CONFLICT OF LAWS

Professor Pielemeier

Spring 2011

Initial Syllabus and Advance Assignment

Advance Assignment: For Wednesday, January 19, read the information on pages 1-3 below and be prepared to discuss the materials assigned for Unit 1 and the first two cases and notes in Unit 2 (up to, but not including Levy on page 9 of this supplement). Remaining assignments will be by the Unit numbers in the Supplemental Materials.

Required Course Materials

(1) Brilmayer and Goldsmith, Conflict of Laws, Cases and Materials (5th ed. 2002, Aspen).

(2) Supplemental Material. I have developed some supplemental material for the course, which you should purchase from the Law School Bookstore. I will also post these supplemental materials on TWEN (see below), in the event you would like to download them to your computer.

(3) TWEN. I will be setting up an electronic course web site on TWEN ("The West Education Network") to facilitate communication outside of class. All students in the course must sign on to the website and provide an e-mail address. To access TWEN, you will need a Westlaw password. You can sign on by going to lawschool.westlaw.com, and clicking on TWEN courses, then click on Add/Drop Courses and you should see all Hamline courses that have a TWEN page.

Office Hours and E-Mail

[illegible] 651-523-2910. [illegible]

Goals and Objectives

The initial portion of this course will entail coverage of the major choice of law approaches used today by courts in the United States. It will also occasionally touch upon approaches used by

other countries. (In most of the world, the subject matter of this course is known as "private international law.") Choice of law issues arise most typically in the litigation of civil cases involving parties and/or facts in different states or countries. An understanding of the subject matter can also be useful in planning transactions with a view towards more certainty on the applicable law should a dispute arise.

After this initial coverage, we will turn to constitutional limitations that can be applicable in the choice of law context (Chapter 3) and some brief coverage on the relationship between personal jurisdiction and choice of law (chapter 4). We will then move to chapter 6 for coverage of the law applicable to recognition of judgments from other jurisdictions.

Finally, we will touch on special problems that can arise in cases in federal court (portions of chapter 5) and choice of law issues relating to American Indian tribal courts (supplemental materials). To the extent time permits, we will finish with some coverage of the application of federal law by American courts to events that take place beyond the boundaries of the United States (Chapter 7), Conflicts and the Internet (Chapter 8) and some special problems that can arise in the context of divorce, child custody, and support (chapter 6.D.).

CLASS ATTENDANCE, GRADING AND CLASS PARTICIPATION POLICY

You are expected to be prepared for discussion of the materials assigned for each day. If you are called upon and are not well-prepared, this will result in a waste of your classmates' time as well as your own. Thus, if for any legitimate reason, you are not well-prepared, please let me know before class begins, and you will not be called upon during that class period.

As the Academic Rules and Attendance Policy provide, regular and punctual class attendance and preparation are required. As a general rule, I consider absences in excess of five 50 minute classes per semester to be excessive. Since this class will meet two days a week for 75 minutes each, I will consider absences in excess of three classes to be excessive. If the permitted number of absences is exceeded, opportunities to pursue "make-up work," as opposed to being withdrawn from the course, will not be granted absent a strong justification for the excessive absence, such as incapacitating illness or injury, death in the family, childbirth, or analogous circumstances. Such make-up work, if permitted, will ordinarily be in the form of a required short written paper.

At my discretion, lateness to class may be deemed an absence. Please be on time (subject to snow emergencies) and remain in the classroom during the entire class period unless illness requires that you leave.

The primary basis for your grade in the course will be a three hour examination.

However,, grades may be adjusted upwards for significant contributions to classroom discussion and/or significant contributions to any discussion taking place on TWEN. Significant

contributions to classroom discussion entail contributions beyond mere apparent good preparation. To warrant consideration for upwards adjustment, such contributions must reflect significant thought about the assigned materials. Extensive contributions are not the equivalent of significant contributions (and can on occasion be the opposite). No upwards adjustment will be more than one grade increment (e.g., a B to a B+).

