of Thessaloniki; LL.M., S.J.D., Harvard Law School.
I. INTRODUCTION

1. Twenty-Five Years

In 1987, Professor Phaedon John Kozyris, to whose memory this Article is dedicated, thought that judicial production in the choice-of-law area had grown to such a level that it was impossible for conflicts teachers to stay reasonably informed. As a means of keeping up with the annual avalanche of choice-of-law cases, he proposed to the members of the Section on Conflict of Laws of the Association of American Law Schools the idea of including in its annual Newsletter a brief survey of choice-of-law cases, to be written by a different member every year. Knowing that many good ideas die in the implementation (and understanding also the value of leading by example), Kozyris volunteered to write the first survey. Its purpose, he said, was “to highlight rather than to classify systematically interesting developments in the field.” Professor Herma Hill Kay, then Section Chair, liked the idea and suggested publishing the survey in this Journal, so as to “put this annual service

2. Id. at 547.
to more permanent form, and make it available to a wider audience.”

Twenty-five years later, the service continues. Over the years, the number of choice-of-law cases has grown by more than ten percent per year for a cumulative 304 percent growth, and the survey has grown in length and


5. In 1987, American state and federal courts decided 1,551 choice-of-law cases. In 2011, this number grew to 4,711.
readership, _inter alia_ by being translated into Chinese and Spanish.⁶ One can only hope that it continues to be useful.⁷ Sadly, Professor Kozyris passed away last year, but the continuation of this survey is a fitting honor to his legacy.⁸

The expansion in the length of the Survey has not altered its aim, which continues to be to “highlight” rather than to discuss in depth the cases decided every year. The sheer number of cases, combined with the space limitations of this hospitable _Journal_, renders impossible a more ambitious undertaking.

At the same time, the expansion in readership beyond the core of American conflicts professors and the inclusion of foreign scholars and students has necessitated a slight change in the discussion of cases, which now includes background information and occasionally explanations that normally would be unnecessary for the initial core readership.

One thing that has not changed is the author’s goal to inform rather than to advocate and to keep criticism to a minimum. However, at times (including this year), a certain degree of criticism is unavoidable, at least when discussing cases decided by courts that know better (e.g., the Supreme Court).

2. _This Year_

This year’s Survey covers cases decided by American state and federal _appellate_ courts from January 1 to December 31, 2011, _and_ posted on Westlaw before January 4, 2012. Of the 1,086 appellate cases meeting both of these parameters,⁹ the Survey focuses on those cases that may contribute some

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7. With allowance that one only hears the favorable, and also discounting the numerous yearly private plaudits, _see, e.g._, Association of American Law School Section on Conflicts Law, _Resolution of Thanks_, January 9, 1999 (characterizing the Survey as “enormously informative and influential . . . and . . . extraordinarily helpful” to academics and practitioners alike); D. Owen, M. Madden, & M. Davis, _Products Liability_, § 30:1 (v. II, 3d ed. 2005) (characterizing the survey as “enormously helpful in providing a comprehensive review of recent cases as well as an enlightening and thorough explanation of choice of law principles in action.”)

8. For a brief appraisal of Kozyris’ contribution to American conflicts law and comparative law, _see_ Symeon C. Symeondes, _A Dedication to Professor P. John Kozyris_, 58 Am. J. Comp. L. 221 (2010).

9. These cases have been identified by searching Westlaw’s 2011 “Allstates,” “CTA,” and (continued...
thing new to the development or understanding of conflicts law—and, particularly, choice of law.

The highlights of the year include:

• Three Supreme Court decisions, none of which improve the law and two of which can only reinforce the cynicism among many of our students.
  
  • The first decision, on general jurisdiction, is unremarkable but probably not harmful.\textsuperscript{10}
  
  • The second decision, on specific jurisdiction, would have been disastrous had it produced a majority opinion; an attempt to turn the clock back by several decades garnered only four votes, with two Justices concurring in result, and three dissenting.\textsuperscript{11}
  
  • The third decision produced a 5 to 4 majority which, with “tendentious reasoning,” held that the Federal Arbitration Act preempted state court rulings that protected consumers by refusing to enforce certain class-arbitration waivers.\textsuperscript{12}
  
• Two decisions by the West Virginia Supreme Court refusing to enforce arbitration clauses purporting to waive the claims of nursing home residents arising from the operator’s gross negligence and criticizing the United States Supreme Court for “tendentious reasoning” and for creating new doctrines “from whole cloth.”\textsuperscript{13}

• A decision of the New York Court of Appeals struggling to apply the Neumeier rules in a case involving the same pattern as Schultz v. Boy Scouts.\textsuperscript{14}

• A decision of the California Supreme Court worthy of Judge Traynor’s

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text continued

“SCT” databases with various queries, as well as with all the key numbers that Westlaw uses in placing cases into its “Conflict of Laws” database. Of the 1,086 appellate cases, 776 were decided by state intermediate and supreme courts, 307 by federal intermediate courts, and three by the U.S. Supreme Court. In addition, another 3,628 cases have been decided by federal district courts (not discussed in the Survey), thus raising the total number of conflicts cases for 2011 to 4,711.

\textsuperscript{10} See infra at II.1.

\textsuperscript{11} See infra at II.2.

\textsuperscript{12} See infra at V.1.a(1).

\textsuperscript{13} See infra at V.1.a(2).

\textsuperscript{14} See infra at IV.1.
legacy in delineating the extraterritorial reach of California statutes.\textsuperscript{15}

- A decision of the Delaware Supreme Court holding that Delaware had an interest in “regulating the conduct of its licensed drivers” even when they drive in a state with lower standards.\textsuperscript{16}

- An Arkansas case involving a conflict between Arkansas’ dram shop act and Louisiana’s \textit{anti}-dram shop act and applying the Louisiana act to an Arkansas accident.\textsuperscript{17}

- A products liability case in which a driver who had a rollover accident after taking a sleeping pill at a rest stop, prevailed (on the choice-of-law question) against the dealer who sold him the convertible car but failed to warn him that it was not equipped with a roll bar to protect him in case of a rollover.\textsuperscript{18}

- A decision of the Eleventh Circuit enforcing a foreign arbitration and choice-of-law clause prospectively waiving a seaman’s Jones Act rights, even though there was little possibility that an American court would have the opportunity to review the resulting arbitration award.\textsuperscript{19}

- Several state supreme court decisions illustrating the operation of the four competing approaches to conflicts involving statutes of limitation.\textsuperscript{20}

- A Wyoming Supreme Court decision holding that same-sex spouses married in Canada could obtain a divorce in Wyoming, and a New York decision recognizing a Canadian same-sex marriage in the context of an inheritance dispute and decided before New York allowed same-sex marriages.\textsuperscript{21}

- A Washington decision recognizing a Sudanese cultural marriage blessed by the village Sultan and rejecting an allegation that Sudanese civil authorities would not recognize the marriage because the groom had only paid 35 of the 50 cows he promised as dowry to the bride’s father.\textsuperscript{22}

- A Kentucky decision holding that a Jewish religious marriage performed
without a marriage licence in Kentucky and not accompanied by the civil part of the ceremony was not a valid marriage. 23

• A Vermont Supreme Court decision holding that Vermont had jurisdiction to terminate the parental rights of a father without in personam jurisdiction over him, as long as the children were domiciled in Vermont. 24

• A Fifth Circuit en banc decision holding that two unmarried same-sex partners who adopted a Louisiana child in New York did not have a federal cause of action under the Full Faith and Credit clause against the Louisiana Registrar who refused to issue a revised birth certificate listing both adoptive parents. 25

• A decision of the Nevada Supreme Court characterizing as penal and refusing to recognize a California judgment that imposed a fine on a company for erecting an advertising sign in violation of zoning restrictions. 26

• Several cases involving convicted sex offenders required by sister-state judgments to register their place or residence, or terminating the obligation to register. 27

• Four federal appellate decisions holding that corporate defendants are amenable to suit under the Alien Tort Statute (but not under the Torture Victim Protection Act) and that they can be held liable for aiding and abetting in the commission of the international law violations the ATS contemplates. 28

II. JURISDICTION

This Survey does not usually cover adjudicatory jurisdiction. However, for the benefit of foreign readers, an exception is warranted this year because, after more than two decades of silence on the subject, the United States Supreme Court rendered two important decisions on the same day 29: Goodyear Dunlop

23. See id.
24. See infra at VII.2.
25. See infra at VII.3.
26. See infra at VIII.1.
27. See id.
28. See infra at IX.1-2.
29. For in-depth discussions of these two cases, see Patrick J. Borchers, J. McIntyre Machinery, Good year, and the Incoherence of the Minimum Contacts Test, 44 Creighton L. Rev. 1245 (continued...)
The first decision deals with “general” or “all-purpose” jurisdiction, a subject about which the Court has not spoken since 1984, in *Helicopteros Nacionales de Colombia, S.A. v. Hall*. The second decision deals with “specific” or “case-linked” jurisdiction, a subject on which the Court last spoke in 1987, in *Asahi Metal Industry Co. v. Superior Court of Cal., Solano Cty.*

The difference between the two types of jurisdiction is that a court that has general jurisdiction may adjudicate any claim against the defendant, including claims unrelated to the defendant’s contacts with, or activity in, the forum state. By contrast, a court that has only specific jurisdiction may only adjudicate claims against the defendant that arise from the defendant’s specific contacts with, or activity in, the forum state.

1. General Jurisdiction: Goodyear

*Goodyear* arose out of a bus accident in France that resulted in the death of two boys from North Carolina. The accident was attributed to a defective tire manufactured in Turkey by a subsidiary of The Goodyear Tire and Rubber Company (Goodyear USA). The boys’ parents filed a products liability action in North Carolina against Goodyear USA, its Turkish subsidiary and two other foreign subsidiaries. The issue was whether North Carolina had jurisdiction over the subsidiaries. Specific jurisdiction was unavailable because the claim was unrelated to any activity of the subsidiaries in North Carolina. However, tens of thousands (out of millions) of their tires were sold in North Carolina through intermediaries, although the particular type of tire involved in the accident was never sold there. The question was whether these sales were sufficient to sustain jurisdiction in North Carolina.
general jurisdiction in North Carolina. Confusing or blending general and specific jurisdiction, the North Carolina courts answered this question in the affirmative, noting that a sufficient number of the subsidiaries’ tires had reached North Carolina through “the stream of commerce.” The Supreme Court reversed in a unanimous opinion written by Justice Ginsburg.

The Court defined –or redefined?– general jurisdiction by stating that a court may assert general jurisdiction over foreign corporations to hear any and all claims against them “when their affiliations with the State are so ‘continuous and systematic’ as to render them essentially at home in the forum State.”36 One hopes that the italicized phrase is just a figure of speech that does not raise the bar for general jurisdiction. Indeed, in Perkins, the first and only Supreme Court case to find such jurisdiction, the Philippine corporation was “essentially at home” in the forum state of Ohio, if only because the corporation did not have another home at that time (the World War II period) and had to conduct its business from outside the Philippines, which happened to be Ohio.37 In contrast, in Helicopteros, the Colombian corporation was far from being at home in the forum state of Texas, because its only activities there were certain purchases of Texas products. There is, of course, a long distance between the home-away-from-home facts in Perkins and the isolated purchasers in Helicopteros. Goodyear, however, did not even fall in-between these poles. The Goodyear Court correctly concluded that:

Measured against Helicopteros and Perkins, North Carolina is not a forum in which it would be permissible to subject petitioners to general jurisdiction. Unlike the defendant in Perkins, whose sole wartime business activity was conducted in Ohio, petitioners are in no sense at home in North Carolina. Their attenuated connections to the State . . . fall far short of the ‘the continuous and systematic general business contacts’ necessary to empower North Carolina to entertain suit against them on claims unrelated to anything that connects them to the State.38

This of course explains why Goodyear was an easy case that should not have reached the Supreme Court or should have been reversed without an opinion in light of Helicopteros. One fears that what will remain from Goodyear in the hands of less erudite courts below is the “essentially at home” catchphrase. If this proves to be the case, Goodyear will be a disservice to American jurisdiction law.

36. Goodyear, 131 S.Ct. at 2851 (emphasis added).
38. Goodyear, 131 S.Ct. at 2857.
2. **Specific Jurisdiction: McIntyre**

In *McIntyre*, the forum state of New Jersey asserted specific jurisdiction over an English manufacturer whose massive metal-shearing machine had severed the fingers of a New Jersey worker in New Jersey. Unlike the situation in *Goodyear*, most foreign readers will find nothing exorbitant in this assertion of jurisdiction. For example, Article 5(2) of the European Union’s Brussels I Regulation provides that, “in matters relating to tort,” a defendant may be sued “in the courts of the place where the harmful event occurred,”\(^{39}\) even in the absence of any other contacts with that place. However, American jurisdiction law is anything but simple—thanks in part to the inability of the Supreme Court to articulate a unified or at least coherent jurisdictional test. *Asahi*,\(^{40}\) the Court’s last pronouncement on the matter, produced three separate opinions reflecting significant philosophical divisions among the then-Justices. Twenty-four years later, *McIntyre* also produced three separate opinions exhibiting even deeper divisions among the current Justices.

\(a\). **Asahi.** For readers unfamiliar with *Asahi*, that case began as a products liability action filed against a Taiwanese tire manufacturer by a California domiciliary who was injured in a California accident allegedly caused by the sudden loss of air in his motorcycle tire, which had been manufactured by the defendant. The Taiwanese manufacturer filed a cross-complaint seeking indemnification from Asahi, a Japanese company that had manufactured the valve assembly that was incorporated into the tire. Later on, the California plaintiff settled his claim against the Taiwanese defendant and was no longer involved in the case. Thus, the only jurisdictional question left in *Asahi* was whether California had jurisdiction over the Japanese valve manufacturer in its indemnification dispute with the Taiwanese tire manufacturer.

The Supreme Court unanimously answered this question in the negative, but did not provide a majority rationale for its holding. Four Justices, led by Justice O’Connor, reasoned that a defendant’s mere awareness that its products would reach the forum state through the “stream of commerce” without anything else is insufficient to make an assertion of jurisdiction over that defendant consistent with “traditional notions of fair play and substantial justice,” as the Due Process clause requires. Instead, the plaintiff must show additional acts by the defendant indicating a specific intent to serve the forum’s market. Four other Justices led by Justice Brennan reasoned that ordinarily the defendant’s awareness that its products would reach the forum state through the


stream of commerce is sufficient to subject the defendant to specific jurisdiction in that state. However, an assertion of jurisdiction must always be subject to a reasonableness inquiry and, in the circumstances of this case, California’s assertion of jurisdiction was unreasonable. A third opinion authored by Justice Stevens agreed that California’s assertion of jurisdiction was unreasonable in this case, but refused to commit to the stream of commerce test articulated by either O’Connor or Brennan, while noting that California satisfied even O’Connor’s more stringent test because more than 100,000 of Asahi’s valve assemblies had been sold in California.

**b. McIntyre.** The facts of McIntyre differed in at least two important respects from those in Asahi: (1) Unlike Asahi, which was essentially a dispute between two foreign manufacturers, McIntyre was a dispute between a New Jersey worker injured in New Jersey and a foreign manufacturer whose machine caused the injury; (2) In Asahi, the Japanese defendant had manufactured a component part of the injury-causing product and had no control over where the Taiwanese defendant would sell the products that incorporated the components parts. By contrast, in McIntyre, the British manufacturer (McIntyre UK) had manufactured the entire injury-causing product (the machine), and had actively targeted the American market as a whole: (a) by soliciting clients at trade shows in the United States; and (b) by hiring an exclusive, albeit independent, distributor to promote and sell its machines in the United States, including the machine that caused the injury. McIntyre UK did not target (nor did it exclude) the New Jersey market *per se* because its objective was to sell as many machines as possible, “anywhere and everywhere” in the United States “to anyone in America willing to buy them.”

Yet, six Justices concluded that New Jersey did not have jurisdiction, and voted to reverse the New Jersey judgment that held to the contrary. Three Justices (Scalia, Thomas, and Chief Justice Roberts) joined Justice Kennedy’s plurality opinion. Justice Breyer wrote an opinion joined by Justice Alito, concurring in result, and Justice Ginsburg wrote a dissenting opinion, joined by Justices Sotomayor and Kagan.

**(1) The plurality.** Justice Kennedy’s plurality opinion moved to the right of O’Connor’s Asahi opinion by seeking to re-anchor American jurisdiction theory in the long-discarded notions of “submission” and “consent,” and by strongly criticizing Brennan’s Asahi opinion which was based on foreseeability

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41. *McIntyre*, 131 S.Ct. at 2899 (Ginsburg, J., dissenting).
42. *Id. at 2891 (Breyer, J., concurring).*
and fairness. According to the plurality, the basis of jurisdiction is not foreseeability but rather the defendant’s submission to the forum state’s sovereignty through “purposeful availment.” The “stream of commerce” metaphor obviously does not fit this conception of jurisdiction because a defendant cannot control where the stream goes. The plurality acknowledged the Court’s earlier statement that “a defendant’s placing goods into the stream of commerce ‘with the expectation that they will be purchased by consumers within the forum State’ may indicate purposeful availment.” But that statement simply meant that a defendant may “in an appropriate case be subject to jurisdiction without entering the forum . . . as where manufacturers or distributors ‘seek to serve’ a given State’s market.” The key question, the plurality stated, is “whether the defendant’s activities manifest an intention to submit to the power of [the forum] sovereign.” The plurality continued:

In other words, the defendant must ‘purposefully avail[il]’ itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.’ . . . The defendant’s transmission of goods permits the exercise of jurisdiction only where the defendant can be said to have targeted the forum; as a general rule, it is not enough that the defendant might have predicted that its goods will reach the forum State.

According to the plurality, Justice Brennan’s concurrence in Asahi, advocating a rule based on general notions of fairness and foreseeability, was “inconsistent with the premises of lawful judicial power” because “jurisdiction is . . . a question of authority rather than fairness” and “it is the defendant’s actions, not his expectations, that empower a State’s courts to subject him to

43. McIntyre, 131 S.Ct. at 2787, 2788, 2789, 2790.
44. Id., at 2788 (quoting World–Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 298 (1980)).
45. Id. at 2788.
46. Id. (emphasis added). According to Professor Borchers, the plurality opinion was a “bullheaded attempt to ground personal jurisdiction in a sovereignty theory,” a theory that the Court had rejected several times before. Borchers, supra note 29, at 1263. See also id. at 1272 (“At least three times in the minimum contacts era the Court has buried the notion that the Due Process Clause imports state sovereignty, but each time . . . it pulls itself from the grave, and in increasingly grotesque forms terrorizes the neighborhood.”). Borchers concludes that the plurality opinion “attempted to roll back the clock by a century or more,” id. at 1246, and is “quite possibly the most poorly reasoned and obtuse decision of the entire minimum contacts era.” Id. at 1263.
47. McIntyre, 131 S.Ct. at 2788 (internal quotations and citations omitted).
judgment.”  

(2) The concurrence. Justice Breyer agreed with the plurality that New Jersey did not have jurisdiction, but he based his conclusion on narrow factual grounds. Essentially accepting O’Connor’s stream-of-commerce-plus test (at least for the purposes of this case), Justice Breyer noted that “a single sale of a product in a State does not constitute an adequate basis for asserting jurisdiction over an out-of-state defendant, even if that defendant places his goods in the stream of commerce, fully aware (and hoping) that such a sale will take place.”  

In this case, Breyer concluded, the plaintiff failed to carry his burden of proving that the British manufacturer “purposefully avail[ed] itself of the privilege of conducting activities’ within New Jersey,” and the facts showed “no ‘regular ... flow’ or ‘regular course’ of sales in New Jersey . . . no ‘something more,’ such as special state-related design, advertising, advice, marketing, or anything else . . . no specific effort by the British Manufacturer to sell in New Jersey.”  

Justice Breyer also stated that this case was “an unsuitable vehicle for making broad pronouncements that refashion basic jurisdictional rules.”  

