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Conflict of Laws in Massachusetts, Part II: Related Problems in Selecting the Applicable Law

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Introduction

This is the second half of a two-part article on conflict of laws in Massachusetts. Part I, which was published in the preceding issue of the *Massachusetts Law Review*, provided a background on the "functional approach" that Massachusetts courts apply to conflict-of-laws problems, and analyzed the application of that approach to several major areas of substantive law. This part of the article focuses on the approach of Massachusetts courts to conflict-of-laws problems that involve statutes of limitations and repose, choice-of-law clauses, forum selection clauses and the elusive distinction between substance and procedure.

I. Limitations on Actions

A. Conflict-of-Laws Problems in Determining the Applicable Statute of Limitations

Until 1995, Massachusetts courts treated statutes of limitations as "procedural" rather than "substantive," and generally applied Massachusetts's statute of limitations to all claims brought before them. However, in *New England Telephone & Telegraph Co. v. Gourdeau Construction Co.*,[1] the Supreme Judicial Court ("SJC") followed a nationwide trend and concluded that its former per se rule was no longer viable.[2]

Instead it adopted the position of section 142 of the *Restatement (Second) of Conflict of Laws ("Second Restatement")* and applied a "functional approach" to determine "the state which, *with respect to the issue of limitations* is the state of most significant relationship to the occurrence and to the parties."[3] The SJC reasoned that the "court's treatment of the application of statutes of limitations as procedural [would] no longer be continued," because "[t]he certainty of the traditional answer as to which statute of limitations to apply does not justify a refusal to apply the statute of limitations of another jurisdiction in particular circumstances."[4]

Section 142, which governs statute of limitations issues, provides that whether a claim will be maintained against that defense is determined under the principles stated in § 6. Section 142 provides:

> In general, unless the exceptional circumstances of the case make such a result unreasonable:
>
> (1) The forum will apply its own statute of limitations barring the claim.
>
> (2) The 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.[5]

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1. 419 Mass. 658 (1995).

2. *Id.* at 664.

3. *Id.* at 663 (quoting Restatement (Second) of Conflict of Laws § 142 cmt. e (1988 Revisions) (emphasis added).

4. *Id.* at 664.

5. Restatement (Second) of Conflict of Laws § 142 (1988 Revisions). The general principles section for "Procedure," under which section 142 falls, does not provide any "contacts" section as with torts and contracts and is not particularly helpful in choice-of-law analyses. It simply advises the reader that "[a] court usually applies its own local law rules prescribing how litigation shall be conducted even when it applies the local law rules of another state to resolve other issues in the case." Restatement (Second) of Conflict of Laws § 122 (1971).

In deciding whether Massachusetts has a substantial interest and which jurisdiction has a more significant relationship to the parties and the claim, the court focuses on the statute of limitations issue, and not on the type of underlying claim.[6] This means that regardless of the nature of the cause of action (e.g., personal injury, defamation, contract), if there is a conflict of law involving limitations, the conflicts analysis will rely on the *Second Restatement* sections that address limitations, and not the issue or topic-related section relating to the area of law of the cause of action.[7]

When section 142 was applied in *Gourdeau Construction Co.*, it appeared that the court understood section 142 to mean that Massachusetts would apply its own statute of limitations unless the commonwealth both lacked a substantial interest in the claim, and another state had a more significant interest in it. This squared with the stated policy that the forum state "should not entertain a claim when doing so would not advance any local interest and would frustrate the policy of a state with a closer connection with the case and whose statute of limitations would bar the claim."[8] However, under the court's interpretation of section 142(2) in *Gourdeau Construction Co.*, as long as Massachusetts had a substantial interest in a case, Massachusetts's statute of limitations would apply even if another state had a more significant relationship to the parties and occurrence.[9]

Within a short time, the court appeared to reinterpret section 142 in *Nierman v. Hyatt Corp.*[10] In *Nierman*, the plaintiff, a Massachusetts resident, who made his reservation from Massachusetts, brought a negligence action after sustaining injuries at the defendant's hotel in Texas.[11] The defendant was a Delaware corporation with its principal place of business in Illinois. It owned at least one hotel in Massachusetts and regularly solicited business in the state.[12] The suit was filed more than two years, but less than three years, after the plaintiff was injured at the defendant's hotel.[13] As a consequence of the timing, the action would be barred by the Texas statute of limitations, but timely filed under Massachusetts law.[14]

The Massachusetts Appeals Court held that the Massachusetts statute of limitations governed and that the action should proceed.[15] Applying section 142, the court stated:

> Massachusetts has a substantial interest in the maintenance of the plaintiffs' claims. The plaintiffs are not out-of-State forum shoppers; they are Massachusetts residents, and the impact of their injuries will be felt in this State. Massachusetts has an interest in providing an opportunity for resident plaintiffs to seek compensation for personal injuries. Moreover, although Hyatt is not a citizen of Massachusetts, it has an ongoing, significant business presence here of the same non-citizen character as its business presence in Texas. For that reason, the interest of Massachusetts in affording a forum to its resident plaintiffs is not undercut by any interest Massachusetts may have in maintaining comity with a sister State. Because Hyatt is not exclusively, or even principally, based in Texas, it does not fall within the ambit of any protection that Texas may wish to afford to local defendants from the prosecution of what Texas, but not Massachusetts, perceives to be stale claims. ... By allowing the claim to go forward, Massachusetts can advance its interest in providing its citizens with an opportunity to maintain their action without offending Texas policy concerns.[16]

Taking a different view of section 142, the SJC reversed.[17] It determined that while Massachusetts had "a general interest in having its residents compensated for personal injuries suffered in another State," nonetheless, it had "no substantial interest that would be advanced by entertaining the plaintiffs' claims."[18] Texas, the court decided, had closer connections to the issue because the alleged negligence and injuries occurred there, the hotel was located in Texas and employed Texans, and the allegedly negligent employee presumably lived in Texas.[19] Therefore, the court held, Texas had "the dominant interest in having its own limitations statute enforced."[20]

The SJC's reversal of the Appeals Court's decision in *Nierman* is questionable for two reasons. First, the SJC decision in *Nierman* is inconsistent with the language of section 142. The SJC focused on which jurisdiction had a more significant relationship without first analyzing the question of whether Massachusetts had any substantial interest.[21] Section 142(a)(2) requires that a state apply its own statute of limitations unless it has no substantial interest in the claim.[22] Only if it does not have a substantial interest should the analysis move to which state has a more significant relationship to the proceeding. Second, to the extent the SJC did analyze whether Massachusetts had a substantial interest in the claim, it is difficult to accept the court's determination that Massachusetts had none when the case involved an injury that occurred to a Massachusetts domiciliary who contracted from Massachusetts with a national corporation that owned property in Massachusetts.[23]

The SJC's *Nierman* decision was not the first, or only, time a Massachusetts court deemphasized section 142's requirement of determining, in the first instance, whether Massachusetts has *any* substantial interest in the case. In *Newburyport Five Cents Savings Bank v. MacDonald*,[24] the defendant, a Massachusetts resident, defaulted

6. Kahn v. Royal Ins. Co., 429 Mass. 572, 574 (1999); *see Gourdeau*, 419 Mass. at 663.

7. *See Kahn*, 429 Mass. at 574.

8. *Gourdeau*, 419 Mass at 661 (emphasis added) (quoting RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 142 cmt. g (1988 Revisions)).

9. *See id.* at 664 n.6 ("Our analysis does not reach the question presented by § 142(2)(b), under which the State with the more significant relationship to the parties and the occurrence must be determined."). In *Gourdeau*, the court held that Massachusetts had a "substantial interest" when both of the parties had their principal places of business in Massachusetts, the plaintiff was a Massachusetts corporation, and the contract was executed in Massachusetts. *Id.* at 663.

10. 441 Mass. 693 (2004).

11. *Id.* at 693-94.

12. *Id.* at 694.

13. *Id.*

14. *Id.*

15. Nierman v. Hyatt Corp., 59 Mass. App. Ct. 844, 849 (2003), *S.C.*, 441 Mass. 693 (2004).

16. *Id.* at 848-49 (citation omitted).

17. *Nierman*, 441 Mass. at 694.

18. *Id.* at 697.

19. *Id.*

20. *Id.* at 698.

21. *Id.* at 696-98.

22. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 142(a)(2) (1988 Revisions).

23. *Cf.* Kahn v. Royal Ins. Co., 429 Mass. 572, 574-75 (1999) (holding Massachusetts had no substantial interest when plaintiffs "elected ... to rely on an entirely Florida-based insurance transaction, thereby placing themselves outside the substantial interest of Massachusetts" and fact that underlying tort occurred in Massachusetts "provide[d] Massachusetts no substantial interest in the insurance policy claim").