Technology Policy

You may use laptop computers or other electronic devices in class to take notes and access course related materials. You should not use your laptop or electrnoic devices for other purposes. In addition to the usual courtesies due to your classmates, refrain from text-messaging and email, using cell phones, pagers, or any other communication device. Refrain also from displaying wallpaper, screen savers, or other material on your computer screen that can reasonably be expected to distract your classmates.

Unit Number 1: Introduction--Torts--Characterization--
Assignment: Casebook pages xxiii, xxvii-xxix, 1-10 (through note 5), 12-15, and notes 4-6 on pages 21-22. Also consider the following:

1. What is the conceptual basis for the rules reflected by the Restatement and applied in Carroll? Are they conceptually sound?

2. Are these rules pragmatically sound?

3. Is Carroll's application of the rules sound?

4. Is there any better way to run this railroad? (i.e. to resolve these sorts of choice of law disputes). If Carroll were the first case ever in which it was argued that something other than the forum state's law should be applied, what do you think should be considered in resolving the issue?

Unit number 2: Contracts--Characterization
Assignment: The materials below (to "Unit number 3" on page 12) and casebook pages assigned within those materials.

Milliken v. Pratt

125 Mass. 374 (1878)

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The plaintiffs are partners doing business in Portland, Maine, under the firm name of Deering, Milliken & Co. The defendant is and has been since 1859, the wife of Daniel Pratt, and both have always resided in Massachusetts. In 1870, Daniel, who was then doing business in Massachusetts, applied to the plaintiffs at Portland for credit, and they required of him, as a condition of granting the same, a guaranty from the defendant to the amount of five hundred dollars, and accordingly he procured from his wife the following instrument:

> "Portland, January 29, 1870. In consideration of one dollar paid by Deering, Milliken & Co., receipt of which is hereby acknowledged, I guarantee the payment to them by Daniel Pratt of the sum of five hundred dollars, from time to time as he may want--this to be a continuing guaranty. Sarah A. Pratt."

The instrument was executed by the defendant two or three days after its date, at her home in Massachusetts, and there delivered by her to her husband, who sent it by mail from Massachusetts to the plaintiffs in Portland; and the plaintiffs received it from the post office in Portland early in February, 1870.

The plaintiffs subsequently sold and delivered goods to Daniel from time to time until October 7, 1871, and charged the same to him, and if competent, it may be taken to be true, that in so doing they relied upon the guaranty. Between February, 1870, and September 1, 1871, they sold and delivered goods to him on credit to an amount largely exceeding $500, which were fully settled and paid for by him. This action is brought for goods sold from September 1, 1871, to October 7, 1871, inclusive, amounting to $860.12, upon which he paid $300, leaving a balance due of $560.12. The one dollar mentioned in the guaranty was not paid, and the only consideration moving to the defendant therefor was the giving of credit by the plaintiffs to her husband. Some of the goods were selected personally by Daniel at the plaintiffs' store in Portland, others were ordered by letters mailed by Daniel from Massachusetts to the plaintiffs at Portland, and all were sent by the plaintiffs by express from Portland to Daniel in Massachusetts, who paid all express charges....

Payment was duly demanded of the defendant...and was refused by her.

The Superior Court ordered judgment for the defendant; and the plaintiffs appealed to this

court.

GRAY, C.J. The general rule is that the validity of a contract is to be determined by the law of the state in which it is made; if it is valid there, it is deemed valid everywhere, and will sustain an action in the courts of a state whose laws do not permit such a contract. ...Even a contract expressly prohibited by the statutes of the state in which the suit is brought, if not in itself immoral, is not necessarily nor usually deemed so invalid that the comity of the state, as administered by its courts, will refuse to entertain an action on such a contract made by one of its own citizens abroad in a state the laws of which permit it....

If the contract is completed in another state, it makes no difference in principle whether the citizen of this state goes in person, or sends an agent, or writes a letter, across the boundary line between the two states....So if a person residing in this state signs and transmits, either by a messenger or through the post-office, to a person in another state, a written contract, which requires no special forms or solemnities in its execution, and no signature of the person to whom it is addressed, and is assented to and acted on by him there, the contract is made there, just as if the writer personally took the executed contract into the other state, or wrote and signed it there; and it is no objection to the maintenance of an action thereon here, that such a contract is prohibited by the law of this Commonwealth....