He noted that concepts like “submission” and “targeting” a market are difficult standards in contemporary trading modes:

[W]hat do those standards mean when a company targets the world by selling products from its Web site? And does it matter if, instead of shipping the products directly, a company consigns the products through an intermediary (say, Amazon.com) who then receives and fulfills the orders? And what if the company markets its products through popup advertisements that it knows will be viewed in a forum? Those issues have serious commercial consequences but are totally absent in this case.

(3) The dissent. In her dissenting opinion, Justice Ginsburg framed the issue as follows:

A foreign industrialist seeks to develop a market in the United States for machines it manufactures. It hopes to derive substantial revenue from sales it makes to United States purchasers. Where in the United States buyers reside does not matter to this manufacturer. Its goal is simply to sell as much as it can, wherever it can. It excludes no region or State from

48. Id. at 2789.
49. Id. at 2792 (Breyer, J., concurring).
50. Id.
51. Id. at 2793.
52. Id.
the market it wishes to reach. But, all things considered, it prefers to avoid products liability litigation in the United States. To that end, it engages a U.S. distributor to ship its machines stateside. Has it succeeded in escaping personal jurisdiction in a State where one of its products is sold and causes injury or even death to a local user?53

Noting the “purposeful” efforts of McIntyre UK “to reach customers for its products ‘anywhere in the United States,’” its “purposeful . . . engagement of [a U.S. distributor] as the conduit for sales of McIntyre UK’s machines to buyers ‘throughout the United States,’” and its “endeavors to reach and profit from the United States market as a whole,” Justice Ginsburg concluded that the plaintiff’s suit was “brought in a forum entirely appropriate for the adjudication of his claim.”54 Ginsburg continued with several pointed questions:

On what sensible view of the allocation of adjudicatory authority could the place of [plaintiff’s] injury within the United States be deemed off limits for his products liability claim against a foreign manufacturer who targeted the United States (including all the States that constitute the Nation) as the territory it sought to develop?55

. . . Is it not fair and reasonable, given the mode of trading of which this case is an example, to require the international seller to defend at the place its products cause injury? Do not litigational convenience and choice-of-law considerations point in that direction? On what measure of reason and fairness can it be considered undue to require McIntyre UK to defend in New Jersey as an incident of its efforts to develop a market for its industrial machines anywhere and everywhere in the United States? Is not the burden on McIntyre UK to defend in New Jersey fair, i.e., a reasonable cost of transacting business internationally, in comparison to the burden on Nicastro to go to Nottingham, England to gain recompense for an injury he sustained using McIntyre’s product at his workplace in Saddle Brook, New Jersey?56

(d) Assessment. Justice Ginsburg’s questions are cogent; and they deserved a more serious consideration than they received from the plurality and concurring Justices. In terms of substantive justice, the outcome of McIntyre is truly lamentable. In terms of jurisdictional theory, McIntyre may be equally bad, but it could have been worse. Expert commentators have characterized McIntyre

53. McIntyre, 131 S.Ct. at 2794 (Ginsburg, J., dissenting).
54. Id. at 2797.
55. Id.
56. Id. at 2800-01 (footnotes omitted).
as nothing short of “a disaster”57 and as “exceptional in its display of poor judgment and faulty reasoning.”58 To put it mildly, *McIntyre* does not advance the ball. While some authors criticize the Court for its “failure to articulate a coherent standard”59 of jurisdiction, it is doubtful that a single coherent standard from this Court would be a good development. Given a choice between lack of clarity and a bad standard, the former is much preferable as the lesser evil. That is what we have had with *Asahi* and this is what we have with *McIntyre*. In this context, the best thing one can say about the *McIntyre* plurality is that it was not a majority opinion, and the best aspect of Justice Breyer’s concurrence is that it prevented Justice Kennedy’s opinion from becoming a majority opinion.60

### 3. Jurisdiction Based on Nationwide Contacts

*McIntyre* illustrates the big hole in American jurisdictional law: A defendant who targets the United States market as a whole but not the market of any particular state can avoid being subject to jurisdiction in any state for actions arising under state law. Indeed, even under the plurality’s rigid conception of jurisdiction, there is little doubt that McIntyre UK’s activities in the United States were sufficient to empower the United States courts to assert jurisdiction over it in a case arising under federal law. The plurality conceded this point,61 but noted that the question in this case “concerns the authority of a New Jersey state court to exercise jurisdiction, so it is petitioner’s purposeful contacts with New Jersey, not with the United States, that alone are relevant.”62

Foreign readers may wonder whether a federal court sitting in New Jersey would have jurisdiction in *McIntyre*. Under present law, the answer is no. The United States and its constituent states are distinct sovereignties and, as the plurality noted, “a litigant may have the requisite relationship with the United States Government but not with the government of any individual State.”63 The anomaly is that, despite the separateness of these sovereignties, the territorial/in

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57. Borchers, supra note 29, at 1246.
58. Ides, supra note 29, at ___. See also id. (“[T]he clerks let their justices down, the justices let their colleagues down, and the Court let us all down.”).
59. Id.
60. One can speculate that, had Justice Breyer joined the three dissenters, Justice Alito might have joined Kennedy’s plurality opinion, making it a majority opinion.
61. See id. at 1790 (noting that the defendant “directed marketing and sales efforts at the United States.”).
62. Id. See also id. (noting that the defendant’s activities “may reveal an intent to serve the U.S. market, but they do not show that J. McIntyre purposefully availed itself of the New Jersey market.”).
63. Id. at 2789.
personam jurisdiction of their courts is, for the most part, coextensive and is defined by state law. Under Federal Rule of Civil Procedure 4(k)(1)(A), a federal court has personal jurisdiction over a defendant only if that defendant is subject to the jurisdiction of the state in which the court sits. Rule 4(k)(2) extends the jurisdiction of federal courts over defendant who are not subject to the jurisdiction of state courts up to the limits of the federal Constitution, but only for claims arising under federal law. Because the McIntyre claim arose under state law, the defendant was not subject to the jurisdiction of the federal court under Rule 4(k)(2). The plurality acknowledged the gap, noting that perhaps “Congress could authorize the exercise of jurisdiction in appropriate courts,” but since Congress had not done so, the plaintiff was out of luck: “The Constitution commands restraint before discarding liberty in the name of expediency.” Obviously, the defendant’s “liberty” is more important than fairness to injured plaintiffs.

Would a state court in another state have specific jurisdiction for a claim arising out of injury that occurred in New Jersey? If not, would another state have general jurisdiction? Would McIntyre UK feel “essentially at home” in any other state? The answers to these questions are far from clear, at least to this author.

4. Pending Legislation

In 2010, a bill intended to fill this gap in American jurisdictional law was introduced in the U.S. Congress but did not advance beyond the committee stage. On December 13, 2011, an identical bill—H.R. 3246 entitled the “Foreign Manufacturers Legal Accountability Act of 2011”—was introduced in the House of Representatives by Ohio Representative Betty Sutton (D). This bill requires foreign manufacturers or producers of certain “covered products” imported to the United States to register an agent authorized to accept service of process “for

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64. Id. at 2790.
65. Id. at 2791.
66. The American distributor was bankrupt.
68. These products would not include machines like the one involved in McIntyre, but would include drugs, cosmetics, certain “biological products,” “chemical substances,” pesticides, “consumer products,” motor vehicles, and any component parts of any of the above. See H.R.3646 § 2(a)(3), 112th Congress. “Covered products” are further defined as those distributed in “commerce,” and “commerce” is defined as trade or transportation “between a place in a State [of the United States] and any place outside thereof.” Id. §2(a)(2), (4).
the purpose of any State or Federal regulatory proceedings or any civil action in State or Federal court related to such covered product.\textsuperscript{69} The registration will take place in a state chosen by the manufacturer and having a “substantial connection to the importation, distribution, or sale of the products of the foreign manufacturer or producer.”\textsuperscript{70} By so registering, a manufacturer or producer would “consent[] to the personal jurisdiction of the State and Federal courts of the State in which the registered agent is located for the purpose of any judicial proceeding related to such covered product.”\textsuperscript{71}

Thus, if this bill becomes law, it would provide a basis for specific jurisdiction in actions “related to” or arising from covered products, not only in federal courts but also in state courts in the state of registration. Such jurisdiction will not encompass actions “brought by foreign plaintiffs where the alleged injury or damage occurred outside the United States.”\textsuperscript{72} However, the bill will not negate jurisdiction for injuries occurring in the United States but outside the registration state, if such jurisdiction can be grounded on other actual contacts sufficient to satisfy the Due Process standards.\textsuperscript{73}

Ironically, in its present version, this bill would not change the outcome of cases like \textit{McIntyre}, \textit{Asahi}, or \textit{Goodyear}:

(1) The \textit{McIntyre} outcome would not change because the machine involved in that case is not included in the bill’s list of “covered products.”

(2) The \textit{Asahi} outcome would not change because, although the list of covered products includes “component parts” of motor vehicles, it does so only for items that are “not yet” component parts. Thus the valve assembly, which was already incorporated into the tire before importation to the United States, would not be a “covered product.”

\textsuperscript{69} Id. at § 2(a)(1).
\textsuperscript{70} Id. at § 2(a)(2).
\textsuperscript{71} Id. at § 3(c)(1) (emphasis added).
\textsuperscript{72} See id. § 3(c)(2) (emphasis added) (providing that consent to jurisdiction “shall not apply to actions brought by foreign plaintiffs where the alleged injury or damage occurred outside the United States.”).
\textsuperscript{73} The introductory report that accompanied the 2010 version of the bill stated: “That a foreign manufacturer has consented to the jurisdiction of the courts in one state . . . does not mean that injured consumers can only bring suit in that state. It is the Committee’s intent that injured consumers can continue to pursue their claims in any state they wish. The difference is that the foreign manufacturer can contest the exercise of jurisdiction by courts in states other than the one where the registered agent is located.” House Report, \textit{supra note} \textsuperscript{67}, 2010 WL 5148066, at *14.
(3) The Goodyear outcome would not change because the bill confers only specific, not general, jurisdiction. This is clear from the bill’s language that registration amounts to consent to personal jurisdiction in proceedings “related to such covered product.”74 This is also the drafters’ intent. The introductory report that accompanied the 2010 version of the bill stated that “[t]he scope of consent extends only to the covered product that allegedly caused the plaintiff’s injury,” and that a foreign manufacturer “does not, by virtue of registering an agent . . . , generally consent to jurisdiction related to claims involving products that are not covered by the Act.”75

Opponents of the bill argue, inter alia, that the bill would be counterproductive because it will expose American manufacturers to retaliatory legislation by other countries. This argument is vastly overstated. This is because—as Article (5(2) of the Brussels I Regulation, supra, illustrates—American manufacturers are already exposed to jurisdiction in most countries in which American products cause injuries, even in the absence of any other contacts with those countries. Moreover, Article 4 of Brussels I allows courts in the EU countries to assert jurisdiction over American manufacturers (and other defendants not domiciled in an EU country) on additional jurisdictional bases which are provided in the respective national laws but which are not available against EU-domiciled defendants. These bases are listed in the Regulation’s Annex I and some of them—such as those of Article 14 of the French Civil Code or Article 23 of the German Code of Civil Procedure—are considered exorbitant by EU, American, and international standards. Worse yet, judgments obtained in one EU country on these exorbitant bases are entitled to almost automatic recognition and enforcement in all other EU countries. It is hard to imagine any more discriminatory treatment of foreign defendants as this one.

A variation of the retaliation argument focuses on the enforceability of American judgments in other countries. The argument is that foreign countries will enact legislation making the enforcement of American judgments in those countries even more difficult than presently. Here again the response is: “Can it get any worse?” It is common knowledge that foreign courts are far less hospitable to American judgments than American courts are to foreign judgments.76 The risk of even more discriminatory treatment against American judgments may be real, but the current regime which deprives injured

74. Id. § 3(c)(i).
76. See SYMEON C. SYMEONIDES & WENDY C. PERDUE, CONFLICT OF LAWS: AMERICAN, COMPARATIVE, INTERNATIONAL ____ (3rd ed. 2012), and authorities provided therein.
Americans such as Mr. Nicastro in *McIntyre* of an American forum and forces them to litigate their claims in a distant land is hardly acceptable. In any event, these arguments and counter-arguments may be academic because, at least in the near future, the chances of this bill becoming law are at best modest.

### III. CHOICE-OF-LAW METHODOLOGY

From the perspective of choice-of-law methodology, 2011 was an uneventful year because no state supreme court altered or refined its choice-of-law methodology. Thus, the methodological table provided in last year’s Survey remains unaltered. For the reader’s convenience, last year’s table is reproduced below, with the caveats and qualifications detailed in the Surveys of previous years.

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### IV. TORTS

1. **Schultz Reappears in New York**

   *Edwards v. Erie Coach Lines Co.*\(^{77}\) presented the same tri-state pattern as the well-known case *Schultz v. Boy Scouts of America, Inc.*\(^{78}\) a New York injury involving two out-of-state defendants, one of whom had the same home state as the victims. An Ontario bus carrying the members of an Ontario hockey team collided in New York with a Pennsylvania tractor-trailer parked on the shoulder of the road. The collision caused the death of some of the bus passengers and injuries to the others. In the families’ New York lawsuits, the parties stipulated that the bus defendants and the trailer defendants were 90 percent and 10 percent at fault, respectively. Ontario, but not New York, law limited the amount of non-economic damages to $310,000. The trailer defendants did not invoke Pennsylvania law.

   In the bus passengers’ action against the Ontario bus defendants, the New York trial court applied Ontario law, even though the defendants did not raise the applicability of the Ontario cap as an affirmative defense and did not provide the substance of Ontario law in their pleadings. In a decision discussed in last

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\(^{77}\) 952 N.E.2d 1033 (N.Y. 2011).

year’s survey, the intermediate court ruled that the trial court did not abuse its discretion in applying Ontario law because the pertinent New York rule allows the court to take judicial notice of foreign law even if it is not pleaded. Relying on *Schultz*, the intermediate court also ruled that this action fell squarely within the scope of the first *Neumeier* rule, which calls for the application of the law of the parties’ common domicile, in this case Ontario. The New York Court of Appeals affirmed this part of the judgment.

The action against the Pennsylvania trailer defendants fell within the scope of the third *Neumeier* rule, which calls for the application of the law of the state of the accident, here New York, unless displacing that law “will advance the relevant substantive law purposes without impairing the smooth working of the multi-state system or producing great uncertainty for litigants.” Invoking this exception, the intermediate court held that Ontario law should govern this action as well. The court reasoned that, “while applying Ontario law ‘may not affirmatively advance the substantive law purposes of New York, it will not frustrate those interests because New York has no significant interest in applying its own law to this dispute.’” The court also noted that one additional reason for not applying New York law was the parties’ stipulation that the truck defendants were only 10 percent liable for the accident. The application of New York law to those defendants would mean that they would have to pay more than the bus defendants who were 90 percent at fault and such a result, the court reasoned, “would ‘produce[e] great uncertainty for [the] litigants.’”

The Court of Appeals reversed this part of the judgment, holding that the action against the trailer defendants should be governed by New York law under the main part of the third *Neumeier* rule. The court reasoned that: (1) “the fact that the trailer defendants declined to advocate for Pennsylvania law does not permit them to take advantage of the Ontario cap”; and (2) the stipulation regarding the percentages of fault was “not relevant to ‘interest analysis,’ which seeks to recognize and respect the policy interests of a jurisdiction in the resolution of the particular issue[.]” The court rejected the trailer defendants’ argument that their position was identical to that of the Franciscan Brothers in *Schultz*. The court noted that: (a) “[w]hile New York employs ‘interest analysis’

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81. *Id.* at 458.
82. *Butler*, N.Y.S.2d at 544 (quoting *Schultz*).
83. *Id.* (quoting *Neumeier*).
84. *Edwards*, 952 N.E.2d at 1044.
rather than ‘grouping of contacts,’ the number and intensity of contacts is relevant when considering whether to deviate from *lex loci delicti* under the third *Neumeier* rule, and (b) New Jersey’s contacts in *Schultz v. Franciscans* were significant enough to justify such a deviation. By contrast, in this case:

> there was no cause to contemplate a jurisdiction other than New York, the place where the conduct causing injuries and the injuries themselves occurred. The trailer defendants did not ask [the trial court] to consider the law of their domicile, Pennsylvania, and they had no contacts whatsoever with Ontario other than the happenstance that plaintiffs and the bus defendants were domiciled there.

Judge Ciparick dissented from the application of Ontario law to the bus defendants and criticized the majority for “allow[ing] for a situation whereby the tractor-trailer defendants may end up paying more than the bus defendants because of the cap applied on noneconomic tort awards by Ontario—a patently absurd result.” Instead, the dissent would apply New York law to both sets of defendants under a “single *Neumeier* analysis” based exclusively on the third *Neumeier* rule. The dissent reasoned that: (i) the third rule should apply whenever *some* defendants are not domiciled in the same state as the plaintiffs, at least when those defendants are jointly and severally liable with defendants who are domiciled in the same state as the plaintiffs, and (2) the exception from the third rule should not apply because New York had a “strong interest in the conduct of business enterprises on its highways and in properly compensating the victims of torts, whether New York or foreign domiciliaries, committed by business enterprises on its highways.”

The dissent distinguished this case from *Schultz* on the ground that, in this case, “the causes of action arise from a single incident in New York . . . and the liability of the defendants is interrelated.” The majority acknowledged that *Schultz* involved several acts occurring at different times but rejected this

85. *Id.*
86. *Id.*
87. *Id.* at 1046 (Ciparick, J., dissenting in part).
88. *Id.*
89. See *id.* at n.2 (“I see no reason why the rule should not be applied to situations, such as here, where there are multiple jointly and severally liable defendants.”).
90. *Id.* at 1046. See also *id.* at 1047 (“In contrast, Ontario’s primary interest in having its law applied and capping nonpecuniary losses is to keep motor vehicle insurance costs low . . . [but] [t]hat interest . . . need not extend to commercial vehicles operating outside of Ontario and subject to the loss-allocation laws of those states.”).
91. *Id.* at 1045.
distinction, reasoning that, “regardless of the factual dissimilarities between the two cases, the defendants in Schultz were—just like defendants in this case—subject to joint and several liability for their separate allegedly tortious acts.”

In summary, the three opinions in this case reached three different results: (1) the intermediate court applied Ontario law to both defendants; (2) the majority of the Court of Appeals applied Ontario law to the bus defendants and New York law to the trailer defendants; and (3) the dissenting opinion would apply New York law to both defendants. One can criticize or defend each of the three results, in whole or in part. In the absence of the Neumeier rules, the result proposed by the dissenting opinion is probably the one that is most defensible, at least intuitively. However, with the Neumeier rules in place, the majority opinion was—technically speaking—the only opinion that correctly applied the rules.

To be sure, “technically” correct does not necessarily mean substantively correct. Both the intermediate court and the dissenting opinion were substantively correct to point out the possibility of forcing a defendant who was only ten percent liable to shoulder a much higher percentage of the payable damages. The truth is, there is always a potential problem when a court applies the laws of different states to parties involved in an accident caused by the same act. The problem exists whether these parties are defendants, as in this case, or plaintiffs, and whether they litigate in the same or different trials. Yet, this separate treatment is one of the consequences of the abandonment of the lex loci delicti rule and the introduction of issue-by-issue analysis. Both of these developments are generally beneficial developments in many other respects, even if they can lead to anomalies in some cases. These anomalies—which resemble an inappropriate dépeçage although technically they do not meet its definition—can be avoided if the rules allow sufficient discretion and the court makes good use of it. Unfortunately, the Neumeier rules do not provide enough flexibility. Although the third rule and part of the second rule each contain an escape, the first rule which mandates the application of the law of the parties’

92. Id. at 1043 n.9.

93. For example, the same problem would be present if some of the victims were not domiciled in Ontario as it exists in so many mass torts and products liability cases in which the same product injures consumers domiciled in different states.