24. 48 Mass. App. Ct. 904 (1999).

on promissory notes secured by commercial real estate in New Hampshire, and the plaintiff, a Massachusetts bank, foreclosed on the property.[25] The defendant challenged the foreclosure, claiming it was barred by the applicable Massachusetts statute of limitations.[26] The Appeals Court disagreed, holding that New Hampshire had the more significant relationship to the occurrence and parties because the foreclosure sale had been conducted under New Hampshire law, and the deficiency action involved the financing and purchase of New Hampshire property by New Hampshire trusts.[27] Although section 142(a)(2) requires a preliminary inquiry into whether the forum state has any substantial interest, the court initially determined that New Hampshire had a more substantial relationship to the claim, and only thereafter, did the court note that "no substantial interest of Massachusetts would be adversely affected" by applying New Hampshire's statute of limitations.[28]

Summary

Section 142 requires a forum to apply its own statute of limitations 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.[29] However, the SJC has put greater weight on which state has a more significant relationship to the claim, and has paid short shrift to the preliminary question of whether the forum state has a substantial interest in the claim.[30]

B. Conflict-of-Laws Treatment of Statutes of Repose

The SJC has described the statute of repose as "a cousin, if not a sibling, of a statute of limitations," to which a wholly separate choice of law analysis applies.[31] The court has determined that, because statutes of repose are not "clearly procedural," they must be treated as substantive law and, using a functional approach, analyzed to determine which jurisdiction has the "more significant relationship."[32] Repose problems are analyzed by application of the *Second Restatement* sections that undergird the applicable substantive law. For example, when a wrongful death case presents a statute of repose conflict, the *Second Restatement* analysis begins with the issue-specific section for wrongful death.

Statute of repose issues typically arise in the context of personal injury actions. The functional approach requires application of *Second Restatement* sections 145 (the topic section for torts), and 146 (the issue-specific personal injury section). Each of these sections calls for application of the law of the jurisdiction with the more significant relationship, as measured by the factors set out by section 6(2). For example, in *Cosme v. Whitin Machine Works,*[33] a Massachusetts resident working in Connecticut was injured in the course of his employment while cleaning a machine. The accident occurred in 1986. The machine that caused the injury was designed, manufactured and delivered in 1939. Connecticut law provided a ten-year statute of repose for product liability actions of the type involved in this case, while Massachusetts had no such limitation. To determine which state's law applied, the court applied the factors identified in *Second Restatement* section 145, which are "applicable to all torts and to all issues in tort," as well as section 146, which applies to all cases involving personal injury.[34] Both sections refer to the general underlying principles contained in section 6(2).[35] Although the court recited the four contacts in section 145, there was no apparent reliance on them. Rather, the court relied on section 146 and the section 6 factors in rendering its decision. Of the seven section 6 factors, the *Cosme* court focused only on the relevant policies of the jurisdictions to determine the outcome. Because Massachusetts had no statute of repose in products liability actions, the court reasoned that Massachusetts had no policy to protect tortfeasors from injuries caused by older products as did Connecticut. Further, although Connecticut had an interest in having its laws apply, it was "not as compelling ... as it would be if [the defendant] were a Connecticut business, and Connecticut's corresponding interest in protecting its courts from such claims is obviously not at stake." Finally, the court reasoned, Massachusetts had a strong interest in seeing its resident compensated and holding its resident-defendant (even though the accident itself occurred outside the state) accountable. As a result, the *Cosme* court, after providing a complete *Second Restatement* analysis that touched on all three levels, held that Massachusetts law applied because the state had a more significant interest in the matter than did Connecticut.

25. *Id.*

26. *Id.* at 905.

27. *Id.* at 906.

28. *Id.*

29. Restatement (Second) of Conflict of Laws § 142 (1988 Revisions).

30. The borrowing clause of the Massachusetts tolling statute, Mass. Gen. Laws ch. 260, § 9 (2008), requires the court to determine which jurisdiction's statute of limitations applies under certain circumstances. The tolling statute suspends the statute of limitations when the defendant has left the jurisdiction either at the time, or after, the action accrues.

> If, when a cause of action hereinbefore mentioned accrues against a person, he resides out of the commonwealth, the action may be commenced within the time herein limited after he comes into the commonwealth; and if, after a cause of action has accrued, the person against whom it has accrued resides out of the commonwealth, the time of such residence shall be excluded in determining the time limited for the commencement of the action; *but no action shall be brought by any person upon a cause of action which was barred by the laws of any state or country while he resided therein.*

Mass. Gen Laws ch. 260, § 9 (2008) (emphasis added).

Under modern Massachusetts law, it is difficult to conceive of a situation in which the borrowing clause, or the tolling statute as a whole, would apply. The words "resides out of the commonwealth," within this statute describe a situation involving a person who, by reason of non-residence, is beyond the jurisdiction and process of court. Walsh v. Ogorzalek, 372 Mass. 271, 274 (1977). In light of the Massachusetts long arm statute, Mass. Gen. Laws ch. 223A, § 3 (2008), and the statute providing for service upon a nonresident automobile driver by service on the registrar of motor vehicles, Mass. Gen. Laws ch. 90, § 3A (2008), it seems unlikely that a case could arise that requires analysis of a borrowing clause issue. However, to the extent such a situation could arise, only if the tolling provision was invoked would the borrowing clause have an effect. *See* Wilcox v. Riverside Park Enter., Inc., 399 Mass. 533, 539 (1987) (holding that when tolling provision was not invoked because defendant resided in Massachusetts during all material times, borrowing clause had no significance).

31. Kahn v. Royal Ins. Co., 429 Mass. 572, 576 (1999); *see also* Cosme v. Whitin Mach. Works, 417 Mass. 643, 647 n.5 (1994) ("[W]e have concluded in the past that statutes of repose are different in nature from statutes of limitation.").

32. *Cosme,* 417 Mass. at 647.

33. 417 Mass. 643 (1994).

34. *Id.* at 646-50 (quoting Restatement (Second) of Conflict of Laws §§ 145, 146 (1971)). The section 145 factors are: "(a) the place where the injury occurred,(b) the place where the conduct causing the injury occurred,(c) the domicil, residence, nationality, place of incorporation and place of business of the parties, and (d) the place where the relationship, if any, between the parties is centered." Restatement (Second) of Conflict of Laws § 145 (1971). Section 146 states that, for personal injury cases:

> the local law of the state where the injury occurred determines the rights and liabilities of the parties, unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 to the occurrence and the parties, in which event the local law of the other state will be applied."

Id. § 146.

35. Restatement (Second) of Conflict of Laws §§ 6, 146 (1971). Section 6(2) provides that the relevant considerations include:

> (a) the needs of the interstate and international systems, (b) the

The result of *Cosme* is helpfully compared with *Alves v. Siegel's Broadway Auto Parts, Inc.*[36] In *Alves*, the decedent, a Connecticut resident, was crushed to death by a garbage truck in Connecticut, while in the course of employment for his Connecticut-incorporated employer.[37] The defendant impleaded the compacting mechanism manufacturer (a Massachusetts corporation which sold and delivered the unit to the decedent's employer in Massachusetts) as a third-party defendant.[38] The court granted the third-party defendant summary judgment on the ground that, under Connecticut law, a products liability cause of action was barred by a statute of repose, which, unlike a statute of limitations, was substantive because it barred a cause of action from arising.[39] The court held that Connecticut law applied because, under Massachusetts choice-of-law rules, the law of the place of the injury "should be supplanted only if Massachusetts has a more significant relationship to the cause of action."[40] Here, the court applied the section 6 factors and determined that no state, including Massachusetts, had a more significant relationship to the cause of action than the place of the injury, and therefore that Connecticut law should apply.[41] The outcome determinative difference between *Cosme* and *Alves* appears to be that the defendant in *Alves* was a Connecticut corporation (whereas in *Cosme* it was a Massachusetts corporation), thus tilting the balance toward Connecticut with respect to which jurisdiction had the most significant relationship.

Summary

Statute of repose issues are governed by the *Second Restatement* sections that underlie the area of law in which the case arises. For example, when a statute of repose arises in a tort case, the necessary analysis must include a review of the issue-related section of the *Second Restatement* (e.g., personal injury), the section 145 topic section, and the policy factors in section 6.

II. Treatment of Choice-of-Law Clauses by the Massachusetts Courts

A. Early Case Law in Massachusetts

Contracting parties frequently seek to avoid choice-of-law problems by including a "choice-of-law" clause in their agreement, specifying which state's substantive law will govern disputes arising from their agreement. If accepted by the courts, such choice-of-law clauses can provide certainty to the parties as to the applicable law and avoid litigation over complex choice-of-law issues.

The treatment of choice-of-law clauses by Massachusetts courts reflects broader trends in choice-of-law theory. Professor Beale, reporter for the first *Restatement of Conflict of Laws ("First Restatement")*, rejected the proposition that the parties could choose the law applicable to their contracts. He argued that honoring such agreements "involves permission to the parties to do a legislative act. It practically makes a legislative body of any two persons who choose to get together and contract."[42] Conferring such authority on the parties was inconsistent with the concept of vested rights, that the parties' rights are defined by the law of the place in which their legal rights accrued.

Early Massachusetts cases appeared to accept Beale's argument.[43] Yet, in *Mittenthal v. Mascagni*,[44] a 1903 decision, the SJC enforced a forum selection clause in a contract made in Italy that called for all suits to be brought there. The court's discussion emphasized the practical reasons for the parties, who were only temporarily in the United States, to specify Italian courts for the resolution of disputes arising from their transaction, and in so doing, suggested a more hospitable attitude toward forum selection clauses. After Massachusetts adopted a section of the Uniform Commercial Code ("U.C.C.") permitting parties to specify the governing law in commercial contracts,[45] the SJC began to express its receptivity to choice-of-law clauses,[46] and thereafter applied the law chosen by the parties in several cases.[47]

B. Massachusetts Adopts the *Second Restatement* Approach to Choice-of-Law Clauses

The *Second Restatement*, promulgated in 1971, allows parties entering into a contract to specify the law governing their agreement. Section 187, entitled "Law of the State Chosen by the Parties," provides:

> (1) The law of the state chosen by the parties to govern their contractual rights and duties will be applied if the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed to that issue.
>
> (2) The law of the state chosen by the parties to govern their contractual rights and duties will be applied, even if the particular issue is one which the parties could not have resolved by an explicit provision in their agreement directed to that issue, unless either
>
> (a) the chosen state has no substantial relationship to the parties or the transaction and there is no

relevant policies of the forum, (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue, (d) the protection of justified expectations, (e) the basic policies underlying the particular field of law, (f) certainty, predictability and uniformity of result, and (g) ease in the determination and application of the law to be applied.