The guaranty, bearing date of Portland, in the State of Maine, was executed by the defendant, a married woman, having her home in this Commonwealth, as collateral security for the liability of her husband for goods sold by the plaintiffs to him, and was sent by her through him by mail to the plaintiffs at Portland. The sales of the goods ordered by him from the plaintiffs at Portland, and there delivered by them to him in person, or to a carrier for him, were made in the State of Maine.... The contract between the defendant and the plaintiffs was complete when the guaranty had been received and acted on by them at Portland, and not before....It must therefore be treated as made and to be performed in the State of Maine.

The law of Maine authorized a married woman to bind herself by any contract as if she was unmarried. St. of Maine of 1866, c. 52.... The law of Massachusetts, as then existing, did not allow her to enter into a contract as surety of for the accommodation of her husband or of any third person. Gen. Sts. c. 108, section 3....Since the making of the contract sued on, and before the bringing of this action, the law of this Commonwealth has been changed, so as to enable married women to make such contracts. St. 1874, c. 184....

The question therefore is, whether a contract made in another state by a married woman domiciled here, which a married woman was not at the time capable of making under the law of this Commonwealth, but was then allowed by the law of that state to make, and which she could now lawfully make in this Commonwealth, will sustain an action against her in our courts.

It has been often stated by commentators that the law of the domicil, regulating the capacity of a person, accompanies and governs the person everywhere. But this statement, in modern times at least, is subject to many qualification; and the opinions of foreign jurists upon the subject...are too varying and contradictory to control the general current of the English and

American authorities in favor of holding that a contract, which by the law of the place is recognized as lawfully made by a capable person, is valid everywhere, although the person would not, under the law of his domicil, be deemed capable of making it....

Mr. Justice Story, in his Commentaries on the Conflict of Laws, after elaborate consideration of the authorities, arrives at the conclusion that..."although foreign jurists generally hold that the law of the domicil ought to govern in regard to the capacity of persons to contract; yet the common law holds a different doctrine, namely, that the lex loci contractus is to govern."....

In Pearl v. Hansborough, 9 Humph. 426, the rule was carried so far as to hold that where a married woman domiciled with her husband in the State of Mississippi, by the law of which a purchase by a married woman was valid and the property purchased went to her separate use, bought personal property in Tennessee, by the law of which married women were incapable of contracting, the contract of purchase was void and could not be enforced in Tennessee. Some authorities, on the other hand, would uphold a contract made by a party capable by the law of his domicil, though incapable by the law of the place of the contract.... But that alternative is not here presented....

The principal reasons on which continental jurists have maintained that personal laws of the domicil, affecting the status and capacity of all inhabitants of a particular class, bind them wherever they may go, appear to have been that each state has the rightful power of regulating the status and condition of its subjects, and being best acquainted with the circumstances of climate, race, character, manners and customs, can best judge at what age young persons may begin to act for themselves, and whether and how far married women may act independently of their husbands; that laws limiting the capacity of infants or of married women are intended for their protection, and cannot therefore be dispensed with by their agreement; that all civilized states recognize the incapacity of infants and married women; and that a person, dealing with either, ordinarily has notice, by the apparent age or sex, that the person is likely to be of a class whom the laws protect, and is thus put upon inquiry how far, by the law of the domicil of the person, the protection extends.

On the other hand, it is only by the comity of other states that laws can operate beyond the limit of the state that makes them. In the great majority of cases, especially in this country, where it is so common to travel, or to transact business through agents, or to correspond by letter, from one state to another, it is more just, as well as more convenient, to have regard to the law of the place of the contract, as a uniform rule operating on all contracts of the same kind, and which the contracting parties may be presumed to have in contemplation when making their contracts, than to require them at their peril to know the domicil of those with whom they deal, and to ascertain the law of that domicil, however remote, which in many cases could not be done without such delay as would greatly cripple the power of contracting abroad at all....

It is possible also that in a state where the common law prevailed in full force, by which a married woman was deemed incapable of binding herself by any contract whatever, it might be inferred that such an utter incapacity, lasting throughout the joint lives of husband and wife, must

be considered as so fixed by the settled policy of the state, for the protection of its own citizens, that it could not be held by the courts of that state to yield to the law of another state in which she might undertake to contract.