94. Dépeçage is the application of the laws of different states to different issues in the same cause of action, not to different causes of action as here. Nevertheless, the two situations raise similar concerns regarding the congruence of the various laws.

95. Rule 3 contains the escape quoted in the text, supra. Rule 2 also contains an escape (“in (continued...)
common domicile does not contain an escape. By contrast, Louisiana and Oregon, the two American jurisdictions that have codified the common-domicile rule, have also provided escapes from it.\textsuperscript{96} Such an escape would have been useful in \textit{Schultz v. Boy Scouts} and would have been useful in the \textit{Edwards} case as well.

Be that as it may, by applying the law of the parties’ common domicile in the action against the bus defendants, \textit{Edwards} joined the vast majority of state supreme court cases decided in states like New York that have abandoned the \textit{lex loci} rule. As documented elsewhere, eighty-five percent of cases involving the common-domicile pattern have applied the law of the parties’ common domicile.\textsuperscript{97} In cases like \textit{Babcock} in which the state of the common domicile has a pro-recovery law, the percentage is ninety-seven percent, whereas in cases like \textit{Edwards} and \textit{Schultz} in which the common domicile has a lower recovery law the percentage is down to seventy percent.

2. Other New York Cases

\textit{Shaw v. Coach}\textsuperscript{98} is another traffic accident case whose outcome depended on the application of the \textit{Neumeier} rules. A New York plaintiff was injured in New Jersey when the car in which he was a passenger and which was driven by his mother, also a New York domiciliary, collided with a Greyhound bus. The bus was owned by one corporate defendant, operated by another corporate defendant (Greyhound), and driven by an individual defendant (collectively the “bus defendants”). None of the bus defendants had a domicile or place of business in New York or New Jersey and all of them argued for the application of New Jersey law. That law provided that a defendant who was less than 40 percent at fault was only responsible for its proportional share of the damages

\textsuperscript{95} (...continued)

the absence of exceptional circumstances”), but the escape applies to only half of this rule.


\textsuperscript{97} For the latest tables and citations, see SYMEON C. SYMEONIDES & WENDY C. PERDUE, \textsc{Conflict of Laws: American, Comparative, International _____} (3rd ed. 2012).

\textsuperscript{98} 918 N.Y.S.2d 120 (N.Y.A.D. 2nd Dept. 2011).
due to a plaintiff. In contrast, the plaintiff and his mother’s estate, who was also a defendant, argued for the application of New York law. That law was similar to New Jersey’s but it contained an exception critical in this case for defendants found liable in the use of a car. Under this exception, those defendants could be held responsible for the full amount of the plaintiff’s damages, regardless of their percentage of fault.

Under Edwards, the plaintiff’s claims vis a vis his mother’s estate would fall within the scope of the first Neumeier rule, whereas his claims vis a vis the bus defendants would fall within the scope of the third Neumeier rule. However, Shaw was decided before Edwards. The Shaw court noted the dangers lurking in the application of the laws of different states to the various defendants, but concluded that this was not a problem in this case because New York law should apply with regard to all defendants.

Limiting its discussion to the escape of the third Neumeier rule, the court examined the purposes of the conflicting laws and the interests of the respective states in applying them. The court found that the New Jersey rule was designed to lower insurance rates, reduce litigation, and promote fairness among joint tortfeasors. However, New Jersey did not have an interest in applying its law, for three reasons: (1) the bus and car involved in the accident were not insured in that state; (2) New Jersey courts were not implicated; and (3) the tortfeasors were not domiciled or based in New Jersey. In contrast, the New York law reflected the New York legislature’s deliberate choice that the policy underlying the common-law joint and several liability rule—the sense that compensation of the relatively innocent victim serves a more important purpose than striking a nuanced balance between and among the relatively guilty—should continue to apply to the majority of automobile accident victims in order to ensure that they obtain a full recovery.99

The court concluded that, because in this case the victim was domiciled in New York, the application of New York law would “advance the substantive law purposes of this State’s law because it would insure that the plaintiff, the ‘relatively innocent victim,’ is fully compensated.”100

99. Id. at 125 (internal quotations omitted).
100. Id. at 126. Finally, in rebuffing the criticism that it favored New York domiciliaries, the New York court drew support from a poorly reasoned New Jersey case, Erny v. Estate of Merola, 792 A.2d 1208 (N.J. 2002) (discussed in Symeonides, 2002 Survey at 15-17) that had applied the same New York law to a case arising from a New Jersey accident. However, Erny differed in two important respects (and this is why it was poorly reasoned): the (continued...)
In *DaSilva v. C & E Ventures, Inc.*, the defendant was the Port Authority of New York & New Jersey (PA) which, as its name suggests, is a domiciliary of both states. The plaintiffs were workers who claimed to have been exposed to lead while performing lead paint abatement work on the George Washington bridge, which spans New York and New Jersey. Most of the plaintiffs were domiciled in New York, but some of them were domiciled in New Jersey. Fortunately for the court, this was a conduct regulation conflict which fell outside the scope of the *Neumeier* rules and in which the parties’ domiciles are a secondary factor. Under New Jersey law, the owner of a structure (here the PA) would not be liable for injury sustained by a contractor’s employee as a result of the very work the contractor was hired to perform. In contrast, under New York law, the PA would be liable because New York’s Labor Law § 241(6) imposed a nondelegable duty upon owners to provide safe conditions of work.

The PA argued that this law should not be applied because the injuries occurred while the workers were working on the New Jersey portion of the bridge. The court found that PA failed to prove this allegation and that the evidence showed that the plaintiffs were injured in both states. The court held that, under these circumstances, and as long as the plaintiffs were not injured solely in New Jersey, the trial court was correct to apply New York law.

3. Cases from Other States

In *Sinnott v. Thompson*, the Delaware Supreme Court faced a conflict between the contributory negligence rule of the accident state, North Carolina, and the comparative negligence rule of Delaware, which was the defendants’ domicile. The defendants were the owner of a car registered and insured in Delaware, and her son James Sinnott to whom she entrusted the car while he was studying at Campbell University in North Carolina. The plaintiff was a New York domiciliary and Sinnott’s fellow student at Campbell. After consuming several alcoholic drinks, Sinnott and the plaintiff decided to drive to a restaurant in the mother’s car with Sinnott as driver and the plaintiff as passenger. As a result of Sinnott’s driving with excessive speed in North Carolina, an accident ensued causing severe injuries to the plaintiff. Under North Carolina’s contributory negligence rule the plaintiff could not recover because he knew about Sinnott’s drinking before he entered the car.

The court held that Delaware had the most significant relationship and

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100. (...continued)

plaintiff was a New Jersey domiciliary, and all defendants were New York domiciliaries.


102. 32 A.3d 351 (Del. 2011).
its law should govern under the Restatement (Second). As is typical of opinions with thin reasoning, the court quoted in full Sections 6 and 145 of the Restatement but relegated to an inconsequential footnote the more specific Section 146 which applies to personal injury actions and calls for the presumptive application of the law of the state of conduct and injury. The court relied on other cases that ostensibly supported the proposition that “the place where the injury occurred is an inferior contact in comparison to the other contacts listed in section 145(2).” The court rejected the argument that North Carolina had a conduct-regulating interest in applying its law, reasoning that North Carolina’s interests were “sufficiently protected by its ability to impose criminal penalties for violating its motor vehicle laws” and that those interests “were vindicated when Sinnott pled guilty to driving while impaired.” In contrast, the court concluded, “Delaware has an overriding interest in regulating the conduct of its citizens [and] Delaware’s interests include regulating the conduct of its licensed drivers and the vehicles that it has registered and which are insured under its law.” The court also noted Delaware’s “strong public policy against contributory negligence as a complete bar to recovery” and recited a statement from a federal district court sitting in another state that “the interest of the forum state in applying its law and policies to those who seek relief in its courts is paramount.”

The court then turned to the plaintiff’s negligent entrustment claim against Sinnott’s mother and quickly concluded that Delaware law should govern this claim as well. This could well be the right result, except that the reader is left to wonder. The opinion does not say whether the laws of the two states differed, and if so how, and neither the lower court opinion nor the parties’ briefs contain any discussion of this issue. The following are the possibilities, depending on the content of the two state’s laws: (1) if the laws of the two states were the same, this would be a non-conflict; (2) if Delaware, but not North Carolina, imposed liability on the car owner, this would be (a) a false conflict if the two rules qualified as conduct regulating, and (b) a no-interest case if the two rules qualified as loss-distributing; and (3) if North Carolina, but not Delaware, imposed such liability, this would be a true conflict. The Delaware Supreme Court’s reasoning was not enlightening. It consisted of an except from

103. Id. at 355. One of those cases was Travelers Indem. Co. v. Lake, 594 A.2d 38 (Del. 1991), which however was clearly distinguishable because both the plaintiff and the defendant were Delaware domiciliaries and the issue (amount of damages) was undoubtedly a loss-distribution issue.

104. Sinnott, 32 A.3d at 357.

105. Id.

106. Id. (quoting Conlin v. Hutcheon, 560 F.Supp. 934, at 937 (D.Colo. 1983)).
a lower court case stating that “[d]etermining the liability ... for negligent entrustment on the basis of the law of a far away state where an accident happens to occur . . . —as opposed to the law of the state where the entrustment occurred . . .—would place an intolerable burden on the interstate system.”

Bourgeois v. Vanderbilt presented a conflict between the dram shop act of Arkansas, which was both the accident state and the forum state, and Louisiana’s anti-dram shop act. After hitting a jackpot a Texas truck driver got intoxicated by consuming large quantities of alcohol in the defendant’s casino in Shreveport, Louisiana. The defendant then drove a few miles into Arkansas where he collided with a bus driven by the plaintiff who, coincidentally, was a Louisiana domiciliary. The plaintiff would have a cause of action against the casino owner under Arkansas’ dram shop act, but not under Louisiana’s anti-dram shop act, which specifically immunized alcohol vendors and servers from suits by persons injured by drunk patrons.

Following Leflar’s five choice-influencing factors, the trial court granted the casino owner’s motion for summary judgment. The court reasoned, *inter alia*, that the “simplification of judicial task factor” weighed in favor of Louisiana law because it was easier to apply, and Louisiana had a more significant relationship because the casino was located in Louisiana, the plaintiff was a Louisiana domiciliary and the negligent conduct occurred in Louisiana. The court concluded that Arkansas had “no interest in regulating Louisiana businesses by applying the ideals and principles of Arkansas dram shop laws to out-of-state business enterprises and injecting these principles into litigation between two Louisiana citizens.”

The Eighth Circuit Court of Appeals found this opinion “well-reasoned” and affirmed the judgment. Neither court discussed the fact that, given the casino’s proximity to the Louisiana-Arkansas border, it was entirely predictable that the serving of excessive alcohol to intoxicated patrons in Louisiana could cause accidents in Arkansas. Nor did either of the two courts discuss the distinct possibility that, although the victim of this Arkansas accident happened to be a Louisianian, the next victim could well be an Arkansan.

110. Id.
Enterprise Products Partners, L.P. v. Mitchell\textsuperscript{112} arose out of an explosion of a liquid propane pipeline in Mississippi that killed two Mississippi domiciliaries and injured several others. The failed segment of the pipeline had been manufactured in Texas and was installed in Mississippi as part of a 1,300 mile pipeline that spanned several southern states. It was operated by the defendant, a Texas-based company. The defendant argued for the application of Mississippi law, which limited the amount of compensatory damages, while the plaintiffs argued for the application of Texas law, which did not impose any limits.

The Texas court agreed with the Mississippi plaintiffs and held that Texas law should govern. The court noted that the policy behind Mississippi’s compensatory damages cap was essentially “to end the state’s ‘hell-hole’ reputation and attract more business and insurers to Mississippi.”\textsuperscript{113} The court concluded that this policy was not implicated in this case because the defendant had limited contacts with Mississippi and, when the pipeline was built in the 1960s, it was not built in reliance on Mississippi’s cap which was enacted four decades later. The court also emphasized that the defendant had its principal place of business in Texas and that “the decisions regarding maintenance and operation of the pipeline—i.e., the conduct causing the injury—occurred in Texas.”\textsuperscript{114}

4. Products Liability

In re New York City Asbestos Litigation\textsuperscript{115} was a products liability action filed by an Oregon domiciliary who contracted mesothelioma from her exposure to talc powder manufactured and sold by the defendant, a New York based corporation. After unsuccessful treatment, the plaintiff ended her life in Oregon, under the supervision of a physician pursuant to the Oregon Death with Dignity Act (“ODWDA”). Under New York law, a physician-assisted suicide is a crime and it \textit{could} be considered an “intervening cause” precluding a wrongful death action. However, the ODWDA specifically provides that a suicide under the Act does not preclude civil claims the decedent may have had. On the other hand, another Oregon statute limited the amount of non-economic damages in personal injury or wrongful death actions to $500,000. New York law did not impose such a limit. Predictably, the decedent’s estate invoked the first Oregon statute but not the second, arguing instead that New York law should govern the

\begin{itemize}
\item \textsuperscript{112} 340 S.W.3d 476 (Tex.App. 1st Dist. 2011), reconsideration en banc denied (Apr. 06, 2011), reh’g overruled (Apr. 06, 2011), petition for review filed (Jun. 22, 2011).
\item \textsuperscript{113} \textit{Id.} at 482.
\item \textsuperscript{114} \textit{Id.}
\item \textsuperscript{115} 32 Misc.3d 161, 921 N.Y.S.2d 466 (N.Y.Sup. 2011).
\end{itemize}
amount of damages.

The New York court noted the estate’s “strategic” choice, but went along and focused on the question of damages. The decedent had used the product for 11 years while living in Michigan, two years while living in New York, and two years while living in California. She stopped using the product 20 years before she moved to Oregon, where she lived for another 16 years before her death. The court found that the injury occurred not when the decedent was exposed to the product, but rather when the illness manifested itself, and that this occurred in Oregon where she was diagnosed with mesothelioma. After all, that is when and where the magic “last event” occurred. The court supported its conclusion by reciting one of the first Restatement’s infamous illustrations involving “deleterious” substances. The court held that Oregon law, including its damages cap, governed the action under the third Neumeier rule.

In Bailey v. Cottrell, Inc., the products liability action was filed in Georgia, a lex loci delicti state that routinely uses the public policy exception as a means of avoiding the application of the lex loci. This case was no exception. The injury occurred in Indiana, which requires showing of negligence for design defects, whereas Georgia has adopted strict liability. Relying on Alexander v. General Motors Corp., a decision of the Georgia Supreme Court, the Bailey court concluded that the Indiana and Georgia rules were “sufficiently dissimilar” and that this dissimilarity offended Georgia’s public policy. By Georgia standards, this was not an unusual conclusion, except that, unlike Alexander, which involved a Georgia plaintiff and an out-of-state manufacturer, Bailey involved a Georgia manufacturer and an out-of-state plaintiff (from Mississippi). The court did not discuss this difference.

Murphy v. Mancari’s Chrysler Plymouth, Inc., arose from a rollover accident in Michigan in which the driver was seriously injured. The driver had fallen asleep at the wheel after taking a sleeping pill at a Michigan rest stop. The

116. See 921 N.Y.S.2d 466 (“Where a person causes another voluntarily to take a deleterious substance which takes effect within the body, the place of wrong is where the deleterious substance takes effect and not where it is administered.” (quoting comment under Section 377 of first Restatement)).
118. For another 2011 example, see Carroll Fulmer Logistics Corp. v. Hines, 710 S.E.2d 888, (Ga.App. 2011) (wrongful death and survival actions arising from Florida traffic accident involving Georgia motorists; holding that Florida law, which did not allow damages for the decedent’s physical and mental pain, violated Georgia’s public policy).
119. 478 S.E.2d 123 (Ga. 1996).
120. Bailey, ___ S.E.2d ___, at *3.
121. 948 N.E.2d 233 (Ill.App. 1st Dist. 2011).
driver was an Illinois domiciliary, who had bought the car from an Illinois dealer. The driver filed two actions: (a) an action for design defects against the Michigan corporation that had designed and manufactured the car in Michigan; and (b) an action against the Illinois car dealer for failing to warn him that the car (a convertible) was not equipped with a roll bar or other device to protect the driver in case of a rollover. The two actions were severed and this case concerns only the failure-to-warn claim against the dealer. The Illinois court applied Illinois law, which was more favorable to the plaintiff than Michigan law. For example, Michigan limited non-economic damages to $500,000. The court found that Illinois had a more significant relationship than Michigan because both parties were Illinois domiciliaries, their relationship was centered in Illinois, and the critical conduct—the dealer’s failure to warn—occurred in Illinois. Of course, all of these contacts would favor the manufacturer in the other action. It remains to be seen what law the court will apply to that action.

Many tort and products liability cases are decided on a forum non conveniens (FNC) basis and usually do not reappear in the law reports until much later, if at all. This Survey does not generally discuss FNC cases because the choice-of-law factor is usually not decisive and the court’s discussion of it is tentative. One of the cases that did discuss FNC in some detail was Anyango v. Rolls-Royce Corp., a products liability action filed in Indiana against the manufacturer of a helicopter engine that was designed and manufactured in Indiana. The engine stalled while the helicopter was flying in British Columbia, causing the helicopter to crash and kill a pedestrian, the plaintiffs’ son. The court granted the defendant’s FNC motion after finding that British Columbia law would govern the action and that other factors also favored the motion. The court found that the plaintiffs did not rebut Indiana’s lex loci presumption because British Columbia had significant contacts with the case. The court also

122. For 2011 cases, see Tazoe v. Airbus S.A.S., 631 F.3d 1321 (11th Cir. 2011) (products liability actions against foreign airplane manufacturer arising from air crash in Brazil; dismissing on FNC basis because, inter alia, Brazilian law would govern the actions); Mace v. Mylan Pharmaceuticals, Inc., 714 S.E.2d 223 (W.Va. 2011) (products liability action against West Virginia manufacturer; holding that when the action would be barred by the other state's statute of limitation, that state is not an “alternative forum” for purposes of FNC analysis); State, ex rel. Mylan, Inc. v. Zakaib, 713 S.E.2d 356 (W.Va. 2011) (products liability action against West Virginia manufacturer; remanding the case to the lower court with instructions to provide findings and conclusions with regard to each FNC factor so that the Supreme Court can determine if the lower court abused its discretion in granting or not granting an FNC motion); Erwin ex rel. Erwin v. Motorola, Inc., 945 N.E.2d 1153 (Ill.App. 1st Dist. 2011), appeal denied, 949 N.E.2d 1097 (Ill. 2011) (products liability action against Illinois headquartered corporation; denying an FNC motion without determining the applicable law because all other factors pointed against the motion).

123. 953 N.E.2d 1147 (Ind.App. 2011).
found that British Columbia had a “substantial interest” in the outcome, even though its law favored the foreign manufacturer in both liability and damages at the expense of the local plaintiffs. The court also noted that the trial “will be enormously costly and time consuming” and “[i]t would be unfair to burden Hoosiers with jury duty when Indiana has little connection with the controversy.”

In Yousef v. General Dynamics Corp. (which was not a products liability case), the New Jersey Supreme Court denied an FNC motion in favor of litigation in South Africa. The case arose out of a traffic accident in South Africa but involved exclusively American parties, including the plaintiffs who were domiciled in New Jersey and a corporate defendant who was doing business in New Jersey. One of the factors that tipped the scales against the motion was New Jersey’s “strong public policy of providing a forum for the redress of wrongs committed against its residents.”

5. Employment Cases

The California Labor Code (CLC) requires employers to pay overtime for days longer than eight hours and weeks longer than 40 hours. In Sullivan v. Oracle Corp., one of the questions was whether this provision of the CLC applied to work performed in California for a California employer by employees domiciled outside California but working for several days per year in California. This case concerned only the hours worked in California. The employees were domiciled in Arizona and Colorado, and both of those states had less generous requirements regarding overtime pay.