36. 710 F. Supp. 864 (D. Mass. 1989).

37. *Id.* at 865.

38. *Id.*

39. *Id.* at 867-68 (quoting Restatement (Second) of Conflict of Laws § 143 (1971)) ("An action will not be entertained in another state if it is barred in the state of the otherwise applicable law by a statute of limitations which bars the right and not merely the remedy.").

40. *Id.* at 871.

41. *Id.* at 871-72.

42. Joseph H. Beale, A Treatise on the Conflict of Laws 1079 (1935).

43. *See* Dolan v. Mutual Reserve Fund Life Ass'n, 173 Mass. 197, 199 (1899) ("doubtful" that parties may nullify local laws by stipulation that contract will be governed by laws of another state); Brockway v. American Ex. Co., 171 Mass 158, 162 (1898) (rejecting contention that stipulation as to governing law would be given effect to modify rights of the parties).

44. 183 Mass. 19 (1903).

45. *See* Mass. Gen. Laws ch. 106, § 1-105(1) (2008), enacted by St. 1957, ch. 765, § 1.

46. *See* Maxwell Shapiro Woolen Co. v. Amerotron Corp., 339 Mass. 252, n. 3 (1959); (citing Mass Gen. Laws ch. 106, § 1-105(1), the U.C.C. choice-of-law provision). *See generally* Edith Fine, *Massachusetts Contract Cases and Problems in the Choice of Law*, 42 Mass. L.Q. 46, 54-55 (1958).

47. *See, e.g.*, Quintin Vespa Co. Inc., v. Constr. Serv. Co., 343 Mass. 547, 552 n.5 (1962); Nissenberg v. Felleman, 339 Mass. 717, 719 (1959).

other reasonable basis for the parties' choice, or

> (b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of § 188, would be the state of the applicable law in the absence of an effective choice of law by the parties.

In *Steranko v. Inforex, Inc.*, the Appeals Court cited section 187 of the *Second Restatement*, but did not formally adopt it. *Steranko* held that "Massachusetts courts will uphold the parties' choice [as to the governing law] as long as the result is not contrary to public policy, and as long as the designated State has some substantial relation to the contract."[48] In *Hodas v. Morin*,[49] the SJC expressly relied on section 187 to determine whether to honor the parties' contractual choice of law in a gestational carrier contract. The *Hodas* court methodically applied the subsections of section 187(2) in determining whether to enforce the choice-of-law clause. Under section 187(2)(a), a choice-of-law clause will not be applied if the state "has no substantial relationship to the parties or the transaction." Because the contract in *Hodas* contemplated both prenatal care and delivery of the child at a Massachusetts hospital, the court concluded that Massachusetts did have a substantial relationship to the transaction, so that section 187(2)(a) did not bar application of the law chosen by the parties.

The court then turned to the more complex analysis required under section 187(2)(b). That subsection provides that the parties' choice should not be honored if another state has a "materially greater interest" in the issue than the chosen state; that state's law would apply absent the choice-of-law clause *and* honoring the parties' choice would be against the public policy of the state whose law would apply under choice-of-law principles.[50] Clearly, these requirements create a heavy presumption in favor of enforcing choice-of-law clauses, since it is only where each of the relevant considerations is met that the parties' choice will be overridden. In *Hodas*, the court suggested that New York might have a materially greater interest in the issue, but concluded that New York law would not apply absent the choice-of-law clause. Thus, after touching all the section 187(2) bases, the court honored the parties' contractual choice of law.

A good example of a federal district court using Massachusetts choice-of-law principles applying section 187(2) is *Boulder Santa Rosa, LLC v. Henry*.[51] The choice-of-law clause in *Boulder Santa Rosa, LLC* occasioned application of Massachusetts law to a loan transaction by Massachusetts-based lenders to Florida borrowers secured, in part, by Florida properties. The court concluded, under section 187(2)(a), that Massachusetts did have a substantial relationship to the transaction, since several parties were from Massachusetts and negotiations took place here. Judge Rya Zobel decided that no determination was needed under section 187(2)(b) as to whether Florida had a materially greater interest in the issue, because, while Florida law prohibits usury, Florida courts did not regard enforcing an interstate contract calling for a high interest rate as against its public policy. Thus, even if Florida law would otherwise apply, the parties could displace it, because (under section 187(2)(b)) the law they chose was not contrary to a fundamental policy of Florida. Here again, the court did a careful section 187(2) analysis, and again, the heavy burden to override the parties' choice of law was not met.

Application of section 187(2) does not always lead to enforcement of a choice-of-law clause. In *Roll Systems, Inc. v. Shupe*,[52] a Massachusetts corporation hired Shupe, a California resident, as a sales representative. After Shupe left Roll Systems and went to work for a competitor, Roll Systems sought an injunction to enforce a noncompetition agreement barring him from doing so. Shupe's contract with Roll Systems provided that Massachusetts law would govern. Judge George O'Toole examined section 187 (2)(b). He concluded that California had a materially greater interest in the transaction than Massachusetts, since Shupe was a California resident who worked out of California. Judge O'Toole held that applying Massachusetts law would be contrary to a fundamental policy of California, which bars noncompetition clauses by statute.[53] Lastly, he decided that California law would apply if there were no choice-of-law clause, because California had the most significant relationship to the transaction. The result was that Shupe was not enjoined from working for his former employer's competitor. While the question in *Roll Systems* is a close one,[54] Judge O'Toole, like the judges in the cases discussed above, carefully followed the steps in section 187(2) to decide whether to honor the choice-of-law clause. Choice-of-law issues often necessitate a balancing of several competing policy factors and are otherwise complex. The authors suggest that adoption of a single and consistent standard by the courts would benefit all concerned.

Sometimes, parties may be able to structure their conduct to enhance the likelihood that a court will approve their contractual choice of law. In *Hodas*, the gestational carrier case, the contract called for prenatal services and delivery to take place in Massachusetts, although the parties were from other states. Their contract also included a choice-of-law clause calling for application of Massachusetts law, which was more likely to uphold the transaction than at least one of the other states involved.[55] The fact that the contract required prenatal services and delivery in Massachusetts created a "substantial relationship to the parties or the transaction,"[56] thus satisfying the first step of a section 187(2) analysis. *Hodas* illustrates that, where conduct contemplated by a contract might take place in several states, the parties can increase the likelihood that their choice of law will be honored by specifying that it will take place in a state that applies the *Second Restatement* approach. This allows a certain amount of "law shopping" by the parties, by including a choice-of-law clause in the contract, and calling for performance of the contract in a state that is likely to honor the choice-of-law clause.

Despite this possibility — or perhaps in part because of it — the

48. 5 Mass. App. Ct. 253, 260 (1977); *see also* Connecticut Nat'l Bank of Hartford v. Kommit, 31 Mass. App. Ct. 348, 351 (1991) (honoring parties' choice of Connecticut law in credit card agreement).

49. 442 Mass. 544 (2004).

50. Restatement (Second) of Conflict of Laws § 187(2)(b) (1988 Revisions).

51. No. 07-10846-RWZ, 2008 WL 687413, at *1 (D. Mass. Mar. 7, 2008).

52. No. 97-12689-GAO, 1998 WL 1785455, at *1 (D. Mass. Jan. 22, 1998).

53. Cal. Bus. & Prof. Code §16600 (West 2008).

54. The strongest argument for honoring the parties' choice of Massachusetts law is that Massachusetts had as strong an interest in the transaction as California, since Roll Systems was a Massachusetts company. If that were the case, then California's interest was not "materially greater" (section 187(2)(b)), and the choice-of-law clause would be enforced.

55. Hodas v. Morin, 442 Mass. 544, 549 (2004). The *Hodas* opinion indicates that the birth mother's state, New York, had a strong public policy against enforcement of gestational carrier agreements.