But it is not true at the present day that all civilized states recognize the absolute incapacity of married women to make contracts. The tendency of modern legislation is to enlarge their capacity in this respect, and in many states they have nearly or quite the same powers as if unmarried. In Massachusetts, even at the time of the making of the contract in question, a married woman was vested by statute with a very extensive power to carry on business by herself, and to bind herself by contracts with regard to her own property, business and earnings; and, before the bringing of the present action, the power had been extended so as to include the making of all kinds of contracts, with any person but her husband, as if she were unmarried. There is therefore no reason of public policy which should prevent the maintenance of this action.

Judgment for the plaintiffs.

Beale, <u>What Law Governs the Validity of a Contract</u>, 23 Harv L. Rev. 260, 270-272 (1910),

> The question whether a contract is valid...can on general principles be determined by no other law than that...of the place of contracting. If the law at that place annexes an obligation to the acts of the parties, the promisee has a legal right which no other law has power to take away....If on the other hand the law of the place where the agreement is made annexes no legal obligation to it, there is no other law which has power to do so....There is no uncertainty in the application of the rule. There can only be one place in which a contract is made, and what that place is can never be subject to great or serious doubt....[I]t is easiest for the parties to follow....Parties do not in fact, in most cases, know what the law is under which they act....[If] their business is so important that they wish to be sure that they are proceeding in accordance with the law, they will be almost certain to consult counsel. Neither party is likely to go back to his own state and there take advice. While, therefore, a party cannot be presumed to know the law of [the state where he acts,] he can very properly be called upon to consult counsel there.

Read, in the casebook:

1. **Restatement provisions, pages 23-29.**
2. **Linn, pages 33-36.**
3. **Notes (8)-(11) on pages 38-39.**

LEVY v. DANIELS' U-DRIVE AUTO RENTING CO.

108 Conn. 333, 143 A. 163 (1928)

WHEELER, C.J. The complaint alleged these facts: The defendant, Daniels' U-Drive Auto Renting Company, Incorporated, rented in Hartford to Sack an automobile, which he operated, and in which Levy, the plaintiff, was a passenger. [All parties were from Connecticut]. During the time the automobile was rented and operated, the defendant renting company was subject to section 21 of chapter 195 of the Public Acts of Connecticut, 1925, which provides:

"Any person renting or leasing to another any motor vehicle owned by him shall be liable for any damage to any person or property caused by the operation of such motor vehicle while so rented or leased."

While the plaintiff was a passenger, Sack brought the car to a stop on the main highway at Longmeadow, Mass., and negligently allowed it to stand directly in the path of automobiles proceeding southerly in the same direction his automobile was headed, without giving sufficient warning to automobiles approaching from his rear, and without having a tail light in operation, and when, due to inclement weather, the visibility was reduced to an exceedingly low degree. At this time the defendant Maginn negligently ran into and upon the rear end of the car Sack was operating, and threw plaintiff forcibly forward, causing him serious injuries. The specific acts of Maginn's negligence are set up at length in the complaint; it is not essential at this time to recite them. The plaintiff suffered his severe injuries in consequence of the concurrent negligence of both defendants.

The defendant demurred to the complaint upon several grounds, upon only one of which the trial court rested its decision; namely, that the liability of the defendant must be determined by the law of Massachusetts, which did not impose upon persons renting automobiles any such obligation as the Connecticut act did....

It is the defendant's contention in support of this ground of demurrer that the action set forth in the complaint is one of tort, and since Massachusetts has no statute like, or substantially like, the Connecticut act, it must be determined by the common law of that state, under which the plaintiff must prove, to prevail, the negligence of the defendant in renting a defective motor vehicle and in failing to disclose the defect. If this were the true theory of the complaint, the conclusion thus reached must have followed. "The locus delicti determined the existence of the cause of action." Orr v. Ahern, 107 Conn. 174.... [Plaintiff's] counsel, however, construe the complaint as one in its nature contractual. The act makes him who rents or leases any motor vehicle to another liable