Continuing in the tradition inaugurated by Chief Justice Traynor, the California Supreme Court undertook “two distinct inquiries: first, whether the relevant provisions of the Labor Code apply as a matter of statutory construction, and second, whether conflict-of-laws principles direct us to apply California law in the event another state also purports to regulate work performed here.” After focusing on the language and history of the Code, the court answered the first inquiry in the affirmative. The court noted that the relevant provisions spoke broadly about “any work” and “any employee,” “without distinguishing

124. Id. at 1152.
125. 16 A.3d 1040 (N.J. 2011).
126. Id. at 1052.
127. 254 P.3d 237 (Cal. 2011).
128. Id. at 240.
between residents and nonresidents.” The application of the overtime provisions to nonresidents was “neither improper nor capricious,” the court reasoned, because those provisions “serve[d] important public policy goals, such as protecting the health and safety of workers and the general public, protecting employees in a relatively weak bargaining position from the evils associated with overwork, and expanding the job market by giving employers an economic incentive to spread employment throughout the workforce.” The court concluded that, to exclude nonresidents from the protection of these provisions “would tend to defeat their purpose by encouraging employers to import unprotected workers from other states.”

The court then examined whether Arizona or Colorado would wish to apply their less generous laws. The court answered this question in the negative, concluding that: (a) Colorado and Arizona had expressed “no interest in disabling their residents from receiving the full protection of California overtime law when working [in California] or in requiring their residents to work side-by-side with California residents in California for lower pay”; and (b) neither state had a legitimate interest in “shielding [a California employer] from the requirements of California wage law as to work performed [in California].” However, the court also concluded that, even if Colorado and Arizona had expressed such an interest, California law should still govern because:

To permit nonresidents to work in California without the protection of our overtime law would completely sacrifice, as to those employees, the state’s important public policy goals of protecting health and safety and preventing the evils associated with overwork. . . . Not to apply California law would also encourage employers to substitute lower paid temporary employees from other states for California employees, thus threatening California’s legitimate interest in expanding the job market. By way of comparison, not to apply the overtime laws of Colorado and Arizona would impact those states’ interests negligibly, or not at all. Colorado overtime law expressly does not apply outside the state’s boundaries, and Arizona has no overtime law. Alternatively, viewing Colorado’s and Arizona’s overtime regimens as expressions of a general interest in providing hospitable regulatory environments to businesses within their own boundaries, that interest is not perceptibly impaired by requiring a California employer to comply with California overtime law for work

129. Id. at 241.
130. Id.
131. Id. at 242.
132. Id. at 246.
performed here.\textsuperscript{133}

In \textit{Robidoux v. Muholland},\textsuperscript{134} the choice-of-law question concerned workers’ compensation immunity. The defendant, a Pennsylvania contractor, hired a Massachusetts worker through a Massachusetts temporary employment agency for work at a Rhode Island worksite. The worker was injured at the worksite and, after receiving worker’s compensation benefits through the Massachusetts agency, he filed a tort action against the contractor in Massachusetts. Under the workers’ compensation statute of Rhode Island, but not Massachusetts, the contractors would be immune from tort liability.

The court held that Massachusetts law should govern because Massachusetts had a more significant relationship and a greater interest than Rhode Island. The court acknowledged that Rhode Island had an interest in regulating conduct within its borders and in applying its own conduct-regulating rules to events occurring in Rhode Island. However, finding that this was not a conduct-regulating conflict, the court focused on the parties’ domiciles. The court concluded that Massachusetts had an interest in ensuring adequate compensation for an injured Massachusetts domiciliary who was knowingly hired in Massachusetts by a contractor who was not a Rhode Island contractor; and also in enabling the Massachusetts employment agency to recoup the workers’ compensation benefits it had already paid.\textsuperscript{135}

6. Other Torts

Other tort conflicts cases decided by appellate courts in 2011 involved class actions,\textsuperscript{136} legal malpractice,\textsuperscript{137} other professional malpractice,\textsuperscript{138} and maritime torts.\textsuperscript{139}

7. Substance vs. Procedure

\begin{itemize}
  \item 133. \textit{Id}. at 247 (citations omitted).
  \item 134. 642 F.3d 20 (1st Cir. 2011) (decided under Massachusetts conflicts law).
  \item 136. See Morrison v. YTB Intern., Inc., 649 F.3d 533 (7th Cir. 2011); Pilgrim v. Universal Health Card, LLC, 660 F.3d 943 (6th Cir. 2011).
  \item 139. See Kriti Filoxenia Special Maritime Enterprise v. Yasa H. Mehmet Motor Vessel, 442 Fed.Appx. 167 (5th Cir. 2011).
\end{itemize}
Lewis v. Waletzky\textsuperscript{140} was a medical malpractice action filed in federal court in Maryland. The question was whether the plaintiff had to go through an ADR procedure with Maryland’s Health Care ADR Office as required by a Maryland statute before suing in Maryland courts for a malpractice that occurred in the District of Columbia. The defendant, a Maryland psychiatrist, prescribed certain antipsychotic drugs to the plaintiff, a District of Columbia domiciliary, which she used in D.C. and suffered injury there. The plaintiff argued that, under Maryland’s \textit{lex loci delicti} rule, a Maryland court would apply D.C. law and thus she did not have to comply with the above statute. The defendant argued that a Maryland court would have applied the statute under the public policy exception, which Maryland’s highest court employs in other tort conflicts. Unable to determine whether those cases were similar enough, the federal court of appeals certified the question to Maryland’s highest court.

Maryland’s highest court concluded, in essence, that both arguments were wrong and that the Maryland statute was applicable, but for a different reason: it was a procedural statute and thus was exempt from the choice-of-law process, including the \textit{lex loci delicti} rule. The court noted that the statute’s provisions: “in no way establish, deny, or define a cause of action [;] . . . [they] do not define the standard of care to be applied; nor do they prescribe how liability is to be determined [but] [i]instead, [they] are part of a legislative scheme intended to control the manner in which Maryland administers justice, by controlling access to Maryland courts.”\textsuperscript{141} Two justices dissented on the ground that this issue was not part of the certified question and the parties did not have the opportunity to brief it.

VI. CONTRACTS

1. Arbitration Clauses

\textit{a. Domestic Cases}

(1) \textit{The Supreme Court’s Concepcion}. The most important development of the year was a decision by the United States Supreme Court that was not even a choice-of-law decision resolving horizontal conflicts, but instead concerned a “vertical conflict” between federal and state law. In \textit{AT&T Mobility LLC v. Concepcion},\textsuperscript{142} the Court held that the Federal Arbitration Act (FAA)
preempts state court rulings that held certain class-arbitration waivers unenforceable.

The FAA was enacted in 1925 under the regime of Swift v. Tyson, primarily in response to the hostility of federal courts toward arbitration agreements. To reverse this hostility, the FAA placed arbitration agreements on equal footing with other contracts by providing, in Section 2, that such agreements are “valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” The italicized phrase, often referred to as the “saving clause,” allows courts to invalidate arbitration agreements under “generally applicable contract defenses, such as fraud, duress, or unconscionability,” but not under defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.

The California Civil Code, which predates the FAA by 52 years, makes unlawful “[a]ll contracts which have for their object, directly or indirectly, to

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142. (...continued)


143. 41 U.S. (16 Pet.) 1 (1842). “Had Erie [R.R. v. Tompkins, 304 U.S. 64 (1938)] been decided fifteen years earlier, there would have been no Federal Arbitration Act and the present subject would have been left in the hands of the National Conference of Commissioners on Uniform State Laws where, in the constitutional scheme of things, it would seem to belong. It was an oversight on the part of Congress that the statute was not repealed in 1940, for after Erie, it had lost its purpose.” Paul D. Carrington, Self-Deregulation, A “National Policy” of the Supreme Court, 3 Nev. L.J. 259 at 264 (2002).

144. “The objectionable rule of federal common law that Congress sought to reverse was one holding that predispute agreements to arbitrate are revocable. That rule was . . . a protection of improvident individuals from their tendency to underestimate the value and importance of clauses reducing their procedural rights in an unforeseen dispute over the performance of the contract. It recognized the limits to the foresight, interest, and energy most individuals bring to the planning of transactions and events with respect to the remote possibility that they might lead to disputes, limits that are not imposed on parties who are engaged in one of many similar transactions, some of which are certain to end in controversy.” Carrington, supra note 143 at 264-65.


exempt anyone from responsibility for his own fraud, . . . or violation of law . . . .”\textsuperscript{147} The Code also provides that, if a contract or clause of it is unconscionable, “the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.”\textsuperscript{148} Relying on these provisions, which apply to all contracts, the California Supreme Court held in \textit{Discover Bank v. Superior Court}\textsuperscript{149} that a credit-card contract clause prohibiting classwide arbitration would be unconscionable under California law and thus unenforceable. The court reasoned that because damages in consumer cases are often small and a company that “wrongfully exacts a dollar from each of millions of customers will reap a handsome profit,” the class action is often “the only effective way to halt and redress such exploitation.”\textsuperscript{150} Finding that class-arbitration waivers tend to operate “effectively as exculpatory clauses,”\textsuperscript{151} and are “indisputably one-sided” even when they are phrased as a “mutual prohibition,” the court concluded that such clauses, “at least to the extent they operate to insulate a party from liability that otherwise would be imposed under California law, are generally unconscionable.”\textsuperscript{152}

Based on \textit{Discover Bank}, several California cases have held certain class-arbitration clauses unenforceable\textsuperscript{153} as have cases decided under the laws of other states.\textsuperscript{154} The \textit{Conception} case is one of the cases decided under what has

\textsuperscript{147} \textsc{Cal.Civ.Code} § 1668.
\textsuperscript{148} \textsc{Cal.Civ.Code} § 1670.5(a).
\textsuperscript{149} 113 P.3d 1100 (Cal. 2005). \textit{Discover Bank} is discussed in Symeonides, 2005 Survey at 619-21
\textsuperscript{150} \textit{Discover Bank}, 113 P.3 at 1108-09.
\textsuperscript{151} \textit{Id.} at 1108.
\textsuperscript{152} \textit{Id.} 1109.
\textsuperscript{153} See, e.g., Hoffman v. Citibank (South Dakota), N.A., 546 F.3d 1078 (9th Cir. 2008) (decided under California conflicts law; California consumer, South Dakota credit card company, and South Dakota choice-of-law and individual arbitration clauses); Klussman v. Cross Country Bank, 36 Cal.Rptr.3d 728 (Cal.App. 1st Dist. 2005) (California consumers, Delaware credit card company, and Delaware choice-of-law and individual arbitration clauses); Aral v. Earthlink, Inc., 36 Cal.Rptr.3d 229 (Cal.App. 2nd Dist. 2005) (California consumers, Georgia internet service provider, and Georgia choice-of-law and individual arbitration clauses).
come to be known as the *Discover Bank* rule.\(^{155}\) In a 5 to 4 decision, the Court abrogated this rule.

The majority opinion authored by Justice Scalia\(^{156}\) began with the premise that the “overarching purpose of the FAA, . . . is to ensure the enforcement of arbitration agreements according to their terms *so as to facilitate streamlined proceedings.*”\(^{157}\) The italicized phrase is nowhere to be found in the FAA text and is not supported by its history. Although the Court has used this phrase in two other cases, that use was in a different context. In one of these cases, *Mitsubishi Motors*, this phrase was immediately followed by the disclaimer that “potential complexity alone” does not render a case unfit for arbitration.\(^{158}\) Yet, the bulk of the majority opinion depends on the assumptions expressed by the italicized phrase. The majority compared class arbitration with individual arbitration (rather than with individual or class litigation) and found that “[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA.”\(^{159}\)

The majority gave three reasons for this finding. The first two pertain to procedural attributes which the majority *ascribed* to class arbitration and which are supposed to be incompatible with arbitration: slow pace, high costs (for defendants), and procedural difficulty. The majority thought that the switch from individual to class arbitration “sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and

\(^{154}\) (...continued)

in credit card agreements between a Delaware bank and Wisconsin low-income consumers).

\(^{155}\) See Laster v. AT & T Mobility LLC, 584 F.3d 849 (9th Cir. 2009).

\(^{156}\) It is worth noting that, in a previous case, Justice Scalia declared that the Supreme Court’s interpretation of the FAA as binding on state courts was an “unauthorized eviction of state-court power” and that he was “ready to join four other Justices in overruling it, since [it] will not become more correct over time.” Allied–Bruce Terminix Companies, Inc. v. Dobson, 513 U.S. 265, at 285 (1995) (Scalia, J., dissenting). Also, Justice Thomas, who joined Justice Scalia in *Concepcion*, had previously declared that the FAA “does not apply in state courts” (*Allied–Bruce*, 513 U.S. at 285 (Thomas, J., dissenting)) and again that the FAA “does not apply to proceedings in state courts . . . [and] cannot be the basis for displacing a state law that prohibits enforcement of an arbitration clause contained in a contract that is unenforceable under state law.”). Buckeye Check Cashing, Inc. v. Cardeagna, 546 U.S. 440, at 449 (2006) (Thomas, J., dissenting).

\(^{157}\) *Concepcion*, 131 S.Ct. at 1748 (emphasis added).


\(^{159}\) *Concepcion*, 131 S.Ct. at 1748.
more likely to generate procedural morass than final judgment,”\textsuperscript{160} because, \textit{inter alia}, class arbitration “requires procedural formality”\textsuperscript{161} in order to protect the due process rights of absent class members. Of course there is nothing in the FAA that “requires speed, simplicity, or a particular proceeding.”\textsuperscript{162} Moreover, if “streamlining” and speed is what the FAA requires, then class arbitration is certainly capable of delivering both because it spends much less time on each case than individual arbitration.

The majority saved for last the real reason it considers class arbitration to be such a subversive undertaking: “[C]lass arbitration greatly increases risks to defendants,” said the majority, who “[f]aced with even a small chance of a devastating loss, . . . will be pressured into settling questionable claims.”\textsuperscript{163} The majority correctly noted that Section 10 of the FAA allows only a very limited judicial supervision of arbitrations, indeed much more limited than in just about any other western country. But rather than seeing this as a reason for a restrictive interpretation of the FAA or as a problem that affects both defendants and plaintiffs (especially plaintiffs who are not repeat customers of the arbitration industry), the majority took the opposite path of more expansive interpretation at the expense of state efforts to protect their consumers. Showing its concern for defendants, the majority noted: “Defendants are willing to accept the costs of these errors in arbitration, since their impact is limited to the size of individual disputes, and presumably outweighed by savings from avoiding the courts. But when damages allegedly owed to tens of thousands of potential claimants are aggregated and decided at once, the risk of an error will often become unacceptable.”\textsuperscript{164}

The result of this decision is not simply to deprive consumers of the equalizing tool of class arbitration, but to effectively deprive of any remedy all consumers whose contracts include an arbitration clause—very often in fine print or in a “bill stuffer” (as in Discover Bank). For, as one court noted in connection with class actions, “[t]he realistic alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for $30.”\textsuperscript{165} As Justice Breyer asked in his eloquent but restrained dissent, “[w]hat rational lawyer would have signed on to represent the Concepcions in

\textsuperscript{160} Id. at 1751.
\textsuperscript{161} Id.
\textsuperscript{162} Strong, States’ Rights supra note 142.
\textsuperscript{163} Concepcion, 131 S.Ct at 1752.
\textsuperscript{164} Id.
\textsuperscript{165} Carnegie v. Household Int’l, Inc., 376 F.3d 656, 661 (7th Cir. 2004).
litigation for the possibility of fees stemming from a $30.22 claim?" 166 Of course the same is true of arbitration.

But, worse yet, the chances of success for consumers who do go through individual arbitration are exceedingly low. The strategic and tactical advantages of “repeat players” such as credit card companies or on-line sellers over “single shot players” like consumers or employees in individual arbitration are well known and documented, 167 as is the fact that professional arbitrators are dependent on repeat players for their livelihood. Here are two examples:

1. “an arbitrator with an arbitral organization decided nineteen cases in favor of a particular credit card company and then one in favor of the consumer; this was the last referral that the organization made to the arbitrator”, 168

2. In 2009, the National Arbitration Forum (NAF), a private arbitration provider focusing on consumer debt cases, withdrew from that market after being sued in two lawsuits: (a) one by San Francisco’s city attorney, charging that NAF was running an ‘arbitration mill’ favoring credit card companies and that “of 18,075 credit card cases heard over several years, consumers won thirty times”; 169 and (b) another suit by Minnesota’s attorney general, charging that NAF shared a common owner with one of the country’s largest debt collection agencies.

One does not need more data to understand that, in the majority of cases, the choice is not as the Concepcion majority framed it, a choice between class arbitration and individual arbitration, but rather it is a choice between class arbitration and no remedy for consumers.

Following Concepcion, the Supreme Court vacated and remanded several other cases that had held class‐arbitration waivers unenforceable. 170 In one pre-

166. Concepcion, 131 S. Ct. at 1761 (Breyer, J., dissenting).
168. Murray, supra note 167, at 147 (citing congressional testimony). See also id. at 148 (noting that credit-card company claims “are almost always upheld by the industry-selected arbitrators, who often process them on a wholesale basis, and make a great deal of money doing so. The result of this practice is that thousands of citizens are being deprived of any fair opportunity to contest claims, which are in many cases doubtful or even fraudulent.”).
170. See Affiliated Computer Servs., Inc. v. Fenssterstock, 611 F. 3d 124 (2nd Cir. 2010) (applying (continued...)
Concepcion case that reached the same result under federal law, the losing party filed a petition for certiorari that is now pending before the Court.\(^ {171} \)

(2) State Court Resistance. In two cases decided after Concepcion, the West Virginia Supreme Court appeared unimpressed by the reasoning of the Concepcion majority. In Brown v. Genesis Healthcare Corp.,\(^ {172} \) the West Virginia court criticized the Supreme Court for “tendentious reasoning . . . stretch[ing] the application of the FAA,”\(^ {173} \) and creating doctrines “from whole cloth.”\(^ {174} \) The court noted that “Congress intended for the FAA to serve only as a procedural statute for disputes brought in the federal courts . . . [and] to govern only contracts between merchants with relatively equal bargaining power who voluntarily entered arbitration agreements.”\(^ {175} \) Nonetheless, “[w]ith tendentious reasoning, the United States Supreme Court has stretched the application of the FAA from being a procedural statutory scheme effective only in the federal courts, to being a substantive law that preempts state law in both the federal and state courts.”\(^ {176} \) Yet, the West Virginia court declared, “[t]he FAA has no talismanic effect; it does not elevate arbitration clauses to a level of importance above all other contract terms.”\(^ {177} \)

Brown involved three consolidated lawsuits filed by the families of

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170. (...continued)

171. In \textit{In re American Express Merchants’ Litigation}, 634 F.3d 187, 194, 199 (2nd Cir. 2011), which was decided before Concepcion, the Second Circuit held unenforceable a class arbitration waiver under federal law because the waiver would operate as a de facto immunity from antitrust liability by removing the plaintiffs’ only meaningful means of vindicating their statutory antitrust rights. American Express applied for a writ of certiorari. For a post-Concepcion case, see Sanchez v. Valencia Holding Co., LLC, 201 Cal.App.4th 74, ___ Cal.Rptr.3d ___, 2011 WL 5865694 (Cal.App. 2nd Dist. Nov. 23, 2011) (No. B228027), \textit{review filed} (Jan 04, 2012 (holding unenforceable as procedurally and substantively unconscionable a class-arbitration waiver).

172. ___ S.E.2d at ___, 2011 WL 2611327 (W.Va June 29, 2011) (No. 35494, 35546, 35635), \textit{cert. filed}, 80 BNA USLW 3194 (Sep. 27, 2011) (No. 11-391), and \textit{cert. filed}, 80 BNA USLW 3194 (Sep. 27, 2011) (No. 11-394).

173. \textit{Id.} at ___.

174. \textit{Id.} at ___ (“the Supreme Court has created from whole cloth the doctrine of ‘severability’”).