56. Restatement (Second) of Conflict of Laws § 187(2)(a) (1988 Revisions).

Restatement section 187(2) formula makes sense. When the law of several states might legitimately apply to a transaction, it furthers predictability and avoids litigation to allow the parties to designate in advance which of those states' laws will apply. Section 187(2)(a) assures that the chosen jurisdiction will have a meaningful relationship to the transaction. Section 187(2)(b) also provides some protection against the party with the stronger bargaining position imposing a choice on the weaker party that violates the public policy of one of the two states. The SJC can best promote the goals of certainty, predictability and avoidance of choice-of-law litigation by faithfully applying section 187(2) to determine the enforceability of choice-of-law clauses.[57]

C. The Scope of Choice-of-Law Clauses: The Importance of Careful Drafting

Counsel should recognize in drafting choice-of-law clauses that such clauses will not automatically govern all claims that arise from the transaction. *R.R. v. M.H.*,[58] for example, involved a contract which provided that "Rhode Island Law shall govern the interpretation of this agreement." The SJC held that this provision did not require it to apply Rhode Island law to determine whether the agreement (a surrogacy agreement) was enforceable. It construed the choice-of-law clause to call for application of Rhode Island law on matters of interpretation (the meaning of the terms in the contract) but not matters of contract validity or formation.[59] By contrast, the contract in *Hodas* provided, "The parties further agree that this Agreement shall be governed by Massachusetts law."[60] The SJC determined that this clause expressed the parties' intent that Massachusetts law should govern the validity of the agreement as well as interpretation of its terms.[61]

A frequent issue in cases involving contractual choice of law is whether the parties intended that related, non-contractual claims would be governed by the chosen law. For example, in *Stagecoach Transportation, Inc. v. Shuttle, Inc.*,[62] the plaintiff recovered double damages under General Laws chapter 93A for unfair and deceptive trade practices. However, the contract provided, "This agreement shall be governed and interpreted in accordance with the laws of the State of New York," and the defendant argued that multiple damages were not authorized under New York law. The court held that New York law did not apply to the chapter 93A claim, because it was "not a dispute arising out of the agreement but more properly resembled a tort action of deceit."[63] The court contrasted the parties' choice-of-law clause with a clause analyzed by the United States Court of Appeals for the Second Circuit that called for the chosen law to "resolve any controversy or claim arising out of or relating to this contract or breach thereof."[64] In *BNY Financial Corp. v. Fitwel Dress Co., Inc.*,[65] by contrast, a party asserted chapter 93A claims that resembled contract violations, rather than related tortious conduct. The court held that a choice-of-law clause providing that the parties' agreements would be "governed by and shall be construed in accordance with" New York law barred the plaintiff from asserting claims under General Laws chapter 93A.[66]

The federal district court faced a similar problem in construing the scope of a choice-of-law clause in *Neuro-Rehab Associates v. Amresco Commercial Finance, L.L.C.*[67] The plaintiff brought suit for rescission based on misrepresentations in the negotiations leading up to a loan transaction. Judge O'Toole concluded that the choice-of-law clause, which required application of Idaho law to govern "the validity, enforceability, construction and interpretation" of the agreement, required application of Idaho law to these pre-contractual claims, since they challenged the "validity" and "enforceability" of the contract.[68]

To avoid litigation of this sort, parties drafting choice-of-law clauses should be precise about whether the clause applies to all disputes arising from the transaction, or solely to interpretation and enforcement of the contract. A broad clause, for example, should specify that a particular state's law will be applied "to govern, construe and enforce all rights and duties of the parties arising from or relating in any way to the subject matter" of the contract.[69]

A further issue in drafting choice-of-law clauses is whether to specify that the parties are choosing only the substantive law of the chosen state, not its conflicts law as well. Suppose, for example, that the parties choose California law to govern their agreement. It may be that California law would look to the law of some other state to govern an issue (for example, a performance issue if the contract were performed outside California). Unless the parties specify that they only intend California contracts law to apply, a court may be unclear about how to honor the choice-of-law clause: Should it apply California law to the performance issue (because the parties have chosen it) or the law of the state that California would choose based on application of California choice-of-law principles, on the premise that the parties meant the court to *act like a California court* in choosing the applicable law?

The *Second Restatement* takes the position that, when the parties specify that the law of a particular state will govern their transaction, the reference is to the "local law," i.e., the substantive law, of the chosen state and should not lead a court to consider the choice-of-law rules of the chosen state as well.[70] Since the Massachusetts

57. It should be noted that MASS. GEN. LAWS ch. 260, § 22, ¶ 1 (2008) bars choice-of-law clauses calling for application of foreign law [i.e., law other than Massachusetts law] in contracts insuring lives, property or interests in the commonwealth.

58. 426 Mass. 501 (1998).

59. *Id.* at 508.

60. *Hodas*, 442 Mass. at 546-47.

61. *Id.* at 550.

62. 50 Mass. App. Ct. 812 (2001).

63. *Id.* at 818; *see also* Aspen Tech., Inc. v. Applied Mfg. Tech., Inc., No. 05CV3113F, 2008 WL 241095, at *1 (Mass Super. Ct. Jan.9, 2008). In that case the choice-of-law clause provided that the agreement would be "governed by and construed in accordance with the laws of the State of Texas." *Id.* at *3. The superior court applied Texas law to the contractual claims, but did a separate choice-of-law analysis as to non-contractual claims asserted based on the same commercial dispute. *Id.* at *4.

64. *Stagecoach Transp., Inc.*, 50 Mass. App. Ct. at 819 (quoting Turtur v. Rothschild Registry Int'l. Inc., 26 F.3d 304, 309 (2d Cir. 1994)); *see also* Kitner v. CTW Transp., Inc., 53 Mass. App. Ct. 741, 745 (2002) (clause providing that North Dakota law would "govern the identity, construction, enforcement, and interpretation" of contract did not bar chapter 93A claim, since that claim "more closely resemble[d]" tort claim rather than construction, enforcement or interpretation of the contract).

65. No. CIV. A. 95-4785A, 1997 WL 42518, at *1 (Mass. Super. Ct. Jan. 15, 1997).

66. *Accord* Northeast Data Sys., Inc. v. McDonnell Douglas Computer Sys., 986 F.2d 607, 609-11 (1st Cir. 1993); Worldwide Commodities v. J. Amicone Co., 36 Mass. App. Ct. 304, 307-08 (1994).

67. No. 05-12338-GAO, 2006 WL 1704258, at *1 (D. Mass. June 19, 2006).

68. *Id.* at *8-*10.

69. See the discussion in *Inacom Corp. v. Sears, Roebuck & Co.*, 254 F.3d 683, 687 (8th Cir. 2001); *see also* Nissenberg v. Felleman, 339 Mass. 717, 718 n.1 (1959), in which the clause provided that "this agreement and all transactions, assignments and transfers hereunder, and all rights of the parties, shall be governed as to validity, construction, enforcement and in all other respects by the laws of ... New York."

70. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(3) (1988 Revisions)

courts have approved section 187, they are likely to reach the same conclusion.[71] Parties sometimes specify that the choice-of-law clause applies only to the "local law" of the chosen state, "without regard to the conflict-of-laws rules" of that state.[72] This makes explicit what will likely be concluded under general conflicts principles such as section 187. However, it may occasionally bring the parties to grief, where it is clear that the chosen state would have looked to a third state on a particular issue, and that the parties — had they thought about it — would have intended the court to do so.[73] It may be better to leave this to the operation of section 187(3), which allows the court some flexibility in making this decision.

Where the parties have included a choice-of-law clause in their agreement, the Massachusetts courts have construed the clause to cover some issues that fall between substantive law and matters of local procedure. For example, in *Morris v. Watsco, Inc.*,[74] the parties provided that Florida law would apply to their agreement. Suit was brought on the contract in federal court in Massachusetts, and that court certified to the SJC the issue of whether the rate of interest on the judgment should be governed by Florida law — the law designated by the parties — or by Massachusetts law, the law of the forum.[75] The court concluded that the choice-of-law clause, which called for the contract to be "construed and enforced" according to Florida law, encompassed the interest issue.[76]

Similarly, *Newburyport Five Cents Savings Bank v. MacDonald*[77] involved enforcement of certain promissory notes accompanying mortgages. The mortgages provided for application of New Hampshire law to the transactions, but the issue in the case was not a substantive contracts issue, but which statute of limitations to apply.[78] Although the reasoning is obscure, the court — citing *Morris v. Watsco, Inc.* — recognized the parties' right to select the governing law and applied the New Hampshire statute of limitations.[79]

D. Choice-of-Law Clauses Governing Issues That Could Be Resolved by the Parties in Their Agreement

Section 187 of the *Second Restatement* contains the following puzzling provision: "(1) The law of the state chosen by the parties to govern their contractual rights and duties will be applied if the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed to that issue."[80]

This section essentially authorizes parties to incorporate by reference a body of law to govern issues they could have spelled out themselves in their contract. As the *Second Restatement* comment explains:

> [M]ost rules of contract law are designed to fill gaps in a contract which the parties could themselves have filled with express provisions. This is generally true, for example, of rules relating to construction, to conditions precedent and subsequent, to sufficiency of performance and to excuse for nonperformance, including questions of frustration and impossibility.[81]

Under section 187(1), the parties, instead of specifying that a contract shall be void in event of impossibility, may simply provide that their contract will be governed by the law of a particular state, which treats such contracts as void. Because the parties could have directly regulated the issue by a clause in the contract, section 187(1) specifies that they may do so by reference to a state's contract law. Thus, when parties include a general choice-of-law clause (without specifying the issues it is to cover), section 187(a) provides that they select the chosen law for all such issues.

III. Massachusetts Treatment of Forum Selection Clauses

Parties often include "forum selection clauses" in their contracts, specifying what court or courts may entertain any disputes arising from their relationship.[82] Forum selection clauses are different from choice-of-law clauses, which specify which state's substantive law will apply, not the place of suit. Frequently, both types of clauses are included; such two-part clauses usually provide that suits will be brought in the state that will supply the governing law.

A. Evolution of the Massachusetts Attitude Toward Forum Selection Clauses

Early Massachusetts cases refused to enforce forum selection clauses. *Nute v. Hamilton Mutual Insurance Co.*[83] expressed concern that honoring forum selection clauses might open the door to allowing parties to modify many other remedial rights that are traditionally the province of the courts and the legislature, not the parties.[84] *Nute*'s rejection of forum selection clauses was reaffirmed by later Massachusetts decisions as an impermissible attempt to modify the statutory jurisdiction of courts.[85]

After the United States Supreme Court approved forum selection clauses in admiralty cases in *M/S Bremen v. Zapata Off-Shore Oil Co.*,[86] the Massachusetts courts re-evaluated their hostility to them. In *Ernest & Norman Hart Bros. v. Town Contractors, Inc.*,[87] the Appeals Court noted a broad change toward "the modern view"[88] that such clauses should be enforced if reasonable, and predicted that the SJC would overrule the *Nute* approach.[89] The SJC expressly

("In the absence of a contrary indication of intention, the reference is to the local law of the state of the chosen law."); *see also id.* cmt. h.

