

A Heavenly Inquiry from Professor Juenger

Michael Traynor

Via e(thereal) mail

Dear Mike,

I was delighted to learn that you will be participating in the colloquium at Davis. Although the reviewing committee took its sweet time checking my credentials, I feel lucky to have arrived at Conflicts Heaven here on Planet Teleos. I will leave it to the imaginations of you and the others to speculate about who else might be here and who might be elsewhere.

Although my new address sounds a bit territorial, it is not, but instead connotes a spiritually free condition or state in which I can continue my pursuit of ultimate purpose or design as a means of securing multistate justice and solving the various puzzles in the conflict of laws. It is a great pleasure to talk directly with all sorts of people from various disciplines across the centuries. Just the other day, Fermat, a fellow lawyer, was visiting, and that reminds me to ask you to tell the group that I have discovered a truly remarkable methodology for choice of law that, for the time being, the heavenly authorities insist on keeping here. I cannot figure out either their policy or any interest they might have in applying such an embargo, and I certainly don't agree that it is the better rule, but I have no choice at the moment since my most significant jurisdictional relationship for the indefinite future is with Planet Teleos. However, please tell the assembled scholars at Davis that I am confident that they will certainly approach, if not arrive at, my elegant solution by the end of the day or soon thereafter. There is a hint in my book about looking "to values that transcend state boundaries," but I have refined that basic idea considerably. I would also appreciate your giving me your brief

perspective as a practicing lawyer on the state of the conflict of laws today.

With heavenly regards,

Fritz

Dear Fritz,

It was a wonderful surprise to hear from you as well as reassuring to learn that you are irreverent as always even though you are now celestial (which must explain why your message got through our spam filter). The answer in a nutshell is that the conflict of laws is still a mess, although my report is not entirely bleak.

As to personal jurisdiction, U.S. courts continue to struggle with fact-intensive due process inquiries, and several hundred cases have now tried to apply this cumbersome approach to Internet cases. They have also introduced new jurisdictional distinctions such as whether a website is “active” or “passive” that would not meet your high standards. So far, the Supreme Court has shown no readiness to clean up the law of personal jurisdiction and bring it into modern times. Courts in other countries are doing better and there seems to be much less collateral litigation in them over these issues.

On judgments, the principle of finality still brings coherence to the law. The courts are exploring the distinction between recognition and enforcement, the question whether one state’s injunction must be recognized or enforced in another, and related issues of interjurisdictional claim and issue preclusion. The American Law Institute is working on a project regarding the recognition and enforcement of foreign country judgments and is drafting a proposed federal statute. It also has a separate project underway on international intellectual property, with reference particularly to conflict of laws, jurisdiction and judgments.

As to choice of law, the Supreme Court recently reaffirmed its long-standing unwillingness to interfere with a state’s choice of law so long as the state has some due process basis for applying that law. There are still competing theories and plenty of uncertainty. In contract cases, the courts still rely substantially on choice-of-law and choice-of-forum clauses even though there are many underlying issues of validity, interpretation, and scope. Interestingly, the law governing such clauses can produce great tension and debate in legislative forums. For example, even though the ALI

and NCCUSL agreed to modernize the choice of law provision in Article 1 of the UCC, I understand that certain special interests are opposing enactment in the states. And the Hague Convention process, which once tackled the large subject of international jurisdiction and judgments (remember our panel together a few years ago?), is now down to struggling with the contractual choice-of-forum issue.

Although the Restatement Second of Conflict of Laws has been deservedly criticized, there is no reasonable prospect that the ALI will soon undertake a Restatement Third. I expect you will find that comforting news even though, ironically, as you say, you too are holding to a most significant relationship for the indefinite future. The law unfortunately is still too unsettled; and the international dimensions of the subject are becoming increasingly important.

There is one refreshing development: In recent decisions and in individual speeches and writings, several members of the current Supreme Court are recognizing that the global implications of law and legal problems are expanding rapidly and that comparative law analysis is becoming essential both for judicial decision-making and effective advocacy. I hope that this new interest in comparative law will grow and not just be a passing fancy.