175. \textit{Id.} at ___ (footnote omitted).

176. \textit{Id.} at ___.

177. ___ S.E.2d at ___, 2011 WL 2611327 at * __.
nursing home residents who died as a result of the alleged negligence of the nursing home operators (the defendants). Each case involved arbitration clauses “buried within [the] nursing home admission agreements”\(^\text{178}\) that the residents or their representative signed. One clause required all claims to be resolved by arbitration, including claims for “fraud or misrepresentation, negligence, gross negligence, malpractice, or any other claim based on any departure from accepted standards of medical or health care or safety whether sounding in tort or in contract.”\(^\text{179}\) Apparently this clause did not include claims from intentionally shooting the resident, but it did refer all other claims to arbitration to that paragon of impartiality known as the National Arbitration Forum (NAF).\(^\text{180}\)

The arbitration clauses were prohibited by West Virginia’s Nursing Home Act which provided that any waiver by a nursing home resident of his or her right to commence a lawsuit for injuries sustained in a nursing home “shall be null and void as contrary to public policy.”\(^\text{181}\) The court acknowledged that, under Concepcion, the FAA preempted this Act. However, said the court, “the question of whether the arbitration clauses at issue are enforceable is still a matter of state contract law and capable of judicial review.”\(^\text{182}\)

In conducting such a review, the court pointed out that the Supreme Court has not directly addressed the enforceability of arbitration clauses in health care contracts or pre-dispute clauses in cases involving personal injury or wrongful death. The West Virginia court concluded that: (a) “Congress did not intend for the FAA to be, in any way, applicable to personal injury or wrongful death suits that only collaterally derive from a written agreement that evidences a transaction affecting interstate commerce, particularly where the agreement involves a service that is a practical necessity for members of the public;”\(^\text{183}\) and (b) “Congress did not intend for arbitration agreements, adopted prior to an occurrence of negligence that results in a personal injury or wrongful death, and which require questions about the negligence be submitted to arbitration, to be

\(^{178}\) Id. at ___ (emphasis added).

\(^{179}\) Id. at ___.

\(^{180}\) See supra text at note 169.

\(^{181}\) W.VA. Code, 16–5C–15(c).

\(^{182}\) Brown, ___ S.E.2d at ___.

\(^{183}\) Id. at ___. See also id. (”If a party to any pre-dispute contract was to assert a contractual right to avoid liability for their negligent conduct, then we would give the transaction careful examination. Likewise, if a party to a pre-dispute contract asserts a right to avoid courtroom scrutiny of their negligent conduct that caused a personal injury or wrongful death, then such a contract also warrants a wary examination.”).
governed by the Federal Arbitration Act.”

The court held that “as a matter of public policy under West Virginia law, an arbitration clause in a nursing home admission agreement adopted prior to an occurrence of negligence that results in a personal injury or wrongful death, shall not be enforced to compel arbitration of a dispute concerning the negligence.”

Alternatively, after examining the facts of each case, the court found that the clauses were procedurally and substantively unconscionable and held them unenforceable on that basis. As expected, the defendants applied for writs to the U.S. Supreme Court.

In *State ex rel. Richmond American Homes of West Virginia, Inc. v. Sanders*, the West Virginia Supreme Court responded as follows to a federal court’s statement that West Virginia courts are hostile to arbitration or to adhesion contracts: “We are hostile toward contracts of adhesion that are unconscionable and rely upon arbitration as an artifice to defraud a weaker party of rights clearly provided by the common law or statute.” This case involved class-arbitration waivers in house purchase contracts. The plaintiffs alleged that they were injured by radon gas leaking into their homes because the defendant failed to install, or fraudulently installed inoperable radon mitigation systems. The court affirmed the lower court decision that held the clauses unconscionable and unenforceable.

The McCarran–Ferguson Act of 1945 exempts from inadvertent federal preemption state statutes regulating the insurance industry. The Act provides that “[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, . . . unless such Act specifically relates to the business of insurance.” The italicized phrase means that the FAA, which does not specifically relate to the business of insurance, does not preempt state insurance laws. *Sturgeon v. Allied Professionals Ins. Co.* involved: (1) a Missouri statute that prohibited arbitration clauses in insurance contracts; and (2) an insurance contract that contained an arbitration clause and a California choice-of-law clause. The Missouri court held that the arbitration clause was unenforceable because: (1) the FAA did not preempt the Missouri statute; and (2) the California choice-of-

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184. *Id.* at ___.
185. *Id.* at ___.
187. *Id.* at 913.
188. 15 U.S.C. § 1012(b) (emphasis added).
law clause was also unenforceable because, to the extent that California law allowed arbitration clauses in insurance contracts, that law would violate Missouri’s fundamental public policy embodied in the above statute.\footnote{190}

\textbf{b. International Cases}

Section 1 of the FAA exempts from arbitration “contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.”\footnote{191} However, the New York Convention,\footnote{192} which displaces the FAA for most international cases, applies to all employment contracts, including those involving transportation workers. The Convention provides: (a) in Article II, that a contracting country must enforce an arbitration agreement “unless it finds that the said agreement is null and void, inoperative or incapable of being performed”;\footnote{193} and (b) in Article V, that a contracting country must enforce an arbitration award unless “enforcement of the award would be contrary to the public policy of that country.”\footnote{194}

\textit{Lindo v. NCL (Bahamas) Ltd.}\footnote{195} involved the interplay between these two articles of the Convention, as well as other issues of enforceability of a foreign arbitration and choice-of-law clause. \textit{Lindo} was a Jones Act action filed by a Nicaraguan crewmember against a Miami-based shipowner arising out of injury received whileworking on the defendant’s cruise ship. The standard employment contract provided that any claims arising under the employment, including Jones Act claims, were subject to mandatory arbitration in the seaman’s home country, here Nicaragua, under the law of the country of the ship’s flag. The ship carried the flag of the Bahamas, which was a flag of convenience. In response to the shipowner’s motion to compel arbitration, the seaman argued that the contract was void as against public policy because it operated as a prospective waiver of his Jones Act claim. The court assumed

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\footnote{190}{Missouri law would have been applicable in the absence of the choice-of-law clause because the insured risk was located and materialized in Missouri, the insured was domiciled there, and the insurer failed to defend the insured in a Missouri lawsuit.}

\footnote{191}{9 U.S.C. § 1. However, in \textit{Circuit City Stores, Inc. v. Adams}, 532 U.S. 105 (2001), the Supreme Court narrowed this exception by holding that it did not encompass all employment contracts involving commerce, but rather only those involving transportation workers.}


\footnote{193}{New York Convention, art. II(3) (emphasis added).}

\footnote{194}{New York Convention, art. V(2).}

\footnote{195}{652 F.3d 1257 (11th Cir. 2011).}
The outcome of the case depended on two Supreme Court precedents (*Mitsubishi Motors* and *Vimar Seguros*), as well as on Eleventh Circuit precedents, including *Thomas v. Carnival Corp.*

(1) In *Mitsubishi Motors*, the Supreme Court enforced a Japanese arbitration clause, even though the case involved rights based on federal antitrust statutes. However, the Court also noted in the famous footnote 19 that, if the arbitration and choice-of-law clauses “operated in tandem as a prospective waiver of a party’s right to pursue statutory remedies for antitrust violations,” the Court “would have little hesitation in condemning the agreement as against public policy.”

(2) In *Vimar Seguros*, the Court held that this issue should be addressed, not at the initial stage of enforcing the arbitration agreement, but rather at the later stage of enforcing the arbitral award. The Court reiterated, however that an arbitration agreement could be “condemn[ed] . . . as against public policy” if the “choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party’s right to pursue statutory remedies” and if there was “no subsequent opportunity for review.” In the actual case, there was no showing that the application of foreign law would necessarily amount to a denial of comparable rights and there was an opportunity for subsequent review in the award stage because the district court had retained jurisdiction.

(3) In *Thomas*, the Eleventh Circuit refused to enforce a Panamanian arbitration and choice-of-law clause in a case involving claims under the federal Seaman’s Wage Act. The *Thomas* court reasoned that, unlike the situation in *Mitsubishi* and *Vimar Seguros*, here “U.S. law will never be
applied and there would be “no assurance of an ‘opportunity for review,’” because there was no guarantee that the arbitration would produce “some award which the plaintiff can seek to enforce.”

The *Lindo* plaintiff invoked the *Thomas* case. He argued that: (a) in his case the application of Bahamian law would amount to a denial of his Jones Act claims; and (b) there would be no opportunity for subsequent review of the award because the district court had dismissed his action. Thus, if the arbitrator were to rule against him, there would be no award and thus no opportunity for a judicial review. The court rejected the argument, noting that “even if a zero-dollar arbitral award is entered, when a defendant seeks to have the zero-dollar arbitral award recognized and enforced by the district court against the plaintiff, the district court then would be able to perform an Article V analysis and either enforce the award or refuse enforcement based on an available Article V affirmative defense under the Convention, including public policy.” Apparently the court did not realize that (a) the defendant would have no reason to seek recognition or especially enforcement of a zero-dollar award in the United States; and (b) the plaintiff would not be allowed to bring an action under the Convention or the FAA because such an action is available only for “confirming” an award, not for attacking it.

Be that as it may, the *Lindo* court concluded that it should not follow *Thomas* because *Thomas* was inconsistent with an earlier Eleventh Circuit precedent *Bautista v. Star Cruises*, and was poorly reasoned. The *Lindo* court held that: (1) The fact that the plaintiff asserted a statutory Jones Act claim did “not affect the strong presumption in favor of enforcement of the choice clauses in his Contract”; (2) the plaintiff’s public policy defense was not a ground of invalidating the arbitration agreement under Article II of the Convention, but rather a defense to the enforcement of the award under Article V of the Convention; and (3) even if the public policy defense was not premature at this stage, it would be meritless because the remedies provided by Bahamian law were not “clearly inadequate,” even if they were arguably less generous than

204. Id. at 1123.
205. *Lindo*, 652 F.3d at 1279.
206. 396 F.3d 1289, 1301 (11th Cir.2005).
207. The dissent argued that it was *Bautista* rather than *Thomas* that was poorly reasoned. For another Eleventh Circuit case refusing to follow *Thomas*, see *Liles v. Ginn-La West End*, Ltd., 631 F.3d 1242 (11th Cir. 2011), discussed infra at ___.
208. *Lindo*, 652 F.3d at 1276.
209. Id. at 1276–78, 1280-82.
those of the Jones Act. 210

2. Arbitrability

In Cape Flattery Ltd. v. Titan Maritime, LLC, 211 the question was which law governs arbitrability. An agreement between a Bermuda corporation whose ship ran aground on a submerged coral reef in Hawaii and a Florida salvage company provided that “[a]ny dispute arising under this Agreement” was to be settled through arbitration in London under English law. The company salvaged the ship but in the process damaged the reef. Under federal law, the shipowner would be liable for the damage, which in this case exceeded $15 million. The shipowner sued the company for indemnification or contribution and the company responded with a motion to compel arbitration. The shipowner argued that, under Mitsubishi Motors, federal law determined the arbitrability of this dispute, and that under that law the dispute was not arbitrable. The salvage company argued that under Volt, 212 the question of arbitrability should be determined under the law designated in the choice-of-law clause, here English law.

The court acknowledged that the Supreme Court has not resolved this question but concluded that Volt was the more pertinent precedent and that means that non-federal arbitrability law may determine arbitrability, but only if the parties clearly and unmistakenly expressed their intent to that effect. The court concluded that the phrase “arising under” the agreement in the arbitration/choice-of-law clause was ambiguous, and that under applicable precedents it should be interpreted narrowly. Applying this test, the court found that, although the parties had agreed that English law would govern the

210. Id. at 1283-86. Lindo’s holding is consistent with Fifth Circuit cases. See, e.g., Francisco v. M/T Stolt Achievement, 293 F.3d 270 (5th Cir. 2002), cert. denied, 537 U.S. 1030 (2002) (enforcing a clause calling for arbitration in the Philippines, in a personal-injury action filed by a Filipino seaman against the Liberian owner of a Cayman Island vessel on which the plaintiff was injured while the ship was in the Mississippi river; finding that contractual or non-contractual claims arising from maritime employment qualify as claims arising from a “commercial legal relationship” under the New York Convention); Lim v. Offshore Specialty Fabricators, Inc., 404 F.3d 898 (5th Cir. 2005), cert. denied, 46 U.S. 826, 126 S.Ct. 365, 163 L.Ed.2d 71 (U.S. 2005) (holding to the same effect in a case involving a Louisiana employer of Filipino seamen and a maritime employment contract mandating arbitration in the Philippines under Filipino law; holding that the federal pro-arbitration policy embodied in the New York Convention preempted a Louisiana statute that expressly prohibited arbitration, choice-of-forum, and choice-of-law clauses in employment contracts). See also Dahiya v. Talmidge Int’l Ltd., 931 So.2d 1163 (La.App. 4 Cir. 2006), reh’g denied (June 30, 2006).

211. 647 F.3d 914 (9th Cir. 2011).

arbitrable parts of their dispute, the parties had not agreed that English law would also determine which parts are arbitrable and hence they did not displace federal arbitrability law. Applying federal arbitrability law, the court held that this dispute was not arbitrable because the phrase “arising under” encompasses only matters pertaining to the interpretation and performance of the contract and not, as in this case, a tort that occurs during the performance of the contract.215

3. Choice-of-Law Clauses

In Red Lion Hotels Franchising, Inc. v. MAK, LLC214, a contract for a California franchise between a California franchisee and a Washington franchisor contained a Washington choice-of-law clause. The clause was also accompanied by an unusual and cleverly drafted sentence stating that “[n]othing in this [clause] is intended to invoke the application of any franchise, business opportunity, . . . ‘implied covenant,’ . . . fiduciary or any other doctrine of law of the State of Washington . . . which would not otherwise apply absent this [clause].”215 The franchisor sued the franchisee for breach of the franchise contract in federal district court in Washington. The franchisee asserted claims under the “franchisee’s bill of rights” of Washington’s Franchise Investment Protection Act (FIPA) and under the Washington Consumer Protection Act (CPA). The franchisor argued that neither Act applied to this case because the franchise was not located in Washington.

The Ninth Circuit rejected the argument with regard to the FIPA claims. The court did not discuss the above-quoted sentence, other than to say that “[w]e construe the [choice-of-law clause] to mean that we should apply Washington law only insofar as that law, according to its own terms, would be applicable.”216 The court noted that, unlike FIPA’s other provisions which were applicable only to franchises located in “this State” or provided for acts occurring “in this State,” the bill of rights did not contain such a territorial limitation. After examining the history of FIPA and its subsequent amendments, the court concluded that this was a deliberate legislative choice. The court surmised that

213. For other arbitrability cases decided in 2011, see Bechtel do Brasil Construcoes Ltda. v. UEG Araucaria Ltda., 638 F.3d 150 (2nd Cir. 2011) (resolving a conflict between the scope of an arbitration clause and a choice-of-law clause, and holding that the timeliness of the defendant’s claims was for the arbitrator and not for the court to decide); Citigroup Smith Barney v. Henderson, 250 P.3d 926 (Or.App. 2011) (holding that under the contractually chosen law of New York, the question of whether a party had waived its right to arbitrate was for the arbitrator to decide).

214. 663 F.3d 1080 (9th Cir. 2011).
215. Id. at 1084.
216. Id. at 1087.
the Washington legislature “might have wanted to reassure potential out-of-state franchisees that they will be fairly treated by, and thereby encourage them to do business with, Washington franchisors.” 217 The court held that FIPA’s bill of rights was applicable to this case. However, FIPA does not specify a remedy for a violation of the bill of rights, but a franchisee may bring an action under the CPA. The franchisor argued that the CPA was limited to actions brought by Washington residents. The court remanded the case to the trial court to answer this question. 218

The Illinois Franchise Act applies to Illinois franchises and prohibits choice-of-forum clauses designating a forum outside Illinois. However, the Act does not prohibit arbitration clauses and does not expressly prohibit waivers of its substantive provisions. In Faulkenberg v. CB Tax Franchise Systems, LP, 219 a contract between a Texas franchisor and Missouri franchisees provided for several franchises in Missouri and one in Illinois. The contract contained Texas arbitration, choice-of-forum, and choice-of-law clauses. The court held that, with regard to the Illinois franchise, the choice-of-forum clause was void, but the arbitration clause was valid. The court granted a motion to compel arbitration in Texas.

In Capital One Bank v. Fort, 220 a credit card contract between an Oregon consumer and a Virginia bank contained a Virginia choice-of-law clause and a clause providing that the consumer would be responsible for the bank’s attorney fees “[t]o the extent permitted by law.” 221 The bank sued the consumer in Oregon for overdue payments but lost under Virginia’s statute of limitations. The consumer counterclaimed for attorney fees under an Oregon statute. The statute provided that, when a contract provides for attorney fees for only one party and the other party prevails in an action to enforce the contract, the prevailing party shall be entitled to attorney fees. The statute also prohibited waiver of its provisions. The court held that the consumer was entitled to attorney fees because: (a) Oregon law would have been applicable in the absence of the choice-of-law Virginia clause; (b) the above statute embodied a fundamental

217. Id. at 1091.

218. In Schnall v. AT&T Wireless Services, Inc., 225 P.3d 929 (Wash. 2010) (a case criticized in Symeonides, 2010 Survey at 352-54), the Washington Supreme Court held that non-Washington consumers could not sue for violation of Washington’s CPA. However, the court later withdrew that opinion and, in a new opinion rendered in 2011, remanded the case to the lower court for answering this question. See Schnall v. AT&T Wireless Services, Inc., 229 P.3d 129 (Wash. 2011).

219. 637 F.3d 801 (7th Cir. 2011) (decided under Illinois conflicts law).

220. 255 P.3d 508 (Or.App. 2011).

221. Id. at 510.
public policy of Oregon; and (c) Oregon had a materially greater interest in applying its law than Virginia.\textsuperscript{222}

\textit{McKeehan v. McKeehan}\textsuperscript{223} was an inheritance dispute between the decedent’s surviving wife and his children from a previous marriage regarding the ownership of shares in a Ford Company money market account. The account was subject to a Michigan choice-of-law clause. Under Michigan law, the wife, who was listed as a co-owner of the shares, had a right of survivorship in the decedent’s shares. Under the law of Texas, which was the decedent’s domicile at the time of death, the shares would be co-owned but the wife would not have a right of survivorship. The court classified the survivorship as an issue “which the parties could have resolved by an explicit provision in their agreement,” and which under Section 187(1) of the Restatement (Second) would be governed by the contractually chosen law without any limitations. The reason for this classification was that Texas law allowed parties to contractually create a joint tenancy with a right of survivorship. The court also noted that, even if this issue was beyond the parties’ contractual power, the Michigan choice-of-law clause would still be enforceable because Michigan law was not contrary to Texas’s fundamental public policy; even if it was, Michigan law would have been applicable in the absence of the clause because Michigan was the decedent’s domicile at the time of the contract and had other significant contacts, including the place of the contract’s making and performance.\textsuperscript{224}

4. Choice-of-Forum Clauses

This Survey does not cover cases involving choice-of-forum clauses unless the cases also contain significant choice-of-law issues, in which event they are discussed elsewhere in the Survey. It is well known that American courts are very

\textsuperscript{222} In Aronson v. Advanced Cell Technology, 196 Cal.App.4th 1043, 126 Cal.Rptr.3d 832 (Cal.App. 1st Dist. 2011) (No. A129336), a California case involving a Massachusetts choice-of-law clause and a unilateral attorney fee provision, California had a similar attorney fee statute that provided attorney fees for the prevailing party. However, the court did not decide the choice-of-law question because, even if California law applied, the defendant would not be entitled to attorney fees because plaintiff had voluntarily dismissed the action and under California law the defendant would not be considered the “prevailing party.”


favorably disposed toward choice-of-forum clauses and routinely enforce them in the vast majority of cases. For 2011, the Survey has identified only three cases that did not enforce such clauses, and only because the clauses contravened a forum statute that expressly prohibited them. In two of these cases, the state supreme court has granted writs. Among the others, five cases discussing whether the scope of the choice-of-forum clause encompassed tort claims are worth reading.