71. *See supra* Part II.B. (discussing treatment of choice-of-law clauses by Massachusetts courts).

72. *See, e.g.*, Aspen Tech., Inc. v. Applied Mfg. Tech., Inc., No. 05CV3113F, 2008 WL 241095, at *3 (Mass. Super. Ct. Jan. 9, 2008) (agreement "shall be governed by and construed in accordance with the laws of the State of Texas, excluding its conflict of laws rules").

73. For the exquisite complexities that may arise from such drafting, see Michael Gruson, *Governing Law Clauses Excluding Principles of Conflict of Laws*, 37 Int'l Law. 1023, 1023-31 (2003).

74. 385 Mass. 672 (1982).

75. *Id.* at 672-73.

76. *Id.* at 675-78.

77. 48 Mass. App. Ct. 904 (1999).

78. *Id.* at 905.

79. *But see* Rhode Island Depositors' Econ. Prot. Corp. v. Katsarakes, No. CA942831, 1995 WL 808929 (Mass. Super. Ct. Jan. 31, 1995) (holding that broad choice-of-law clause did not govern applicable limitations law, since not "substantive law").

80. Restatement (Second) of Conflict of Laws § 187(1) (1988 Revisions).

81. *Id.* cmt. c.

82. Examples of forum selection clauses are given in Part III.A through D, *infra*.

83. 72 Mass. 174 (1856).

84. *Id.* at 180.

85. *See, e.g.*, Nashua River Paper Co. v. Hammermill Paper Co., 223 Mass. 8, 14-17 (1916). *But see* Mittenthal v. Mascagni, 183 Mass. 19, 21-22 (1903) (enforcing forum selection clause specifying suit in courts of Florence, Italy).

86. 407 U.S. 1 (1972).

87. 18 Mass. App. Ct. 60 (1984).

88. *Id.* at 64.

89. *Id.* at 65 ("In the light of present day trends, attorneys advising clients

approved enforcement of forum selection clauses in dicta in *Jacobson v. Mailboxes Etc. U.S.A., Inc.*[90] "We accept the modern view that forum selection clauses are to be enforced if it is fair and reasonable to do so."[91] The court cited section 80 of the *Second Restatement*, with approval, suggesting that the commentary to that section will be a helpful guide for lawyers in considering when a forum selection clause is reasonable, or in fashioning arguments against enforcement.[92] Since *Jacobson*, the Massachusetts decisions have recognized the enforceability of forum selection clauses, even when parties have designated the courts of another nation as the proper forum.[93]

B. Arguments to Avoid Dismissal Based on a Forum Selection Clause

Typically, cases involving the enforcement of forum selection clauses arise because a party has agreed that suits will be brought in a particular state, but later sues in another. The defendant moves to dismiss based on the clause, and the plaintiff argues that it should not be enforced. Although *Jacobson* indicated that forum selection clauses are presumptively enforceable under Massachusetts law, several arguments may support dismissal based on such a clause.

In *Jacobson*, the SJC held that forum selection clauses "are to be enforced if it's fair and reasonable to do so." It would likely be unreasonable for the parties to choose a forum with no substantial connection to the transaction or the parties.[94] In *M/S Bremen*, which has been repeatedly cited by Massachusetts cases, the Supreme Court held that "'a forum clause should control, absent a strong showing that it should be set aside' or that 'enforcement would be unreasonable and unjust,' or that the clause was invalid for such reasons as fraud or overreaching.'"[95] *M/S Bremen* also suggested that a clause might not be enforced if the chosen forum "will be so gravely difficult and inconvenient that [the party] will for all practical purposes be deprived of his day in court."[96]

While the cases suggest several arguments parties may make to avoid a forum selection clause, such clauses will usually be enforced by the Massachusetts courts. The party seeking to avoid the clause will bear the burden to establish that it would not be fair and reasonable to enforce it.[97] The *Second Restatement* commentary states that it is "relevant" that the contract was an adhesion contract which the other party was "compelled to accept without argument or discussion."[98] But the mere fact that a party accepted a clause drafted by the other party, or that the drafting party chose its home state as the forum, will not render it unenforceable.[99] In *Lambert v. Kysar*, for example, the United States Court of Appeals for the First Circuit enforced a forum selection clause requiring a Massachusetts business to litigate in Washington state, where that state had strong connections to the parties' transaction.[100] However, the court may construe a clause against the drafter in considering the scope of the clause.[101]

In *Cambridge Biotech Corp. v. Pasteur Sanofi Diagnostics*,[102] the plaintiff argued that a forum selection clause should be ignored because the French courts would be unable to properly interpret and apply complex rulings of the United States Bankruptcy Court.[103] The SJC rejected the argument, but did so only following a detailed review of expert evidence about French court procedure.[104] The court also rejected the argument that the forum selection clause should be ignored because some remedies available under Massachusetts law would not be available under French law.[105] In *Scafuri v. Lumenis Ltd.*, the court enforced a forum selection clause identifying Israel as the forum and rejected the plaintiff's argument that it would be dangerous to litigate in Israel.[106] The court was not convinced that the plaintiff "will be deprived of his day in court if required to bring his claim in Israel, a modern country with a legal system similar to our own."[107]

The Massachusetts courts have refused to honor a forum selection clause in several cases presenting unusual circumstances. In *Ernest & Norman Hart Bros. v. Town Contractors, Inc.*,[108] the Appeals Court, while noting the change in judicial attitudes toward forum selection clauses, declined enforcement for several reasons. First, it noted that the clause was agreed upon before the Supreme Court's decision in *M/S Bremen* and the trend toward acceptance of such clauses.[109] Second, the clause was a "boilerplate" provision in a standard contract imposed by the general contractor on a subcontractor, "thus carrying overtones of an adhesion contract between parties of disparate bargaining power."[110] Third, and probably dispositive,

probably would be unwise to rely on the persistence of the *Nute* principle in future Massachusetts cases where the parties purport to bind themselves by a contractual choice of forum provision and no special considerations make it unjust to enforce the parties' agreement.").

90. 419 Mass. 572 (1995); *see also* W. R. Grace & Co. v. Hartford Accident & Indemn. Co., 407 Mass. 572, 582 n.13 (stating in dicta "we see nothing inherently inappropriate in a forum selection clause").

91. 419 Mass. at 574-75.

92. *Id.* at 581.

93. Cambridge Biotech Corp. v. Pasteur Sanofi Diagnostics, 433 Mass. 122, 134 (2000); Scafuri v. Lumenis Ltd., No. 04-P-483, slip op. at 1 (Mass. App. Ct. Aug. 3, 2005); Stagecoach Transp. Inc. v. Shuttle, Inc., 50 Mass. App. Ct. 812, 817-18 (2001).

94. *Cf.* Lambert v. Kysar, 983 F.2d 1110, 1120 (1st Cir. 1993) (inconvenience argument applies where selected forum is unconnected to parties and contract at issue in the case).

95. Ernest & Norman Hart Bros. v. Town Contractors, Inc., 18 Mass. App. Ct. 60, 64-65 (1974) (quoting M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 15 (1972)).

96. 407 U.S. 1, 18 (1972); *see also Cambridge Biotech Corp.*, 433 Mass. at 131 (no showing that forum selection clause "was obtained by fraud, duress, the abuse of economic power, or any other unconscionable means"); Karty v. Mid-America Energy, Inc., 74 Mass. App. Ct. 25, 30 (2009) (clause itself, rather than entire contract, must be shown to have been fraudulently obtained).

97. *See Cambridge Biotech Corp.*, 433 Mass. at 133 (plaintiffs "have not met their substantial burden of showing that honoring the forum selection clause would deprive them of any meaningful day in court"); *see also* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 80 cmt. c (1988 Revisions).

98. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 80 cmt. c (1988 Revisions).

99. *Cf.* Lambert v. Kysar, 983 F.2d 1110, 1119-20 (1st Cir. 1993) (argument for overreaching must be based on something more than boilerplate argument) (applying Washington law).

100. *Id.* at 1117-21. While the *Lambert* court applied Washington law to determine the enforceability of the clause, its discussion suggested that Washington's standards are very similar, if not identical, to those of the federal and Massachusetts courts. *See id.* at § 116-19.

101. *See* Jacobson v. Mailboxes Etc. U.S.A., Inc. 419 Mass. 572, 578 (1995); *accord* JPS Elastomerics Corp. v. Mattel, Inc., No. SUCV2004-03841-C, 2004 WL 5302041, at *1 (Mass. Super. Ct. Oct. 7, 2004).

102. 433 Mass. 122 (2000).

103. *Id.* at 131.

104. *Id.* at 132.

105. *Id.* at 132 n.13.

106. Scafuri v. Lumenis Ltd., No. 04-P-483, slip op. at 3 (Mass. App. Ct. Aug. 3, 2005).

107. *Id.*

108. 18 Mass. App. Ct. 60 (1974).

109. *Id.* at 62.

