**Conflict of Laws**

**2/13**

Buchanan case –

Buchanan’s forced off road by truck- Injured

Sued John Doe to get uninsured motorist benefits

- successful suit against Doe is prereq to getting from insurer

Buchanan is from Va, ins K signed in Va

BUT WVa uninsured motorist statute required proof of physical contact

Lex loci deliciti (tort) or contractual issue covered by place of contracting of insurance

This case is a “no brainer” under interest analysis – West Va. is not interested in its law applying.

* why have the proof of physical contact req?
* worried about fraud
	+ sacrifice compensation
	+ but fraud will not be felt in WVa
* VA law
	+ wants more compensation even if more fraud
* consequences of fraud
	+ VA
	+ compensation to Va'ian

But, because Va. is committed to the 1st Restatement (see McMillan), this case is difficult. Majority – the W. Va. statute simply sets forth a contractually-based condition of recovery. Dissent – no, the tort cause of action against John Doe is the condition for the contact action against insurer; thus the statute should be characterized as one of tort.

* "The forum state applies its own law to ascertain whether the issue is one of tort or contract."

Green: not clear what this means – esp. since the concurrence and dissent look to WVa cases to determine whether WVa law is contract or tort

 \* Perkins v. Doe (W. Virginia): characterized the W Va statute as one of tort.

 \* Lee v. Saliga (W. Virginia): characterized the W Va statute as one of contract (but this was a direct action against the insurance company).

 \* Buchanan case is more like Perkins than Lee, because it consists of a “John Doe” action.

Note the Lacy concurrence in Buchanan: it notes the public policy exception, but is this really the public policy exception in play? No, because, if so, Lacy would have advocated dismissing the case and having the plaintiff refile in West Virginia. Rather, this is veiled interest analysis (in effect, he is saying that because Virginia has an interest, we will keep the case and apply our substantive law of “no contact necessary”).

Note, that in Buchanan, the Court uses **recharacterization** to avoid an unwanted 1st Restatement conclusion.

What else could the court use (besides veiled interests analysis and recharacterization) to move closer to an interests analysis conclusion? Treat the question of contact as an evidentiary or procedural requirement (but opponent could counter and say that this evidentiary/procedural requirement was “bound up” with the action)?

Also concurrence:

Further, if the accident had occurred in Virginia, there would be no question of Buchanan's right to proceed to establish John Doe's liability for his injuries. Indeed, if Buchanan had filed suit in West Virginia, based on the facts before us here, the courts of that state would not have applied the physical contact rule to bar his action.

That’s renvoi…

Dreher v. Budget: facts – accident in Virginia, plaintiffs are both Virginia residents, defendants who allegedly caused the accident rented their car in New York (i.e., that is where contract was made). NY law – derivative liability. Va – no such derivative liability. If issue is a matter of tort, Va. law applies (place of harm). If issue is a matter of contract, then NY law applies (place of contracting).

 \* Court first tries to characterize the action as one of contract. But there is a problem with this. The plaintiffs are third-party beneficiaries of the contract. Under the 1st Restatement, this would really be a tort case, but the Va. S. Ct. doesn’t want to go with tort. It wants this to be a contract case.

 \* There is also an appeal to the public policy of New York in this case. But does this sound like the public policy exception? No, this is even worse than Buchanan. Court is talking about the public policy of New York, not Virginia. The public policy exception is supposed to refer only to the public policy of the forum state, not the sister state. Talking about the public policy of a sister state is merely interest analysis. So this is even worse than Buchanan in using the bastardized form of the public policy exception to veil an interest analysis.

**Note that Virginia appears, at first glance, to be an old-fashioned 1st Restatement state, but after reading these cases, we see that Virginia doesn’t apply the 1st Restatement straightforwardly in practice. It veers towards interest analysis, without admitting it.**

**10 states still follow 1st Restatement, and it all tends to be messily applied – just as we have seen in Virginia.**

**PLEADING AND PROVING FOREIGN LAW**

In the past, a proponent of even sister state law had to prove such law as fact!