In *Liles v. Ginn-La West End, Ltd.* 227 a case involving land purchases in the Bahamas, the contracts contained Bahamian choice-of-forum and choice-of-law clauses. However, the contracts also incorporated the substantive protections provided to land purchasers by the federal Interstate Land Sales Act (“ILSA”). 228 The Act provides that an ILSA suit “may be brought” in the district where “the defendant is found or is an inhabitant or transacts business, or . . . where the offer or sale took place,” 229 and that “[a]ny condition, stipulation, or provision” binding a buyer “to waive compliance with any provision of this chapter . . . shall be void.” 230

The plaintiffs (the land buyers) argued that the choice-of-forum clauses were void because they violated the above ILSA provisions. The Eleventh Circuit noted that this argument might have been well taken if these were domestic rather than international contracts and expressed doubts that the ILSA would be applicable had it not been incorporated into the contracts. The court also noted that an Eleventh Circuit precedent permitted a prospective waiver of substantive rights derived from a federal statute. That being so, the court concluded, the parties could also waive their rights under ILSA’s venue provisions.

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227. 631 F.3d 1242 (11th Cir. 2011).
Rucker v. Oasis Legal Finance, L.L.C., involved lawsuit-funding contracts between an Illinois company (the defendant) Alabama domiciliaries (the plaintiffs). Under the contract, the defendant acquired a specified percentage of the proceeds of the plaintiffs’ lawsuits or other legal claims in exchange for a fixed sum which the plaintiffs would not have to repay if their lawsuits were unsuccessful. The contracts contained exclusive Illinois choice-of-forum clauses and Alabama choice-of-law clauses. The plaintiffs sued in Alabama arguing that, because these contracts were illegal gambling contracts under Alabama law, enforcement of the Illinois choice-of-forum clauses would lead to a violation of Alabama public policy.

The Alabama trial court accepted this argument, but the appellate court disagreed and held the clauses enforceable. The latter court noted that, “[r]egardless of whether this action is litigated in a courthouse in Illinois or Alabama, the court will apply Alabama law . . . and must therefore give proper deference to” Alabama’s policy. The plaintiffs also argued that the choice-of-forum clauses were void because they were part of contracts which themselves were void. The court rejected this argument as well, reasoning that “[a] forum selection clause is viewed as a separate contract that is severable from the agreement in which it is contained.”

5. Other Contracts

Most of the comparatively few cases in which the contract did not contain a choice-of-forum, choice-of-law, or arbitration clause are cases involving automobile insurance contract disputes between insureds and their own insurers. Most cases continue to apply the law of the state in which the policy was delivered, which is usually the state where the insured is domiciled and the car is registered, rather than the state of the accident. Two cases applied the law of the accident state under the public policy exception. In two other cases,
the accident occurred in a state that became the insureds’ new domicile after they purchased the policy. In both cases, the insured notified the insurer about the change of domicile but did not complete the formalities for issuing a new policy. One of the two cases, which was decided under New Jersey conflicts law, applied the pro-insured law of the new domicile.\textsuperscript{236} The other case, which was decided under Florida’s \textit{lex loci contractus} rule, applied the pro-insurer law of the old domicile.\textsuperscript{237}

Among other contract conflicts cases, few present anything more than a passing interest, and none contain any surprises.\textsuperscript{238}

V. STATUTES OF LIMITATION

1. \textbf{The Four Approaches to Limitation Conflicts}

American courts follow four different approaches to statutes-of-limitation conflicts:

(1) The first is the traditional approach which characterizes these statutes as procedural and applies the forum’s statute, subject to exceptions such as borrowing statutes or some judicially created exceptions. The majority of states continue to follow this approach, and this includes several states, such as New York, that have abandoned the traditional approach in other conflicts.

(2) The second is the approach of the Uniform Conflict of

\textsuperscript{235} (...continued)

\textsuperscript{236} See Amica Mut. Ins. Co. v. Fogel, 656 F.3d 167 (3rd Cir. 2011).


\textsuperscript{238} See, \textit{e.g.}, Strong v. Eldorado Casino Shreveport Joint Venture, 73 So.3d 967 (La.App. 2nd Cir. 2011) (holding that Louisiana law governed casino markers issued by Louisiana casino to Texas patron and that markers were not unenforceable gambling debts); Pevets v. Crain Communications, Inc., 2011 WL 2175066 (Ohio App. 6th Dist. Jun. 03, 2011) (No. OT-10-023), \textit{appeal not allowed}, 956 N.E.2d 309 (Ohio 2011) (holding that Michigan law would be applicable to class action brought against Michigan publisher by subscribers from several states); Hillcrest Media, LLC v. Fisher Communications, Inc., 160 Wash.App. 1039, 2011 WL 1465455 (Wash.App. Div. 1 Mar 28, 2011) (No. 64826-8-1) (holding that Washington law governed a commission claim of an Arkansas real estate broker against a Washington company arising from sale of a Washington television station); Graham v. TSL, Ltd., 350 S.W.3d 430 (Ky. 2011) (holding that an employment contract negotiated over the telephone was not made in Kentucky and thus the employee was not entitled to workers’ compensation benefits under Kentucky law).
Laws–Limitations Act of 1982, which treats statutes of limitation as substantive and applies the statute of the state whose substantive law would govern the merits of the action, again subject to exceptions. Seven states have adopted this Act.

(3) The third is an approach first developed by the New Jersey Supreme Court in Heavner v. Uniroyal, Inc., which subjects limitation conflicts to the same analysis as the other issues in the same case, and without any a priori presumption in favor of the lex fori. Depending on the specifics of a case, this analysis may lead to the same or different laws for the two categories of issues. Eight states have adopted this approach.

(4) The fourth approach is that of Section 142 of the Restatement (Second), as revised in 1988. The revised section refers limitation conflicts to the flexible approach of Section 6 of the Restatement, but also provides presumptive shortcuts to the lex fori. Eight states follow the Restatement on this issue.

Table 2 shows the states that follow each of the above approaches, followed by a discussion of representative cases decided in 2011.

<table>
<thead>
<tr>
<th>Traditional</th>
<th>Restatement 2nd</th>
<th>Heavner analysis</th>
<th>Uniform Act</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alabama</td>
<td>Arizona</td>
<td>Arkansas</td>
<td>Colorado</td>
</tr>
<tr>
<td>Alaska</td>
<td>Florida</td>
<td>California</td>
<td>Minnesota</td>
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<tr>
<td>Connecticut</td>
<td>Idaho</td>
<td>Delaware</td>
<td>Montana</td>
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<td>Dist. of Columbia</td>
<td>Massachusetts</td>
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240. For citations, the reader is kindly referred to the Surveys of previous years and SYMEON C. SYMEONIDES, AMERICAN PRIVATE INTERNATIONAL LAW 272-87 (2008). The table does not include Louisiana, which has developed its own approach resembling a combination of the Restatement (Second) and the Uniform Act. See La. CIV. CODE art. 3549. For a discussion by its drafter, see Symeon C. Symeonides, Louisiana Conflicts Law: Two “Surprises,” 54 LA L. REV. 497, 530-48 (1994).
2. The 2011 Cases

In Waterfield v. Meredith Corp., the action was filed in New Hampshire, a state that follows the traditional approach to limitation conflicts but also occasionally combines it with a Heavner-type analysis. New Hampshire is also the state that has given us the somewhat infamous case Keeton v. Hustler Magazine, Inc. Like Keeton, Waterfield was a defamation action. It arose out of material broadcast in Connecticut by a local TV station that was not seen nor heard in New Hampshire. However, the plaintiff claimed that he was a New Hampshire domiciliary at the time of the broadcast (even though he was then incarcerated in Connecticut) because he was “domiciled” in New Hampshire when he was arrested there after having fled Connecticut to escape arrest. The New Hampshire Supreme Court remanded the case to the trial court for determining the plaintiff’s domicile. The court noted that, if the plaintiff was a New Hampshire domiciliary, the New Hampshire statute (which provided a longer limitation period than the Connecticut statute) would automatically apply. If not, the New Hampshire statute could still apply if its application would be justified under New Hampshire’s five choice-influencing considerations, including the better-law factor.

In Andersen v. Lopez, the action was filed in Massachusetts, a state that

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242. 549 A.2d 1187 (N.H. 1988) (applying New Hampshire’s six-year statute of limitations and allowing a multistate defamation action that was barred by the statutes of limitation of all other states of the United States).
has adopted Section 142 of the Restatement Second.\textsuperscript{244} The plaintiffs were Maine domiciliaries whose motorcycle was damaged by the defendants’ motorcycle during an excursion to New Brunswick, Canada. The defendants were Massachusetts domiciliaries. The action would be untimely under New Brunswick’s two-year statute of limitation but was timely under Massachusetts three-year statute. Section 142 of the Restatement (Second) provides in part that, “[i]n general, unless the exceptional circumstances of the case make such a result unreasonable ... [t]he forum will apply its own statute of limitations permitting the claim unless: (a) maintenance of the claim would serve no substantial interest of the forum; and (b) the claim would be barred under the statute of limitations of a state having a more significant relationship to the parties and the occurrence.”\textsuperscript{245} The court concluded that: (1) New Brunswick did not have a more significant relationship than Massachusetts; (2) Massachusetts did have an interest in applying its statute of limitation; and thus (3) it was not unreasonable to allow the action to proceed.

With regard to (1) the court noted that, although New Brunswick had an interest in ensuring compliance within its borders of the “standards of behavior” its tort law embodies, New Brunswick had “no discernible interest in setting the time by which two nonresidents must resolve their disputes in foreign courts, even when those disputes concern the way the nonresidents interacted with each other while they were in New Brunswick.”\textsuperscript{246} With regard to (2), the court reasoned that: (a) Massachusetts had an interest in applying its statute “because the defendants are Massachusetts residents, made the trip on a vehicle they purchased in Massachusetts, and are insured by a Massachusetts insurer”;\textsuperscript{247} (b) by enacting a three-year statute of limitation, the Massachusetts legislature had determined that three years is “an appropriate balance between the length of time its citizens should remain accountable for the consequences of their negligent conduct and the protection they need against protracted exposure to liability”;\textsuperscript{248} and (c) by choosing not to enact a borrowing statute, the legislature indicated the “interest Massachusetts has in allowing the three-year period to run its course.”\textsuperscript{249}

\textsuperscript{244} For another 2011 case decided under the same section, see Matrix Acquisitions, LLC v. Hooks, 2011 WL 2464183 (Ohio App. 5th Dist. Jun. 15, 2011) (No. 10CA111).
\textsuperscript{245} Restatement (Second), Conflict of Laws § 142.
\textsuperscript{246} Andersen, 957 N.E.2d at 729.
\textsuperscript{247} Id. at 728-29.
\textsuperscript{248} Id. at 729.
\textsuperscript{249} Id.
Harodite Industries, Inc. v. Warren Elec. Corp.\textsuperscript{250} was decided by the Supreme Court of Rhode Island, one of the eight states that have adopted a Heavner-type analysis.\textsuperscript{251} A Massachusetts company sued a Rhode Island company for damage to its factory and other property damage caused by defective equipment the defendant sold to the plaintiff. The action was untimely under Massachusetts’ statute of limitation but was timely under Rhode Island’s ten-year catch-all statute. The lower court applied the Rhode Island statute. The court reasoned, \textit{inter alia}, that: (1) Massachusetts did not have “a strong governmental interest in precluding one of its citizens from redressing tortious conduct that caused property damage within [Massachusetts] borders” or “in protecting Rhode Island citizens from lawsuits”; and (2) Rhode Island had “a strong governmental interest in applying its own statute of limitations to actions commenced in a Rhode Island forum when one of the parties is domiciled in this state.”\textsuperscript{252} The court also found that the Rhode Island statute was the “better law” because it “afford[ed] more protection for those who suffer property damage resulting from defective products.”\textsuperscript{253}

The Supreme Court applauded this reasoning, saying that it had nothing to add, except to pause to express “particular agreement” with the lower court’s analysis of the “better law” factor.\textsuperscript{254} The dissent criticized the majority for missing the opportunity to rejoin the “overwhelming majority of jurisdictions and restore the centuries-old rule providing that because statutes of limitations are procedural, the law of the forum state controls.”\textsuperscript{255}

\textit{Vicknair v. Phelps Dodge Industries, Inc.},\textsuperscript{256} was decided by the Supreme Court of North Dakota, one of the seven states that have adopted the Uniform Act. As noted earlier, the Act adopted the premise that limitation periods are a substantive matter that should be governed by the same law as that which governs the merits of the case. Section 2 of the Act provides that: “if a claim is substantively based: (1) upon the law of one other state, the limitation period of

\begin{itemize}
\item \textsuperscript{250} 24 A.3d 514 (R.I. 2011).
\item \textsuperscript{252} Harodite Industries, 24 A.3d at 527-28 (quoting the lower court).
\item \textsuperscript{253} Id. at 528.
\item \textsuperscript{254} Id. at 534-35.
\item \textsuperscript{255} Id. at 538., Flaherty, J., dissenting in part and concurring in result. The dissent provided citations to cases from 25 states following the procedural characterization, but at least seven of those states no longer do so.
\item \textsuperscript{256} 794 N.W.2d 746 (N.D. 2011).
\end{itemize}
that state applies.” However, an escape clause in Section 4 of the Act authorizes resort to the lex fori if the foreign limitation period is “substantially different from the limitation period of [the forum] State and has not afforded a fair opportunity to sue upon or imposes an unfair burden in defending against, the claim.”

*Vicknair* involved the applicability of the italicized part of this escape. The plaintiffs were domiciliaries of states other than North Dakota and their claims against manufacturers of asbestos-containing products were barred by the statutes of limitations of all other states. The plaintiffs sued in North Dakota, seeking to take advantage of that state’s six-year statute of limitation which would allow the action. The North Dakota Supreme Court discussed (much longer than necessary) the question of whether the burden of proof for applying the escape should be borne by the plaintiffs or the defendants. The court concluded that the plaintiffs should bear the burden and, finding that the plaintiffs had not succeeded, affirmed the dismissal of the actions.

*Unifund CCR Partners v. Sunde,*

which was filed in Washington, another state that adopted the Uniform Act, involved the applicability of the non-italicized part of the above escape. This was an action filed by a debt collector as assignee of a Delaware credit card company against a Washington debtor. The action would be barred by Delaware’s three-year statute of limitation, but not by Washington’s six-year statute. However, Delaware also had a tolling statute that suspended the limitation period for as long as the debtor was not subject to jurisdiction in Delaware—which in this case meant forever. The court concluded that this indefinite and potentially perpetual extension of the Delaware limitation period triggered the above-quoted escape clause because it “impose[d] an unfair burden in defending against . . . the claim.” However, unfortunately for the debtor, the escape led straight back to Washington’s six-year statute under which the action was timely. The court was unsympathetic to the debtor’s protests, noting that, in “other types of claims” this escape would lead to Washington’s shorter limitation periods. This was small consolation for this particular debtor.

**VII. DOMESTIC RELATIONS**

1. Marriage

In *Christiansen v. Christiansen,* the Wyoming Supreme Court held that the district court had subject matter jurisdiction to grant divorce to two
Wyoming domiciliaries who had entered into a same-sex marriage in Canada. The district court reasoned that, because a Wyoming statute defined marriage as a contract “between a man and a woman,” there was no marriage to dissolve, and the court did not have subject matter jurisdiction to entertain the action.

The Supreme Court reversed. The court pointed out that the district court was a court of general jurisdiction and that it had overlooked another Wyoming statute providing that “[a]ll marriage contracts which are valid by the laws of the country in which contracted are valid in this state.” The Supreme Court acknowledged that the latter statute was subject to certain exceptions recognized by the common law and involving “marriages which are deemed contrary to the law of nature as generally recognized in Christian countries, such as polygamous and incestuous marriages, and those which the legislature of the state has declared shall not be allowed any validity, because contrary to the policy of its laws.” However, as evidenced by Wyoming’s routine recognition of common-law marriages contracted in other states, these exceptions were narrow and a Canadian same-sex marriage did not fall within their scope, at least in the context of a divorce proceeding:

[R]ecognizing a valid foreign same-sex marriage for the limited purpose of entertaining a divorce proceeding does not lessen the law or policy in Wyoming against allowing the creation of same-sex marriages. A divorce proceeding does not involve recognition of a marriage as an ongoing relationship. Indeed, accepting that a valid marriage exists plays no role except as a condition precedent to granting a divorce. After the condition precedent is met, the laws regarding divorce apply. Laws regarding marriage play no role. . . . [The two partners] are not seeking to live in Wyoming as a married couple. They are not seeking to enforce any right incident to the status of being married. In fact, it is quite the opposite. They are seeking to dissolve a legal relationship entered into under the laws of Canada. Respecting the law of Canada . . . for the limited purpose of accepting the existence of a condition precedent to granting a divorce, is not tantamount to state recognition of an ongoing same-sex marriage. Thus, the policy of this state against the creation of same-sex marriages is not violated.

In re Estate of Ranftle, which was decided before the New York legislature authorized same-sex marriages in New York, involved a Canadian
same-sex marriage between two New Yorkers. The case was a succession dispute between the surviving spouse and the decedent’s brother who argued that the Canadian marriage violated New York’s public policy. The court rejected the argument. The court noted that same-sex marriages did not fall within the exceptions of the comity-based marriage-recognition rule. The court reasoned that the fact that the New York legislature had not acted (until then) to authorize same-sex marriages in New York or to require recognition of validly performed out-of-state same-sex marriages “cannot serve as an expression of public policy for the State,” and that “[i]n the absence of an express statutory prohibition legislative action or inaction does not qualify as an exception to the marriage recognition rule.”

In re Marriage of Akon involved a paternity action that arguably depended on the validity of the mother’s first marriage. The plaintiff, Akon, was the mother’s second husband. He claimed that the mother’s first marriage to a man named Jok was invalid and that Akon was entitled to the legal presumption of paternity of the mother’s two children. The first marriage between the mother (Teresa) and Jok took place in Sudan in 1994 and was blessed by the village Sultan. As consideration for that marriage, Jok promised to pay a dowry of 50 cows to Teresa’s father. Five years later, Jok had only paid 35 cows, when the Sudanese civil war reached the village, causing Teresa to flee with one child and apparently pregnant with another. She then met Akon at a refugee camp and fled with him to Egypt where they married, obtained a family passport listing Akon as the children’s father, and applied for asylum to the United States. They settled in the State of Washington, where Akon filed an action for divorce and custody and Teresa filed an action to disprove Akon’s paternity of the children. The parties’ stories as to what had happened differed widely and the above is Teresa’s story, which the trial court found more credible.

One of Akon’s arguments was that Teresa’s first marriage to Jok was not recognized by Sudan’s civil authorities because Jok did not complete paying the dowry. Treating foreign law as a fact which Akon did not adequately prove, but giving some credence to his claim regarding the civil validity of the marriage, the appellate court held that a valid cultural marriage had taken place in Sudan under the local custom of the particular place.

Then the court discussed a presumption of paternity established by a Washington statute. The statute provided that a man is presumed to be the father of a child born before his marriage to the mother if he voluntarily asserted his paternity and agreed to be and is named the child’s father on the child’s birth

264. Id. at 196–97.
certificate. The court acknowledged that Akon met these conditions but, said the court, “[p]resumptions are the bats of the law, flitting away in the light of evidence,” and, while the statute permitted multiple fathers to exist, “biology does not.”\textsuperscript{266} The court held that the evidence showed that Akon was not the father but commended him for his “concern for the children and his willingness to become their father although under no biological obligation to do so.”\textsuperscript{267}

In \textit{Pinkhasov v. Petocz},\textsuperscript{268} the parties went through a “highly ritualistic orthodox Jewish wedding ceremony” in Kentucky, “in the presence of more than one hundred family, friends, and guests.”