110. *Id.* at 66.

was the fact that the case had already been litigated to judgment in Massachusetts, and the limitations period had passed in Connecticut, the state designated in the forum selection clause.[111] Regarding "the modern view as flexible and one where all equitable considerations will be taken into account," the court declined to enforce the clause.[112] In its remand in *Jacobson*, the SJC suggested that similar arguments might avoid a forum selection clause, depending upon whether California would bar the plaintiff's claims on statute of limitations grounds,[113] and whether California would refuse to enforce the plaintiff's General Laws chapter 93A claims.[114]

It may also be unreasonable to designate a forum that will be seriously inconvenient for one of the parties, especially in consumer cases. In *Kirby v. Miami Systems Corp.*,[115] a case from the Massachusetts Appellate Division, the court refused to dismiss based on a forum selection clause requiring suits to be brought in Ohio. The suit was brought by a Massachusetts employee for wages under a Massachusetts statute, against her employer, a corporation with three places of business in the commonwealth.[116] The court stated:

> [W]here a solitary Massachusetts resident, employed in Massachusetts by a foreign corporation whose "national" activities include three places of business in Massachusetts, brings an action pursuant to G.L. c. 149 ss, 148, 150 to recover a modest amount of wages and benefits under what is apparently an adhesion contract of employment, Massachusetts courts will not enforce forum selection clause in that contract.[117]

Similarly, in *Williams v. America Online*,[118] a superior court judge refused to dismiss a class action on behalf of Massachusetts consumers, despite a forum selection clause calling for suits in Virginia. As one ground for its refusal, the court held that "public policy suggests that Massachusetts consumers who individually have damages of only a few hundred dollars should not have to pursue AOL in Virginia."[119] These cases reflect a certain skepticism about forum selection clauses that are drafted by the party in the dominant bargaining position. This argument is unlikely to persuade a court, however, in a case between business entities. For example, in *Cambridge Biotech Corp.* the court noted that "two sophisticated parties voluntarily agreed in advance [to the forum selection clause]. Massachusetts law requires us to respect their wishes, and international comity requires us to respect the ability of the French courts fairly and competently to settle the parties' dispute."[120]

In *Casavant v. Norwegian Cruise Line, Ltd.*,[121] the court rejected a motion to dismiss based on a forum selection clause. *Casavant* involved the recurring scenario concerning contractual language on a ticket for a cruise conducted by a foreign cruise line, purchased by Massachusetts passengers from a Massachusetts travel agent.[122] The passengers argued — and the court held — that they had not been made aware of the forum selection clause at a time when they could realistically decide whether or not to accept it.[123] The court agreed, since the plaintiffs did not receive the contract (which had been fully paid for) until 13 days before sailing.[124] Since they had not had a reasonable opportunity to reject the clause, the court concluded, under Massachusetts law, that they had not accepted the contract and the clause was unenforceable.[125]

C. Varieties of Forum Selection Clauses

Forum selection clauses vary considerably in language and effect. At one end of the spectrum, the clause may confine all suits to a single court or county. In *Nute v. Hamilton Mutual Insurance Co.*,[126] the clause provided that "the suit should be brought at a proper court in the county of Essex [Massachusetts]."[127] In *Ernest & Norman Hart Bros.*, the clause provided that "Connecticut law shall have jurisdiction in the event of a legal dispute between the parties to this contract, and such disputes shall be adjudicated in Hartford County."[128] This clause might be interpreted to confine suits to the state courts, due to its reference to a county. A similar clause in *LFC Lessors, Inc., v. Pacific Sewer Maintenance Corp.*[129] provided that "the rights and liabilities of the parties hereto [shall be] determined in accordance with the law, and in the courts, of the Commonwealth of Massachusetts."[130] The United States Court of Appeals for the First Circuit read this clause as intended to confine suits to the Massachusetts state courts, and enforced the clause, affirming dismissal of an action brought in the federal district court for the District of Massachusetts.

111. *Id.* at 67.

112. *Id.*

113. A party arguing for dismissal could avoid this argument by agreeing to waive any limitations defense in the state designated by the forum selection clause.

114. "We need not decide whether, if the agreement purported to contract away any claims under G.L. c. 93A, we would decline to enforce the provision on public policy grounds." Jacobson v. Mailboxes Etc. U.S.A., Inc., 419 Mass. 572, 580 n.9 (1995). *But see* Cambridge Biotech Corp. v. Pasteur Sanofi Diagnostics, 433 Mass. 122, 132 n.13 (2000) (forum selection clause in international contract not unenforceable if remedies in chosen forum less favorable than those in U.S. courts).

115. 1999 Mass. App. Div. 197 (1999).

116. *Id.* at 198.

117. *Id.*

118. No. 00-0962, 2001 WL 135825 (Mass. Super. Ct. Feb. 8, 2001).

119. *Id.* at *3 (footnote omitted).

120. *Cambridge Biotech Corp.*, 433 Mass. at 130-33; *see also* Int'l Indus. Dev. Assoc. v. Mith Prod., Inc., No. 043129, 2005 WL 503725, at *1 (Mass. Super. Ct. Jan. 19, 2005) (no reason to ignore clause "where both parties are sophisticated business entities"); Forum Corp. of North America v. Moore Corp., No. 010701BLS, 2001 WL 755823, at *1 (Mass. Super. Ct. May 23, 2001) (rejecting economic coercion argument made by large corporation); *accord* JPS Elastomerics, Corp. v. Mattel, Inc., No. SUCV2004-03841-C, 2004 WL 5302041, at *1 (Mass. Super. Ct. Oct. 7, 2004).

121. 63 Mass. App. Ct. 785 (2005).

122. *Id.* at 788.

123. *Id.*

124. *Id.* at 789.

125. *See generally* Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585 (1991), a much cited case establishing standard for enforcement of forum selection clauses under admiralty law. In *JPS Elastomerics Corp. v. Mattel, Inc.*, No. SUCV2004-03841-C, 2004 WL 5302041, at *1 (Mass. Super. Ct. Oct. 7, 2004), the controversy over enforcement of a forum selection clause arose in an unusual context. The clause in that case called for arbitration in Boston; however a California court had previously ordered the parties to proceed to arbitration in Kentucky. JPS sought a preliminary injunction in the Massachusetts superior court enjoining Mattel from proceeding to arbitration in Kentucky. Although the superior court concluded that the forum selection clause "is likely to be enforceable," it still denied injunctive relief, on the ground that Mattel's violation of the clause threatened only economic harm, which could be remedied by monetary damages. *Id.* at *2.

126. 72 Mass. 174 (1856).

127. *Id.* at 176.

128. 18 Mass. App. Ct. 60, 62 (1984).

129. 739 F.2d 4 (1st Cir. 1984).

130. *Id.* at 6.

Other forum selection clauses confine suits to the state or federal courts in a particular state.

> This Agreement shall be governed by the laws of the State of Ohio. Company ... and Representative ... hereby consent agree [sic] that any action to enforce any provision of this Agreement shall be brought only in a state or federal court located in Hamilton County Ohio."[131]

Still another variant is the "non-exclusive" forum selection clause, whereby the parties agree that suits *may* be brought in a particular court, but does not *require* that they be brought there:

> Without limiting in any way the jurisdiction of the courts of any state, nation or province, or [party's] right to invoke the jurisdiction of such courts, [second party] hereby submits and consents to the jurisdiction of the United States of America and the State of New York... .[132]

This clause provides the first party with the option to sue in the New York state courts (and apparently a federal court in New York), but does not bind the first party to bring all actions in those courts. Parties should be clear on this issue, but frequently are not. This has led to litigation about whether suit may be brought in a court other than the one specified in the clause. For example, courts have differed on whether a forum selection clause that provides that the parties "submit to the jurisdiction of" a particular court is exclusive or non-exclusive.[133] Inclusion of a sentence stating that "jurisdiction of [the chosen court] shall be exclusive," or that litigation arising out of the transaction "may be brought only in the [courts of the chosen state]" should eliminate the ambiguity.[134]

Since the purpose of a forum selection clause is to assure that suits may or must be brought in a particular state, they will normally be interpreted to waive any objections the parties might otherwise have to venue or to personal jurisdiction in the chosen court.[135] Consent is a constitutionally permissible basis for personal jurisdiction,[136] and a forum selection clause is consent, in advance, to the jurisdiction of the chosen court. Sometimes a forum selection clause will expressly provide that the parties (or one of them) waive all objections to personal jurisdiction in the chosen forum.[137]

D. Scope of the Forum Selection Clause

Just as questions may arise concerning the scope of a choice-of-law clause,[138] problems may arise concerning the scope of a forum selection clause. The language of a forum selection clause may cover certain claims between the parties, but not others. If so, the court could find itself in the position of reluctantly dismissing parts of the case in favor of the chosen forum, but retaining others. In *Lambert v. Kysar*,[139] the plaintiff brought contract and tort claims arising from a commercial transaction, and claimed that the tort claims (alleging tortious conduct in the formation of the contract) were not within the scope of the forum selection clause. The First Circuit (applying Massachusetts conflicts doctrine) took a jaundiced view of this argument. "The better general rule, we think, is that contract-related tort claims involving the same operative facts as a parallel claim for breach of contract should be heard in the forum selected by the contracting parties."[140]

In *Jacobson v. Mailboxes Etc. U.S.A., Inc.*, the court also considered whether a forum selection clause applied to "not only claims made under the agreement but also to claims of pre-contract deceit and other wrongs that allegedly induced the plaintiffs to sign the franchise agreement."[141] The forum selection clause in *Jacobson* provided, "Venue and Jurisdiction for all actions enforcing this agreement are agreed to be in the City of San Diego, County of San Diego, California."[142] The court concluded that the "restrictive language of the clause"[143] did not encompass allegations of wrongdoing that induced the contract. Consequently, it had to decide whether to dismiss the claims covered by the forum selection clause and hear the wrongful inducement claims, to dismiss all claims, or to retain jurisdiction over all claims.