There are still plenty of knotty problems. I will mention just one: defamation. Under U.S. rules, it is still possible to get jurisdiction in a statute of limitations haven and claim nationwide or even worldwide damages even though the action would be barred in nearly all states. Borrowing statutes and choice-of-law principles can ameliorate the situation but they are tricky. Internationally, the High Court of Australia decided an important case allowing jurisdiction in Victoria over a claim by a citizen of Australia against Dow Jones for claimed damages to his reputation from a publication of Barrons Online on the Internet; he wisely limited his damage claim to reputational damages in Australia and stipulated that he would not bring multiple actions. Also, the European Court of Justice has held that a defamation claimant can seek full damages when suing in the defendant's domicile but only damages limited to the injury inflicted in his domicile when suing there. A controversial European Commission proposal known as "Rome II" would regulate the laws governing noncontractual obligations and, in defamation and privacy actions, apply the law of the country in which the damage arises. The effect of the European Convention on Human Rights (specifically Article 10 on freedom of expression) and its governing force now in England, for example, may have a bearing someday on the line of U.S. cases that decline to recognize and enforce libel judgments from

England (and other countries) whose laws do not match our First Amendment guarantees. Defamation is an important area in which there are diverging and developing ideas not only in the substantive law but also in all three of the building blocks of the conflict of laws: personal jurisdiction; choice of law, and recognition and enforcement of judgments. It also may be an area that affords a fruitful opportunity to develop principles of multistate justice.

Recently, in a case involving insurance and claims of bad faith, the Supreme Court limited both the amount a plaintiff can obtain as punitive damages and the evidence of conduct in other states that is admissible in evidence to justify a claim. It is too early, however, to predict whether this development will have any impact on the continuing problem of multistate defamation or other cases with interstate ramifications.

In looking to values that transcend state boundaries, I have not yet seen any recent case or article I could commend to you that introduces concepts of comparative responsibility (or comparative interest) into the choice-of-law arena. I don't mean so-called "comparative impairment," which, apart from solid criticism of that method of subordinating one state's policy, is still just another jurisdiction-selecting technique rather than a methodology for multistate justice. (That doesn't mean there isn't one or more such cases or comments, just that I have not come across any yet.)

We are getting quite used to comparative responsibility concepts in torts, even when different potential legal responsibilities of all parties are compared rather than just their fault, and, indeed, a form of sharing of loss or gain is possible in certain admiralty and restitution cases. In conflicts cases, however, courts still are bent on selecting a particular jurisdiction's law to determine an issue or a case unless they can duck the problem via a choice of law clause or a "false conflict" analysis. (I should note that I think Currie's approach continues to be useful at the very least in identifying false conflicts and resolving cases by focusing on areas of policy agreement in a restrained and enlightened way although it does not effectively resolve true conflicts or "unprovided for" cases, but you and I differ about governmental interest analysis and I won't press the point in this response.)

Many years ago, in connection with the problem of competing claims based on conflicting state laws regarding security interests in automobiles, I suggested—neither quite seriously nor facetiously—that perhaps someday a court might consider what no court has ever done and that is split the losses, with a view to securing, in Pound's terms, "all interests so far as possible with the least sacrifice of the totality of interests or the scheme of interests

as a whole.” I didn’t advocate that particular solution, just raised it among others as a possibility, but I have seen no case since that develops such a provocative notion, although Jack Coons’s notable articles on compromise and justice help us understand doctrinal compulsions for all or nothing rules notwithstanding settlement of most disputes.

I am fortunate to be among a group of your admirers and scholars who are assembling in your honor. Whether courts and arbitrators, legislative bodies, legal institutes, scholars, and lawyers will ever join someday in attaining the objective that “multistate justice will be dispensed everywhere” is still a most challenging question.

With affection and high regard,

Mike