Rabbi Litvin solemnized the Jewish religious ceremony in accordance with all laws, customs, and traditions of their faith. During the ceremony, the ’Ketubah’\textsuperscript{269} was written and executed by the parties in the presence of the required Jewish witnesses, a plate was ritualistically broken, and [the groom] performed the ceremonial act of lowering the veil over [bride’s] face. Thereafter, the parties and assemblage joined in other traditional Jewish acts related to marriage at a reception.”\textsuperscript{270}

However, at the parties’ request, the rabbi omitted that portion of the ceremony during which a civil marriage license is routinely executed before witnesses and any language referencing the establishment of a civil marriage. This is because both parties were immigrants and they wanted to remain legally free to marry American citizens and qualifying for citizenship. This was also the reason the parties did not obtain a marriage licence. The trial court found that this was a “legally recognized ‘de facto marriage.’”\textsuperscript{271} The Court of Appeals reversed, holding that Kentucky does not recognize such a concept and also does not recognize common-law marriages contracted in Kentucky.

\textbf{2. Filiation}

In \textit{Pecoraro v. Rostagno-Wallat},\textsuperscript{272} a Michigan court refused to recognize a New York filiation order that held that the plaintiff, a New York domiciliary, was the father of a child born in Michigan. The child was conceived and born

\begin{footnotes}
\item 266. \textit{Id.} at 62.
\item 267. \textit{Id.} at 66.
\item 268. 331 S.W. 3d 285 (Ky.App. 2011).
\item 269. The “Ketubah” is a formal Jewish marriage contract that provides for a money settlement payable to the wife in the event of divorce or at the husband’s death.
\item 270. \textit{Pinkhasov}, 331 S.W.3d at 288.
\item 271. \textit{Id.}
\end{footnotes}
during the mother’s marriage to another man, both Michigan domiciliaries, but the mother admitted that the plaintiff, her law school classmate at the time, was the biological father.

After graduating from law school, the plaintiff filed a filiation action against the mother in New York. The mother contested the court’s jurisdiction over her, but the New York court ruled that it had jurisdiction because she engaged in sexual intercourse in New York and the child may have been conceived by that act. The husband filed a special appearance contesting the court’s jurisdiction over him. The New York court conceded that he was a necessary party and that it did not have jurisdiction over him. Nevertheless, the court allowed the action to proceed and granted the plaintiff’s paternity order. The plaintiff then filed the present action in Michigan asking for recognition and enforcement of the New York order. The trial court granted the action, but the appellate court reversed.

Under Michigan law, a child conceived and born during marriage is presumed the legitimate child of that marriage, and the mother’s husband is presumed to be the child’s father. A third party may not rebut this presumption unless there first exists a judicial determination between the husband and the mother that declares that the child is not the product of the marriage. The Michigan court held that the New York proceeding did not meet this requirement because it was not a proceeding between the husband and the wife. The court also held that the Full Faith and Credit clause did not mandate recognition of the New York order because it was rendered by a court that did not have jurisdiction over the husband.

In *Taylor v. Taylor*, a Texas domiciliary filed an action in Louisiana seeking to disavow his paternity of a child conceived and born during his marriage with the defendant. The child was born while the parents were domiciled in Texas but lived in Louisiana with her mother for ten years, following the parents’ divorce. The disavowal action was timely under Texas law, but not under Louisiana law. The court noted that the presumption that the husband of the mother is the father of the child has been referred to as “the strongest presumption in the law” and that Louisiana had a “substantial interest, if not ultimate responsibility, in determining the parentage of this child who has been a domiciliary of this state for most of her life.” The court held that Louisiana law governed, barring the action.

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274. Id. at *2.
In *In re R.W.*, 275 the Vermont Supreme Court held that Vermont had jurisdiction to terminate a father’s parental rights without in personam jurisdiction over him, as long as the children were domiciled in Vermont and the state exercised due diligence in notifying the father and facilitating his participation in the trial by telephone. The children were born in Sri Lanka but moved to Vermont with their mother. They were placed under state custody following allegations of neglect by the mother and abuse by her new husband. A Vermont state agency sought to terminate the parental right of both parents.

3. Adoption

Utah has enacted some draconian requirements for unmarried biological fathers who seek to prevent the adoption of their children. To preserve his right to object to the adoption, the father must, *inter alia*, establish his paternity before the mother relinquishes the child for adoption, unless he could not have known of a “qualifying circumstance” 276 that somehow might implicate Utah adoption laws. In *Re Adoption of Baby E.Z.* 277 involved a Virginia mother and child and a biological father also domiciled in Virginia. Although the father knew of the possibility of adoption, he probably had no inkling that the child would end up in Utah. It did. The mother surrendered the child for adoption to an agency that placed it up for adoption in Utah. After adoption proceedings began in Utah, the father filed a custody suit in Virginia, which the court later granted, and also sought to intervene in the Utah proceedings.

The Utah Supreme Court held that the federal Parental Kidnapping Prevention Act (PKPA) was applicable to adoption proceedings and ordinarily would prevent a Utah court under these circumstances from exercising its jurisdiction to grant an adoption. However, the court underscored that the PKPA did not *divest* Utah courts from subject matter jurisdiction but rather it only prevented its exercise. In the court’s mind, this distinction was critical because it rendered the PKPA waivable. The court held that the father had waived his right to raise the PKPA by not raising it at the trial court. The court also held that the father lost his right to object to the adoption because he did not comply

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276. "Qualifying circumstances" are those circumstances that would put a father on notice of his obligation to comply with Utah law. A "qualifying circumstance" exists if, between the time of conception and the mother’s consent to adoption or relinquishment of the child for adoption, (1) either the mother or child resided in Utah; (2) the mother intended to give birth to the child in Utah; (3) the child was born in Utah; or (4) the mother intended to place the child for adoption in, or under the laws of, Utah. *Utah Code Ann.* § 78B-6-122(1)(a).
with the above-mentioned requirements of Utah law. The court did not discuss the father’s due process rights.

In *Donjuan v. McDermott*, 278 the biological unwed father filed a paternity action in Georgia, where he and the mother were domiciled. Because he filed the action before the child’s birth, the Georgia court suspended the proceeding until the birth. The mother then moved to Utah, intending to deliver the child there and surrender it for adoption. The father immediately filed a paternity and custody petition in Utah before the birth of the child and its surrender for adoption. Still this was not enough to prevent the loss of his parental rights. Among other “problems,” he failed to timely include a sworn affidavit in his petition and he did not raise his PKPA objections and other constitutional objections at the trial.

Both of the above Utah decisions and the statutes on which they rely call for constitutional scrutiny. By the time of this writing an application for certiorari had been filed in the first, but not the second case.

*Adar v. Smith* 279 involved a child born in Louisiana and adopted by two unmarried same-sex partners in New York. The adoptive parents requested from the Louisiana Registrar of Births the issuance of a new birth certificate listing both adoptive parents. The Registrar refused, citing a Louisiana law that did not permit any unmarried couples to obtain revised birth certificates with both parents’ names. The adoptive parents filed a § 1983 action against the Registrar in federal court in Louisiana. The court held for the plaintiffs, a panel of the Fifth Circuit affirmed, but a sharply divided Fifth Circuit sitting en banc reversed.

The court held that the Full Faith and Credit clause did not confer a federal right of action that could be preemptively vindicated through a § 1983 action. “Section 1983 has no place in the clause’s orchestration of inter-court comity —state courts may err, but their rulings are not subject to declaratory or injunctive relief in federal courts,” 280 said the court, noting that the action should have been brought in state court. In the court’s view, the Full Faith and Credit clause binds state courts but does not bind non-judicial state actors. The court also found in the alternative that the Louisiana Registrar did not deny recognition to the New York adoption judgment but simply limited the plaintiffs to the enforcement remedies Louisiana law allowed. That was permissible, the court reasoned, because enforcement mechanisms do not travel with the judgment. The court also held that the Louisiana statute did not violate the Equal
Protection clause. Five judges dissented sharply. The Supreme Court denied certiorari.

4. Child Support

Under both the Uniform Interstate Family Support Act (UIFSA) and the Full Faith and Credit for Child Support Orders Act (FFCCSOA), a child support order may be modified in another state if the issuing state no longer has jurisdiction because it is no longer the domicile of the child nor of any of the individual contestants. In such a case: (1) UIFSA provides that the forum state may modify the order if: (a) a petitioner “who is a nonresident of this state” seeks modification; and (b) the forum state has jurisdiction over the obligor;\(^281\) and (2) FFCCSOA provides that the forum state may modify the order if it has jurisdiction “pursuant to subsection (i),” which provides that the party seeking modification shall register the order in a state “with jurisdiction over the nonmovant.”\(^282\)

The difference between the two Acts is that, under UIFSA the petitioner must be a non-resident of the forum state, whereas FFCCSOA is silent on this issue. Is this a conflict? If FFCCSOA is viewed as a jurisdictional statute, then there is a potential conflict in the sense that FFCCSOA (unlike UIFSA) does not require that the petitioner be a nonresident of the modifying state. The better view is that FFCCSOA is not a jurisdictional statute because federal statutes do not grant jurisdiction to state courts. The function of FFCCSOA is simply to delineate the obligation of states to give full faith and credit to judgments of other states. State courts have the jurisdiction granted by state law (in this case UIFSA), as long as the grant is constitutional. Under this view, there is no conflict between the two Acts. Indeed all the evidence is that Congress intended to strengthen and complement the UIFSA, not to contradict it.

Be that as it may, in *Bowman v. Bowman*,\(^283\) a New York court took the opposite view. The court found a conflict between the two Acts and held that FFCCSOA preempted UIFSA.\(^284\) In *Bowman*, the child support order was issued in Washington when both parents and the child lived there. Subsequently, the mother and the child moved to New York and the father moved to California. The mother filed a petition in New York seeking to modify the father’s visitation rights and the father cross-petitioned seeking sole custody. In the meantime, the

\(^{281}\) UIFSA § 611(a).

\(^{282}\) 28 U.S.C. § 1738B(e) and (i).

\(^{283}\) 917 N.Y.S.2d 379 (N.Y.A.D. 3rd Dept. 2011).

\(^{284}\) In *Roberts v. Bedard*, __ S.W.3d ____ 2011 WL 4103910 (Ky.App. Sep. 16, 2011) (No. 2011-CA-002112-ME), the court took the opposite view, which seems to be the majority view, and held that the FFCCSOA did not preempt UIFSA.
mother registered the Washington support order in New York and filed an action seeking an upward modification.

The father argued that New York did not have personal jurisdiction over him nor subject matter jurisdiction to modify the Washington support order. The court rejected both arguments. The court held that New York had personal jurisdiction because the father had acquiesced in the child’s relocation to New York, visited the child there, and invoked the aid of the New York courts and protections of its laws by cross-petitioning for modification of the Washington custody order. The court acknowledged that New York did not have subject matter jurisdiction under the UIFSA, but concluded that it had jurisdiction under the FFCCSOA. The court held that the FFCCSOA preempted the UIFSA. In *Lilly v. Lilly*, the question was whether the term “residence” in UIFSA and FFCCSOA really means simple residence or instead domicile. The case involved modification of a California support order issued when the mother and the child were domiciled in California and the father was stationed there while serving in the military. The mother and child later moved to Utah and the father, while still serving in California, filed a petition in Utah to modify the California order. He argued that, at all relevant times, he was domiciled in Utah and his military service in California did not negate his Utah domicile. Under both the FFCCSOA and UIFSA, the question of whether Utah could modify the California order depended on whether California was no longer the residence (?) or domicile (?) of any of the contestants. The Utah court concluded that the term residence as used in the UIFSA meant domicile. The court remanded the case to the lower court for determining whether the father had retained his Utah domicile while serving and residing in California.

Regarding time limitations, UIFSA provides that, in enforcing a support order from another state, the forum applies either its own statute of limitations or the statute of the issuing state, whichever provides the longer period. In *Thornton v. Thornton*, the obligee sought to enforce in Oklahoma a Texas support order issued 16 years earlier. Oklahoma’s statute had expired and the question was whether the order was still viable under Texas law. The court found that it was not viable because under Texas law a judgment becomes dormant after 12 years, unless it is previously revived, and this did not occur in this case.

In *Dandurand v. Underwood*, the issuing state of Kansas provided that the father’s support obligation terminated when the child reached 18, whereas

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286. 247 P.3d 1180 (Okla. 2011).
the forum state of Missouri provided for a longer duration. The case was governed by UIFSA’s predecessor, URESA. The Missouri court applied Missouri law and, with questionable reasoning, rejected the father’s argument that the Full Faith and Credit clause prevented this result.

5. Child Custody

The cases involving interstate custody disputes are simply too numerous to be fairly and accurately summarized here. Interested readers may wish to review four state supreme court cases cited below.288

VIII. JUDGMENTS

1. Sister-State Judgments

“The courts of no country execute the penal laws of another,” said the United States Supreme Court in the 1825 case The Antelope.289 In the 1892 case Huntington v. Attrill,290 the Court stated that the same principle applied to sister-state judgment that are penal “in the international sense.” The Court examined the statute on which the judgment was based and concluded that the judgment was not penal in that sense:

The question whether a statute of one state, which in some aspects may be called penal, is a penal law, in the international sense, so that it cannot be enforced in the courts of another state, depends upon the question whether its purpose is to punish an offense against the public justice of the state, or to afford a private remedy to a person injured by the wrongful act.291

The Court made a similar statement in the 1970 case Nelson v. George,292 but has not spoken on this matter since then.

A 2011 Nevada judgment may provide the Court with an opportunity for an actual holding on this issue. In Oakland v. Desert Outdoor Advertising, Inc.,293 the Nevada Supreme Court denied enforcement to a California judgment that the court characterized as penal. The California judgment ordered the defendant

289. 23 U.S. 66 123, 10 Wheat. 66, 6 L.Ed. 268 (1825).
290. 146 U.S. 657 (1892).
291. Id. at 673-74.
to pay a civil penalty of almost half-a-million dollars for refusing to remove an outdoor advertising sign erected in violation of the municipal code of Oakland, California. When the city sought enforcement of this judgment in Nevada, the lower court denied enforcement and the Nevada Supreme Court affirmed. The court determined that the above-quoted statement from Huntington was not dictum because it was necessary for answering the question before the Court.

The Nevada court then examined whether the California judgment was penal. The City of Oakland argued that the judgment was remedial and not penal because it resulted from Oakland’s enforcement of its individual rights under California’s unfair competition laws and was brought to halt a private harm against Oakland. The court rejected the argument, noting that the central question was whether the statute on which the judgment was based “provided civil penalties as a means to punish a violator for an offense against the public or whether the statute created a private right of action to compensate a private person or entity.” The court noted that the statute declared that its purpose was “to strengthen the ability of local governments to enforce zoning ordinances governing advertising displays” and concluded that this declaration made it “clear that the statutes’ remedies do not address private harms but rather address only public wrongs—in this case, the abatement of a public nuisance—and were intended to deter conduct deemed wrongful under California law.” The court concluded that “the purpose of the statute and resulting judgment was not to ‘afford a private remedy to a person injured by the wrongful act,’ but its essential character and effect was to ‘punish an offense against the public justice of the state,’ as evidenced by Oakland implementing suit.”

In Donlan v. State, the question was whether the Full Faith and Credit clause prevented Nevada from continuing to require a Nevada domiciliary to register as a sex offender after California, where he was convicted for a sex offense, terminated this requirement by administrative decision. This requirement was imposed 25 years earlier when the plaintiff was domiciled in California. The Nevada Supreme Court answered the question in the negative. The court noted that the California administrative decision was not a judgment, which under Supreme Court precedents Nevada had to enforce regardless of its own public policy. Rather the decision was a “public act or record” which under the same precedents is subject to a less exacting standard of deference. The Nevada

295. Id.
296. Id.
297. Id. (quoting Huntington, 146 U.S. at 673–74).
298. 249 P.3d 1231 (Nev. 2011).
court reasoned that the California decision simply meant that the plaintiff was no longer required to register as a sex offender “within the jurisdiction of California,” but California had “no authority to dictate to [Nevada] the manner in which it can best protect its citizenry from those convicted of sex offenses.”

_Nolan v. Fifteenth Judicial Dist. Attorney’s Office_ involved the same scenario, except that the registration requirement had been terminated by _judicial_ action in the state that imposed it (Ohio). The original Ohio judgment had imposed a ten-year registration requirement in 2001, but the Ohio court lifted the requirement eight years later, in 2009. The Louisiana court did not think that this made any difference and held that the plaintiff was still required to register as a sex offender in Louisiana where he had relocated in the meantime. The court reasoned that the later Ohio judgment simply meant that the plaintiff was not required to register as a sex offender in Ohio, and that Louisiana was “not seeking to force him to register as a sex offender in Ohio.” The court concluded that Louisiana was simply enforcing its own laws regarding registration and, in so doing, was giving full faith and credit to the Ohio conviction and, somehow, it was not denying full faith and credit to the later Ohio judgment.

_Doe v. O’Donnell_ involved the converse scenario. A New York court convicted the plaintiff of a sex offense and imposed on him a lifetime registration requirement. The plaintiff later moved to Virginia and registered as a sex-offender there. Eleven years after his conviction, he obtained a Virginia judgment releasing him of the obligation to register in Virginia. He then filed a petition in New York, asking to be released from the obligation of continuing to register in New York. The court denied the petition. The court reasoned that this case did not implicate the Full Faith and Credit clause because the issue before the Virginia court was different from the issue before the New York court. The court concluded: “New York and Virginia have each separately adjudicated the risk posed by petitioner to their respective citizens and imposed registration requirements upon petitioner pursuant to each state’s sex offender registration law. As neither state has attempted to adjudicate the same matter, the Full Faith and Credit clause is not implicated.”

299. _Id._ at 1234.

300. _Id._ at 1233.

301. 62 So.3d 805 (La.App. 3rd Cir. 2011), _reh’g denied_ (May 25, 2011), _writ denied_, 68 So.3d 520 (La. 2011).

302. 62 So.3d 805 at 807 (emphasis added).

and Credit Clause has not been violated.”304

2. Foreign Judgments and Arbitration Awards

In *Diamond Offshore (Bermuda), Ltd. v. Haaksman*,305 a Texas court refused to recognize a Dutch judgment that was rendered in violation of a Bermuda choice-of-forum clause. The clause was part of an employment contract between a Texas-based employer and employees temporarily residing in the Netherlands for work to be performed on oil rigs off the Dutch coast. The court held that the fact that the employer litigated the enforceability of the choice-of-forum clause in the Dutch proceeding did not preclude the employer from re-litigating the issue in Texas.

*Figueiredo Ferraz E Engenharia de Projeto Ltda. v. Republic of Peru*,306 was an action to confirm (i.e., enforce) a $21 million arbitration award rendered in favor of a Brazilian corporation and against a Peruvian governmental entity. The corporation brought the action in the United States where the Peruvian Government had substantial assets because enforcement in Peru would have taken about 20 years. The reason was a Peruvian cap statute that limited the amount the governmental entity could pay in satisfaction of judgments against it. The Second Circuit held that the district court abused its discretion when it denied the defendants’ motion to dismiss the action on forum non conveniens grounds. The Second Circuit reasoned that, although the Peruvian cap statute was a problem, its existence did not make Peru an inadequate forum but instead militated in favor of dismissal. This was because the statute was “intimately involved with sovereign prerogative” and the Peruvian courts were “the only tribunal[s] empowered to speak authoritatively” about it.307

IX. EXTRATERRITORIAL REACH OF FEDERAL LAW

1. The Alien Tort Statute

307. Id. at __ *5 (quotations omitted).
The Alien Tort Statute (ATS) provides that federal district courts have original jurisdiction “of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.” During 2011, several federal appellate court decisions, two of which are headed for the United States Supreme Court, involved the application of this statute to corporate defendants.