The court held that "separate actions should not be encouraged."[144] Consequently, the trial court on remand should determine whether the "greater focus" of the plaintiff's claims was on the pre-contract conduct or on the breach of contract claims.[145] If the wrongful inducement claims predominated, the court should retain jurisdiction *over the entire case*, despite the forum selection clause. If the contract claims formed the principal focus of the case, it should dismiss those claims in deference to the parties' chosen forum, and decline jurisdiction over the related claims on *forum non conveniens* grounds, leaving the entire case to be litigated in California. "A

131. Miami Sys. Corp. v. Justices of the Appellate Div., No. CV994495, 2000 WL 1273525, at *1 (Mass. Super. Ct. Mar. 23, 2000); *see also* Int'l Indust. Dev. Assoc. v. Mith Prod., Inc., No. 043129, 2005 WL 503725, at *1 (Mass. Super. Ct. Jan. 19, 2005) ("Agreement shall be governed by the laws of the State of Florida and all disputes shall be resolved in the courts of the State of Florida or in the United States District Court for the District of Florida."); Forum Corporation of North America v. Moore Corp., No. 010701BLS, 2001 WL 755823, at *2 (Mass. Super. Ct. May 23, 2001) (parties "hereby consent to the exclusive jurisdiction of, and venue in, any state or federal court within Cook or Lake County, Illinois for all purposes in connection with any action or proceeding relating to this Agreement.").

132. Stagecoach Transp., Inc. v. Shuttle, Inc., 50 Mass. App. Ct. 812, 817 (2001).

133. *See* cases cited at PETER HAY ET AL., HORNBOOK ON CONFLICT OF LAWS 479 n.4 (4th ed. 2004).

134. A slightly different clause was considered in *Cambridge Biotech Corp. v. Pasteur Sanofi Diagnostics*, 433 Mass. 122 (2000). The provision at issue stated, "Should any controversy exist or arise under the present Agreement, it is herewith agreed that the parties shall bring it before the courts in the country of the respective defendant." This clause appears to require the party bringing suit always to sue in a court located in the other party's domicile. *Id.* at 124.

135. Inso Corp. v. Dekotec Handelsgees, mbH, 999 F.Supp.165, 166-67 (D. Mass. 1998).

136. Nat'l Equip. Rental v. Szukhent, 375 U.S. 311, 315-16 (1964).

137. For example,

> You expressly agree that exclusive jurisdiction for any claim or dispute with AOL relating in any way to your membership or your use of AOL resides in the court of Virginia and you further agree and expressly consent to the exercise of personal jurisdiction in the courts of Virginia in connection with any such dispute.

Williams v. America Online, Inc., No. 00-0962, 2001 WL 135825, at *1 (Mass. Super. Ct. Feb. 8, 2001); *see also* SimplexGrinnell LP v. Ranco El Eden, Inc., 2006 WL 1075464, at *1 n.2 (Mass. Super. Ct. Mar. 27, 2006) ("all claims as to lack of personal jurisdiction, and forum non-conveniens are hereby and expressly waived").

138. *See supra* Part II. C.

139. 983 F.2d 1110 (1st Cir. 1993).

140. *Id.* at 1121-22.

141. 419 Mass. 572, 575 (1995). Because the parties' contract contained a choice-of-law clause, the SJC applied California law to the question of the scope of the forum selection clause. *Id.* However, its discussion of the issue suggests that it would rule the same way if it were applying Massachusetts law.

142. *Id.* at 573.

143. *Id.* at 578.

144. *Id.* at 579.

145. *Id.*

plaintiff should not be allowed to vitiate the effect of a forum selection clause simply by alleging peripheral claims that fall outside its apparent scope."[146]

This holding suggests that a party seeking to avoid a forum selection clause should plead as many claims as possible that fall outside the apparent scope of the clause. Conversely, parties who want the clause to broadly control the dispute should draft them accordingly, to cover not only contractual claims, but all claims arising out of or relating in any way to the transaction between the parties.

E. Treatment of Forum Selection Clauses in Federal Court

The complexities mount when a party moves to dismiss based on a forum selection clause in federal court. In diversity cases, *Erie Railroad Co. v. Tompkins*[147] requires the federal court to apply state law on substantive matters, but does *Erie* require a federal court in a diversity case to apply state law with regard to the enforcement of forum selection clauses? The analysis of this issue is further complicated by 28 U.S.C. § 1404(a), which authorizes transfer of a case pending in a federal district court to another federal district "for the convenience of parties and witnesses, in the interest of justice."

The United States Supreme Court held in *Stewart Organization, Inc. v. Ricoh Corp.*[148] that federal diversity courts should look to the federal transfer statute (section 1404(a)), not state law, in deciding whether to transfer a case with a forum selection clause.[149] Under section 1404(a), the court should consider a number of interests in deciding whether to transfer, including the parties' convenience, the presence of a forum selection clause, as well as various public interest factors.[150] Thus, the state and federal courts in Massachusetts will not automatically treat forum selection clauses the same way; a case that would be dismissed based on the forum selection clause if brought in state court might not be dismissed or transferred, under the multi-faceted analysis required by *Ricoh*, in federal court.

However, if a forum selection clause calls for suit to be brought in the courts of another country, or in state court, section 1404(a) does not apply — it only applies to transfers to another federal district. It remains unclear whether, in cases to which section 1404(a) does not apply, *Erie Railroad Co.*[151] requires a federal court to treat forum selection clauses the same way as do Massachusetts courts.[152] Because the standard used by the Massachusetts courts closely tracks the federal approach under *M/S Bremen* and *Carnival Cruise Lines, Inc. v. Shute,*[153] it will seldom be necessary for the court to reach the complex issues posed by *Erie*.

F. The Combined Effect of a Forum Selection Clause and a Choice-of-Law Clause

Parties frequently include both a forum selection clause and a choice-of-law clause in their contracts. The combination of these two provisions makes it more likely that disputes between the parties will actually be decided under the law they have specified. The parties will almost always include a forum selection clause requiring actions to be brought in the courts of the state of the chosen law.[154] If the forum selection clause is enforced, litigation between the parties will be decided in the courts of the state whose law has been selected by the parties. If the parties have selected a state that generally enforces choice-of-law clauses, it is likely that the case will be litigated in the chosen forum and under the law the parties have chosen.

This can work in reverse as well, that is, selecting the substantive law of a particular state may enhance the likelihood that the forum selection clause will be honored by the courts of other states. The Massachusetts courts have held that, where the parties include both a choice-of-law clause and a forum selection clause in their agreement, the law of the chosen state will be used to determine the enforceability of the forum selection clause. In *Jacobson v. Mailboxes Etc. U.S.A., Inc.,*[155] the franchise agreement contained both a choice-of-law clause and a forum selection clause. The forum selection clause required that all actions to enforce the agreement be brought in San Diego.[156] When the franchisee brought suit in Massachusetts, the franchisor moved to dismiss based on the forum selection clause.[157] The trial court analyzed the question of the enforceability of the clause under Massachusetts law.[158] The SJC, however, held that that question must be determined *under California law*, because the parties had properly chosen California law in their choice-of-law clause.[159] This broad interpretation of the scope of the choice-of-law clause highlights the importance of analyzing carefully the issues the clause will govern.[160] It might seem self-evident that a Massachusetts court would apply Massachusetts law to decide the validity of a forum selection clause. However, under *Jacobson*, the court will evaluate the forum selection clause under the law of another state if that state has been chosen to govern the substantive issues in the case.

G. Procedure for Seeking Dismissal Based on a Forum Selection Clause

Parties seeking dismissal based on a forum selection clause might move to dismiss for improper venue, or lack of jurisdiction, for failure

146. *Id.*; *see also* Cambridge Biotech Co. v. Pasteur Sanofi Diagnostics, 433 Mass. 122, 130 n.7 (2000) (tort claims asserted in licensing case should be heard in forum selected by parties for disputes arising under their agreement).

147. 304 U.S. 64 (1938).

148. 487 U.S. 22 (1988).

149. *Id.* at 25-31.

150. *Id.*

151. 304 U.S. 64 (1938).

152. *See* Lambert v. Kysar, 983 F.2d 1110, 1117 n.10 (1st Cir. 1993) (noting circuit split on this issue); *see also* Royal Bed and Spring Co. v. Famossul Industria e Comercio de Moveis, Ltda., 906 F.2d 45, 49-52 (1st Cir. 1990).

153. M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972); Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585 (1991).

154. This is not always the case, however. In *Cambridge Biotech Corp. v. Pasteur Sanofi Diagnostics*, 433 Mass. 122 (2000), the clause called for suit to be brought in the courts of the defendant's country, but specified that Massachusetts law would apply to the interpretation of the agreement. *Id.* at 124.

155. 419 Mass. 572 (1995).

156. *Id.* at 573.

157. *Id.*

158. *Id.*

159. *Id.* at 575; *see also*, Lambert v. Kysar, 983 F.2d 1110, 1118 (1st Cir. 1993); Miami Sys. Corp. v. Justices of the Appellate Div., No. CV994495, 2000 WL 1273525, at *1 (Mass. Super. Ct. Mar. 23, 2000).