* + 1. Had to be pleaded like any other fact
		2. Proved through rules of evid (w/ experts)
		3. Decided by jury
		4. Very limited appellate review

This was in large part because the cause of action was thought to be a remedial law of the forum and the content of foreign law was a factual basis in that cause of action for recovery

Green has a theory about the relationship between this and Pennoyer theory of PJ

someday he’ll publish it…

 This is clearly not what we do now with respect to sister state law: Sister state law is subject to judicial notice, with all that that means (i.e., court makes the decision as a matter of law, sister state law not formally submitted as “evidence” requiring proof, de novo review upon appeal, etc.)

While courts are generally required to take judicial notice of sister state law, the situation is mixed with regard to foreign law. FRCP 44.1 provides that a federal judge takes judicial notice of foreign law. As far as state approaches go – a few states preclude judges from taking judicial notice of foreign law, some allow it on a discretionary basis, and some make such judicial notice mandatory.

**A separate question: What is party fails to plead foreign law?**

Consider what happens when a party fails to plead any law.

The claim is generally considered sufficient until the D brings a motion to dismiss. So the same thing should arguably be true when the choice of law rules say that foreign law applies but the plaintiff says nothing about it.

sometimes courts are said to be permitted to dismiss sua sponte for failure to state a claim when the defendant does not mention it

Green wonders whether a court might not be obligated to do so

1. 2 Californians enter into gambling contract in Cal, perf in Cal
	* + 1. P sues D under contract in Cal state ct
			2. D fails to bring motion to dismiss for failure to state a claim
			3. can the case proceed or must ct bring up CA law
			4. Green: Yes

This would apply when the Californians sue in NV state court too – obligation to protect Cal interests under Full faith and Credit

Maybe no comparable duty with the relevant law is foreign…?

A separate, but related, question: **What if foreign law is introduced by the D or the ct, but the parties do not offer evidence of foreign law**?

Many possible solutions:

- put burden on plaintiff and dismiss
- put burden on defendant and assume states a claim
- put burden on party best able to identify law
- put burden on court
- use presumption about what law is like to allow case to proceed

This used to be quite common because there were no good law libraries

If it was a general common law case, under Swift the ct would just come to its own conclusion (by forum lights) about what the general common law was

but there were also some presumptions that courts would use

EG what about question of whether the general common law in Pa was overridden by statute? What happens if no evidence was offered about the matter? Rather than dismissing the action, the court would presume that the common law still applies, unchanged by state, in Pa – this would be so even though the forum might have abrogated the common law by statute

 Would things be different if the action were under Ca. or Fl. Law (formerly civil law states)? Yes - in these cases, the court would generally NOT presume that the general common law applied

 What about Engl. Law? Presume the common law applies. French law? Proponent must offer evidence of what French law is, otherwise, action will be dismissed (unless another presumption was used).

Also note that courts may often presume that fundamental principles of law apply (regardless of whether they are actually a part of the common law). Examples: breach of contract, liability for negligence, battery

This shifts the burden to the party opposing the application of the fundamental principle of law to show that the jurisdiction’s law did not have this fundamental principle.

Courts also sometimes presumed that sister state law/foreign law was identical to forum state law. A dubious proposition, but there is an argument to made for this: that the parties have consented to the law of the forum state when they make no arguments for sister state law/foreign law.

Walton v Arabian American Oil Co (2d Cir 1956)

1. P (from Ark) suing D (Del corp) for Saudi accident involving D’s car driven by D’s employees
2. P sues in NY fed ct
	* 1. Follows NY conflicts rules
		2. Klaxon
		3. Saudi law applies
3. P did not allege Saudi law
4. D did not either
5. Here ct brought up apparently sua sponte that Saudi law applied
	* 1. P refused to offer evid of law
		2. trial ct dismissed and ct app affirmed

 Green wonders why we must put burden on P…

the proper approach should be more nuanced – here the D is in a better position to know Saudi law

in some cases a ct will presume that foreign law is like forum law in absence of evid to the contrary:

*Louknitsky v. Louknitsky*

- California state court determining spousal rights in marital property of couple, now domiciled in Ca., while they were in China
- presumed Chinese law was the same as California’s community property system

Green: because CA has an interest we can understand this as a case of CA simply choosing to apply CA law