The Ninth Circuit produced another en banc decision on Sarei v. Rio Tinto, PLC, a case that has been pending for more than ten years and has been discussed five times in this Survey. Sarei was an ATS action filed against a British-Australian mining corporation by current and former residents of Papua New Guinea (PNG) alleging international law violations committed by government forces at the corporation’s behest. This phase of the case concerns claims for genocide, war crimes, crimes against humanity and racial discrimination. This decision consists of seven separate opinions collectively exceeding 100 pages. The following is a drastically abbreviated synopsis of the 32-page majority opinion authored by Judge Mary Schroeder.

(i) The Reach and scope of ATS: (a) Extraterritoriality. The ATS clearly applies extraterritorially and has been so applied in numerous cases. The Supreme Court has not disapproved of these cases and Congress implicitly ratified them in enacting the Torture Victim Protection Act (TVPA) as a statutory note to the ATS. The Supreme Court’s recent decision in Morrison, does not cast doubt on this conclusion. Morrison does not require an express statement that a statute applies extraterritorially but only requires a “clear indication” about extraterritorial intent which can be inferred from either the text or the context of the statute. Both the text (e.g., “action by an alien” and act “in violation of the law of nations”) and the context of the ATS (combating piracies) provide such a clear indication.

(b) Corporate liability. There is nothing in the ATS text or history to
suggest that the statute does not apply to corporate defendants.\textsuperscript{315} In \textit{Sosa},\textsuperscript{316} the Supreme Court referred to the liability of a private actor “such as a corporation or individual.”\textsuperscript{317} The Second Circuit was wrong in reaching the opposite conclusion in \textit{Kiobel}.

\textbf{(c) Aiding and abetting.} The ATS does not preclude liability based on aiding and abetting in the commission of the proscribed acts.\textsuperscript{319} The Second and Eleventh Circuits have also held to the same effect.\textsuperscript{320}

\textbf{(d) “Arising under.”} The basis of the ATS jurisdiction grant is not diversity or alienage but rather federal question jurisdiction. Consequently, it encompasses actions brought by aliens against aliens as in this case. While it is true that international law as a whole is not part of federal common law, those peremptory international law norms that possess the characteristics necessary for an ATS action under \textit{Sosa} are incorporated into the federal common law.\textsuperscript{321}

\textbf{(2) Justiciability:} (a) \textit{Prudential exhaustion of local remedies}. When the United States ‘nexus’ is weak, the court should carefully consider the question of exhaustion of local remedies, particularly—but not exclusively—with respect to claims that do not involve matters of “universal concern.” The court below complied with this principle and required exhaustion of local remedies for claims other than those involving matters of “universal concern.”\textsuperscript{322}

\textbf{(b) Political Question and Act of State doctrines.} Neither doctrine requires dismissal of the action. The Political Question doctrine is inapplicable, \textit{inter alia}, because both the U.S. government and the PNG government have changed their initial position and no longer object to the adjudication of this case. The Act of State doctrine does not bar claims based on

\begin{footnotes}
\item[315] See \textit{id.} at ___*6-7.
\item[317] \textit{Sosa}, 542 U.S. at 733 n. 20.
\item[318] See \textit{Kiobel} v. Royal Dutch Petroleum Co., 621 F.3d 111 (2d Cir. 2010), discussed in \textit{Symeonides, 2010 Survey} at 316.
\item[319] See \textit{Sarei}, ___ F.3d at ___*7.
\item[320] See \textit{infra} at text discussing cases from five circuits.
\item[321] See \textit{Sarei}, ___ F.3d at ___*8-13.
\item[322] \textit{Id.} at ___*13-14.
\end{footnotes}
violation of *jus cogens* as the claims involved in this case.\footnote{323}

(3) The plaintiffs’ specific claims. The court found that the plaintiffs’ complaint adequately alleged (a) genocide, (b) war crimes, (c) crimes against humanity arising from a food and medical blockade, and (d) racial discrimination. The court found that the first two claims qualified for an ATS action under *Sosa* because the prohibitions against genocide and war crimes are specific, universal, and obligatory internationally accepted norms, that these norms bind individuals and corporations alike, and they include aiding and abetting liability.\footnote{324} However, the court found that these last two claims did not qualify for an ATS action.\footnote{325}

This is by no means the last decision on this case. The defendant has applied for a writ of certiorari.\footnote{326} Even if the Supreme Court does not grant this application, the Court has already agreed to review the Second Circuit’s decision in *Kiobel* (supra)\footnote{327} and will surely have a lot to say, at least on the question of corporate liability in aiding and abetting in the commission of acts falling within the scope of the ATS. It would be ironic if the Court were to absolve corporations from civil liability under the ATS after bestowing them with the rights of natural persons for First Amendment purposes in *Citizens United*.\footnote{328}

So far, *Kiobel* is the only federal appellate case to hold that corporations cannot be liable under the ATS. Before *Kiobel*, the Fifth and Eleventh Circuits had reached the opposite conclusion, even if they did not find liability under the facts of the particular case.\footnote{329} In 2011, four more circuits disagreed with *Kiobel*: the Ninth Circuit in *Sarei*, the Seventh Circuit in *Flomo v. Firestone Nat. Rubber Co., LLC*,\footnote{330} the District of Columbia Circuit in *Doe VIII v. Exxon Mobil Corp*;\footnote{331} and the Fourth Circuit in *Aziz v. Alcolac, Inc*.\footnote{332}
In *Flomo*, Judge Posner, writing for the Seventh Circuit, ridiculed the notion that “a corporation or any other entity that doesn’t have a heartbeat . . . can never be in violation of customary international law, no matter how heinous the conduct.” It would be the equivalent of saying that “a pirate can be sued under the Alien Tort Statute but not a pirate corporation (Pirates of the Indian Ocean, Inc., with its headquarters and principal place of business in Somalia),” Posner said. Posner pointed out that after the end of World War II, the allies dissolved German corporations that assisted the Nazi war effort and did so on the authority of customary international law. But even if it was true, as the defendant argued, that corporations have never been punished for violations of international law, “there is always a first time for litigation to enforce a norm.” The court also rejected the defendant’s arguments that the ATS does not apply extraterritorially and that plaintiffs must always exhaust their local remedies before filing an ATS action. However, the court found that the plaintiffs did not carry their burden of proving that the defendant’s practices amounted to a violation of a norm of customary international law.

In *Doe VIII v. Exxon Mobil*, a group of Indonesian villagers from the Aceh territory filed an action against Exxon claiming that Exxon’s security forces committed murder, torture, sexual assault, battery, and false imprisonment in violation of the ATS and the TVPA, and various common law torts. In a scholarly and comprehensive 60-page opinion authored by Judge Judith Rogers, the D.C. Circuit held that:

1. The ATS applies extraterritorially;
2. Aiding and abetting liability is available under the ATS because it

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333. *Flomo*, 643 F.3d at 1017.
334. *Id.*
335. *Id.*
336. See *id.* at 1025:

The implications of the argument border on the ridiculous; imagine having been required to file suit in a court in Nazi Germany complaining about genocide, before being able to sue under the Alien Tort Statute. What is true is that a U.S. court might, as a matter of international comity, stay an Alien Tort suit that had been filed in the U.S. court, in order to give the courts of the nation in which the violation had occurred a chance to remedy it, provided that the nation seemed willing and able to do that.

337. The plaintiffs claimed that the defendant indirectly encouraged child labor and exposing children to hazardous conditions at its rubber plantation in Liberia by imposing very high harvesting quotas on employees as a condition of continued employment, thus forcing them to enlist their children as helpers to ensure meeting the quotas.

338. 654 F.3d 11 (D.C.Cir. 2011).
involves a norm established by customary international law;

(3) The *mens rea* and *actus reus* standards for imposing such liability are “knowledge” and “substantial effect” as established by the Nuremberg tribunal and followed by the tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR) whose opinions constitute expressions of customary international law, rather than the higher “purpose” standard of the Rome Statute (ICC) which is not binding on the United States.

(4) Corporations do not enjoy immunity under the ATS: “Given that the law of every jurisdiction in the United States and of every civilized nation, and the law of numerous international treaties, provide that corporations are responsible for their torts, it would create a bizarre anomaly to immunize corporations from liability for the conduct of their agents in lawsuits brought for shockingly egregious violations of universally recognized principles of international law”; 339

(5) The fact that the TVPA (unlike the ATS) speaks of an “individual” committing the proscribed acts means that Congress did not intend for the TVPA to apply to corporations;

(6) Exxon’s non-justiciability arguments (based on deference to the foreign-policy views of the Executive Branch, non-interference with an agreement between Indonesia and the Free Aceh Movement, and international comity) are unpersuasive; and

(7) Under the choice-of-law approach of the District of Columbia, the law of Indonesia would govern the plaintiffs’ claims for common law torts because the injury and most of the conduct occurred there, and the plaintiffs were also domiciled there.

*Aziz v. Alcolac, Inc.*, 340 was an ATS/TVPA action filed by Kurds who were victims of Saddam Hussein’s mustard gas attacks in Iraq. The defendant was an American corporation that manufactured and sold the chemical substance Hussein used to produce the mustard gas. The plaintiffs claimed that the defendant sold large quantities of that substance to an intermediary “with actual or constructive knowledge” that such quantities would ultimately be used by Hussein’s regime to produce mustard gas to be used against the Kurds. The Fourth Circuit agreed with the other circuits that under the ATS (but not the TVPA) corporations are liable for aiding and abetting in the commission of international law violations (here genocide).

339. *Id.* at 57 (quotations omitted).

340. 658 F.3d 388 (4th Cir. 2011).
The Fourth Circuit discussed at length the mens rea standard for imposing aiding and abetting liability and disagreed with the Doe VIII court that such liability can be imposed solely on mere “knowledge” on the part of the abetter. Instead the Fourth Circuit concluded that the proper standard is that established by the Rome Statute, which requires a “specific intent” on the part of the abetter to aid the principal actor in the commission of the violation. Applying this standard to the facts of this case, the court concluded that the plaintiffs failed to carry the burden of proving that the defendant had such a specific intent to assist Hussein in the manufacture of mustard gas.341

2. The Torture Victim Protection Act

The Torture Victim Protection Act (TVPA) provides in part that

An individual who, under actual or apparent authority, or color of law, of any foreign nation—(1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or (2) subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages to the individual’s legal representative, or to any person who may be a claimant in an action for wrongful death.342

As noted earlier, several 2011 cases held that the use of the italicized word “individual” in referring to the perpetrator indicates Congress’s intent to limit the scope of the TVPA to natural persons and exclude corporations or similar entities. In Mohamad v. Rajoub,343 a TVPA action against the Palestinian Authority and the Palestinian Liberation Organization, the District of Columbia Circuit Court discussed this issue at some length and affirmed the dismissal of the action on this basis. The court noted that the Dictionary Act which provides guidance in determining the meaning of any Act of Congress, “strongly implies the word individual does not comprise organizations because it defines ‘person’ to include ‘corporations, companies, associations, firms, partnerships, societies, ... as well as individuals.’”344 The court concluded:

[T]he structure of the TVPA confirms what the plain text of the statute shows: The Congress used the word “individual” to denote only natural

344. Mohamad, 634 F.3d. at 607 (quoting 1 U.S.C. § 1)
persons. The liability provision of the statute uses the word “individual” five times in the same sentence—four times to refer to the victim of torture or extrajudicial killing, which could be only a natural person, and once to the perpetrator of the torture or killing. . . . The [plaintiffs] advance no cogent reason, and we see none, to think the term “individual” has a different meaning when referring to the victim as opposed to the perpetrator. . . . We note also the liability provision uses the word “person” in reference to those “who may be a claimant in an action for wrongful death,” . . .; because a claimant could be a non-natural person, such as the decedent’s estate, this further supports the significance of the Congress having used “individual” rather than “person” to identify who may be sued under the TVPA.  

The court also dismissed the plaintiffs’ argument that they had a federal common-law cause of action for violation of the law of nations. The Supreme Court granted a writ of certiorari and will review this case, along with Kiobel, in the first part of 2012.

3. The Foreign Trade Antitrust Improvements Act

The Foreign Trade Antitrust Improvements Act (FTAIA) is probably one of the most poorly drafted federal statutes. A fairly charitable characterization is that it is “inelegantly phrased” and uses “rather convoluted language.” It is therefore understandable that courts have had difficulty in interpreting and applying it. However, one difficulty that should not be attributed to poor drafting is the insistence of some lower courts to treat the FTAIA as a jurisdictional statute, even though it does not mention the word “jurisdiction,” or even “court.” Rather the FTAIA tells us when the Sherman Act “shall not apply” and (through its exceptions) when the Sherman Act shall apply. Thus, there should be no doubt that the FTAIA is an expression of prescriptive or legislative jurisdiction rather than a statute limiting the adjudicatory jurisdiction of federal

345. Id. at 608.
346. The FTAIA (15 U.S.C. § 6a) provides in part, that:

[The Sherman Act] shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless—

(1) such conduct has a direct, substantial, and reasonably foreseeable effect—

(A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or

(B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and

(2) such effect gives rise to a claim under the provisions of [the Sherman Act], other than this section.

courts.

The Supreme Court has clarified this distinction in several cases involving other statutes, including *Arbaugh v. Y & H Corp.*[^348] and *Morrison v. National Australia Bank Ltd.*[^349] The federal Circuit Courts have begun getting the message and reversing course. In 2011, the Third and Seventh Circuits have done so in *Animal Science Products, Inc. v. China Minmetals Corp.*,[^350] and *Minn-Chem, Inc. v. Agrium Inc.*,[^351] respectively. *Animal Science* was a class action brought by American purchasers of magnesite against Chinese producers and exporters, alleging a conspiracy to fix prices for magnesite exported to the United States. The district court dismissed the action for lack of subject matter jurisdiction under the FTAIA. The Third Circuit vacated and remanded the case with instructions to determine whether the FTAIA imposed a “substantive merits limitation”[^352] to the application of the Sherman Act rather than a jurisdictional bar.

One important practical difference between lack of jurisdiction and a merits limitation is who must bear the burden of proof: (1) The plaintiff bears the burden of proving the existence of subject matter jurisdiction in response to a Rule 12(b)(1) motion; (2) In contrast, the defendant bears the burden of proving a merits limitation through a Rule 12(b)(6) motion for failure to state a claim upon which relief can be granted.

*Minn-Chem, Inc. v. Agrium Inc.*, was a class action filed by American buyers of potash against Canadian, Russian, and Byelorussian potash producers alleging price fixing in violation of the Sherman Act. Specifically, the plaintiffs alleged that the defendants operated a cartel through which they fixed potash prices in Brazil, China, and India, and the inflated prices in those countries in turn influenced the price of potash sold in the United States. The district court denied the defendants’ motion to dismiss, but the Seventh Circuit reversed. The court found that the complaint contained only “generalized allegations” which did not provide

specific factual content to support the asserted proposition that prices in China, India, and Brazil serve as a ‘benchmark’ for prices in the United States and that this benchmark, if it exists, has a strong enough relationship with the domestic potash market to raise a plausible inference that

[^350]: 654 F.3d 462 (3rd Cir. 2011), as amended (Oct. 07, 2011).
[^351]: 657 F.3d 650 (7th Cir. 2011), reh’g en banc granted, opinion vacated (Dec. 02, 2011).
[^352]: *Animal Science*, 654 F.3d at 468.
the defendants’ foreign anticompetitive conduct has a ‘direct, substantial, and reasonably foreseeable effect’ on domestic or import commerce.\footnote{353}

4. The Tariff Act

Section 337(a)(1)(A) of the Tariff Act of 1930 prohibits “[u]nfair methods of competition and unfair acts in the importation of articles . . . into the United States, . . . the threat or effect of which is: (i) to destroy or substantially injure an industry in the United States; (ii) to prevent the establishment of such an industry; or (iii) to restrain or monopolize trade and commerce in the United States.”\footnote{354} TianRui Group Co. Ltd. v. International Trade Comm’n\footnote{355} involved this provision. The International Trade Commission (formerly named the Tariff Commission) which oversees the application of the Tariff Act, determined that the importation of certain cast steel railway wheels manufactured in China violated Section 337. The wheels were manufactured using a process that was developed in the United States, protected under American trade secrets law, and misappropriated in China by a Chinese manufacturer, the defendant.

Invoking the presumption against extraterritoriality, the defendant argued that Section 337 was inapplicable in this case because the misappropriation occurred in China when the defendant hired away employees of one of plaintiff’s licensees (who were trained in the United States). The court rejected the argument. The court reasoned that the text and history of Section 337 negated the presumption against extraterritoriality. Regarding the text, the fact that section 337 is expressly directed at unfair methods of competition and unfair acts “in the importation” of articles into the United States suggests that “this is surely not a statute in which Congress had only ‘domestic concerns in mind.’”\footnote{356} Rather, the focus of section 337 is on an “inherently international transaction—importation,” and this makes this section “analogous to immigration statutes that bar the admission of an alien who has engaged in particular conduct or who makes false statements in connection with his entry into this country.”\footnote{357} In such cases, the focus is not on punishing the conduct or the false statements, but on preventing the admission of the alien. Thus, it is “reasonable

\footnote{353}{Minn-Chem, 657 F.3d at 663. For a 2001 case approving a settlement in an antitrust class action against the operator of a diamond cartel, see Sullivan v. DB Investments, Inc., ___ F.3d ___, 2011 WL 6367740 (3rd Cir. Dec. 20, 2011) (No. 08-2784, 08-2785, 08-2798, 08-2799, 08-2818, 08-2819, 08-2831, 08-2881). For an antitrust action filed against foreign reinsurers under New York antitrust law, see Global Reinsurance Corp.–U.S. Branch v. Equitas Ltd., 921 N.Y.S.2d 1 (N.Y.A.D. 1st Dept. 2011).}

\footnote{354}{19 U.S.C. § 1337.}

\footnote{355}{661 F.3d 1322 (Fed.Cir. 2011).}

\footnote{356}{Id. at 1329 (quoting Pasquantino v. United States, 544 U.S. 349, 371-72 (2005)).}

\footnote{357}{Id.}
to assume that Congress was aware, and intended, that the statute would apply to conduct (or statements) that may have occurred abroad.\textsuperscript{358}

The court also reasoned, however, that this case did not involve application of Section 337 to “purely” extraterritorial conduct. The foreign unfair activity at issue in this case was relevant “only to the extent that it resulted in the importation of goods into this country causing domestic injury” and was used only to establish an element of a claim alleging a domestic injury.\textsuperscript{359} Nor did the application of Section 337 interfere with Chinese law (as the defendant argued):

The Commission does not purport to enforce principles of trade secret law in other countries generally, but only as that conduct affects the U.S. market. That is, the Commission’s investigations, findings, and remedies affect foreign conduct only insofar as that conduct relates to the importation of articles into the United States. The Commission’s activities have not hindered [defendant’s] ability to sell its wheels in China or any other country.\textsuperscript{360}

Finally, the court noted that China acceded to the 1994 Agreement on Trade-Related Aspects of Intellectual Property Rights (“TRIPS”), and the defendant did not identify any differences between American trade secrets law and Chinese trade secrets law (at least as the latter appears in books). In fact, in its forum non conveniens motion, the defendant had argued that Chinese trade secrets law would provide a “more than adequate” remedy for any alleged misappropriation.\textsuperscript{361}

5. Other Federal Statutes

Several other appellate cases decided in 2011 involved the extraterritorial application of other federal statutes, including the “sexual tourism” statute (which prohibits travel in foreign commerce with intent to engage in illicit sexual conduct),\textsuperscript{362} the Maritime Drug Law Enforcement Act (MDLEA),\textsuperscript{363} the

\textsuperscript{358} Id.
\textsuperscript{359} Id. at 1332.
\textsuperscript{360} Id.
\textsuperscript{361} Id.
Drug Trafficking Vessel Interdiction Act (DTVIA), and the Military Extraterritorial Jurisdiction Act (MEJA).

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Symeon C. Symeonides
Salem, Oregon

363. (...continued)