160. A superior court case takes this deference to the parties even further. *McAleer v. Certain Underwriters at Lloyd's*, No. Civ. A. 95-00116, 1996 WL 384248, at *1 (Mass. Super. Ct. June 12, 1996), involved an administrator's effort to reach and apply the proceeds of an insurance policy in a wrongful death case. The defendant moved to dismiss based on a forum selection clause in the insurance contract requiring any suits to be brought in the English courts. Judge Patrick Brady began his analysis by deciding what body of law should govern the underlying insurance transaction. He noted that, under the *Second Restatement*, a court may conclude that the parties "wish[ed] to have the law of a particular forum applied," even if they did not include a choice-of-law clause in the agreement. He concluded that the parties to the insurance contract intended English law to apply to their transaction. After concluding that the English courts would honor the clause, Judge Brady dismissed the case.

to state a claim or perhaps for *forum non conveniens*. The proper characterization may matter: if the motion challenges the venue, for example, it may be waived if it is not asserted at the outset of the case by pre-answer motion or in the answer to the complaint.[161]

Although motions based on forum selection clauses have sometimes been styled as motions under rule 12(b)(1) (challenging subject matter jurisdiction) or rule 12(b)(3)[162] (challenging venue) of the Massachusetts Rules of Civil Procedure, the court in *Jacobson* rejected the argument that enforcement of a forum selection clause involves jurisdiction or venue, holding instead:

> [T]his issue involves neither venue nor jurisdiction in the traditional sense. The trial court had jurisdiction of this case. Parties cannot deny jurisdiction by such an agreement. The question under forum selection clauses is whether an agreement of the parties as to where certain actions must be brought will be enforced in the circumstances. If so, the court will decline to exercise its undoubted jurisdiction in response to a voluntary choice of a different forum.[163]

Thus a motion to dismiss based on a forum selection clause is not subject to rules 12(g) and 12(h), which provide that certain objections are waived if not asserted by the time of pleading. While an objection based on the clause could be asserted by a pre-answer motion or be included in the answer (as was done in *Jacobson*), it is generally not waived under rule 12, and may be raised after pleading.

In *Casavant v. Norwegian Cruise Line, Ltd.*,[164] the Appeals Court held that a party seeking dismissal based on a forum selection clause should move to dismiss under rule 12(b)(6).[165] In *Lambert v. Kysar*, the First Circuit also held that a motion under Federal Rule of Civil Procedure 12(b)(6) is the proper procedure.[166] *Lambert*, like the *Jacobson* court, held that the clause "does not *divest* a court of jurisdiction or proper venue over a contractual dispute. Rather, a court ... is to consider whether it must, *in its discretion, decline* jurisdiction and defer to the selected forum."[167] In *Scafuri v. Lumenis Ltd.*,[168] the Appeals Court held that a motion to dismiss based on a forum selection clause "may be raised at any time in the proceedings before disposition on the merits."[169]

However, in *Scafuri*, the court recognized that a defendant might waive the forum selection clause by affirmative conduct in court before seeking dismissal. The court identified three factors as relevant to waiver: whether the party has taken any action inconsistent with waiving its right to dismissal, whether the "'litigation machinery' had been substantially invoked prior to the party's assertion of waiver, and whether the other party was affected, misled, or prejudiced by any delay in asserting the objection."[170] This suggests that, while the right to seek dismissal based on the clause is not automatically lost by raising it later in the case, the court may find that the moving party has acquiesced in the plaintiff's choice of forum, or delayed raising the objection to the plaintiff's prejudice.[171]

Dismissing claims under rule 12(b)(6) based on a forum selection clause may lead to problems when the plaintiff re-files in the state designated in the forum selection clause. Massachusetts courts generally treat a rule 12(b)(6) dismissal as an adjudication on the merits,[172] which bars a further action on the underlying claim.[173] Thus, when the litigant whose case is dismissed by a Massachusetts court re-files in the state designated by the forum selection clause, the defendant may argue that the Massachusetts action precludes a further action on the underlying claim. To avoid this argument, courts should specify in the dismissal order that it is not meant to preclude litigation in the court designated in the forum selection clause.[174] Even if the Massachusetts court fails to do so, the court in the designated forum should recognize that a dismissal on the basis of the forum selection clause is based on a procedural impediment to reaching the merits, and is not meant to bar litigation in the selected forum.[175]

IV. The Persistent Problem of Substance v. Procedure

A. The Substance v. Procedure Distinction Under the *First* and *Second Restatements*

Under traditional choice of law principles, a court would apply its own procedural rules, even though it chose to apply the substantive law of another state.[176] The *First Restatement* included some 35

161. Mass. R. Civ. P. 12(h). For a case holding that such clauses should be analyzed under Fed. R. Civ. P. 12(b)(3), see *Sucampo Pharmaceuticals Inc. v. Astellas Pharma Inc.*, 471 F.3d 544 (4th Cir. 2006).

162. *See, e.g.*, Miami Systems Corp. v. Justices of the Appellate Div., No. CV994495, 2000 WL 1273525, at *1 (Mass. Super. Ct. Mar. 23, 2000).

163. Jacobson v. Mailboxes Etc. U.S.A., Inc., 419 Mass. 572, 576 n.6 (1995). The United States Court of Appeals for the First Circuit has squarely rejected the argument that this objection can be waived under rule 12(g) and (h). Silva v. Encyclopedia Britannica Inc., 239 F.3d 385, 387-88 (1st Cir. 2001). However, the court was not applying Massachusetts law. The *Silva* court notes that some circuits view the objection as properly raised under rule 12(b)(3). *Id.* at 388 n.3.

164. 63 Mass. App. Ct. 785 (2005).

165. *Id.* at 789-90. In *Casavant*, however, the court held that the motion should have been treated as one for summary judgment, because the defendant had submitted evidentiary materials in support of the motion. *Id.* at 790-91.

166. 983 F.2d 1110, 1112 n.1 (1st Cir. 1993); *see also* LFC Lessors, Inc. v. Pacific Sewer Maintenance Corp., 739 F.2d 4, 7 (1st Cir. 1984).

167. *Lambert*, 983 F.2d at 1119 n.11.

168. No. 04-P-483, slip op. (Mass. App. Ct. Aug. 3, 2005).

169. *Id.* (quoting Silva v. Encyclopedia Britannica Inc., 239 F.3d 385, 388 (1st Cir. 2001). In *Kirby v. Miami Systems Corp.*, 1999 Mass. App. Div. 197 (1999), the court accepted the plaintiff's argument that the enforceability of a forum selection clause is "an affirmative contractual defense relative to which the defendant-employer has the burdens of proof and persuasion." *Id.* at 198.

170. *Scafuri*, No. 04-P-483, slip op. at 2.

171. In *Scafuri*, the court held that asserting a compulsory counterclaim did not waive the objection, where the defendants had asserted the objection from the beginning. *Id.* In *Jacobson*, the SJC held that depositions and other pretrial activities in the case did not waive the argument for dismissal based on the forum selection clause, where factual issues were relevant to its enforceability. Jacobson v. Mailboxes Etc. U.S.A., Inc., 419 Mass. 572, 576 n.6 (1995).

172. Mass. R. Civ. P. 41(b)(3) (providing that claims dismissed on defendant's motion, other than for lack of jurisdiction, improper venue, or failure to join party, operate as adjudication upon merits unless judge specifies otherwise).

173. *See* Mestek, Inc. v. United Pacific Ins. Co., 40 Mass. App. Ct. 729, 731 (1996) (stating dismissal on merits has res judicata effect).

174. Mass. R. Civ. P. 41(b)(3) provides that judges are authorized to specify that an adjudication is *not* on the merits.

175. Massachusetts courts have exhibited this flexibility in similar contexts. For example, in *Ahern v. Warner*, 16 Mass. App. Ct. 223 (1983), the defendant moved to dismiss under rules 12(b)(5) and (6) because the plaintiff failed to timely serve process. The trial judge allowed the motion to dismiss on those grounds. In deciding the case, the Appeals Court noted that the trial judge could, and should, have adjudicated the case under a separate rule for failure to prosecute the claim instead of rule 12(b)(6). Nonetheless, the court focused on the "[t]rue nature" of the motion and decided that even though the rule 12(b)(6) dismissal indicated that the case had been adjudicated on its merits, in fairness, it would not be treated so as to preclude litigation of the claim. *Id.* at 225 ("The liberality of the ... Rules is such that erroneous nomenclature does not prevent the court from recognizing the true nature of a motion.").

sections detailing what issues would be regarded as "procedural," so that the forum court would apply its own principles, even though it applied another state's substantive law to the case. Under the *First Restatement*, forum law governed issues such as the form of the action,[177] the proper party to bring an action,[178] methods of service, when an action is commenced,[179] proper methods of service of process,[180] matters of pleading and "conduct of proceedings in court,"[181] right to jury trial,[182] competency of witnesses,[183] evidence issues[184] and methods and limits on execution.[185]

During the *First Restatement* era, Massachusetts case law reflected the dichotomy between "substance" and "procedure" in choice of law: "It is elementary that the law of the place where the injury was received determines whether a right of action exists, and the law of the place where the action is brought regulates the remedy and its incidents, such as pleading, evidence and practice."[186] Based on this distinction, Massachusetts cases employed the *First Restatement* to apply Massachusetts law on the burden of proof, while coincidentally, they applied another state's tort law to the case.[187] Similarly, the court applied the Massachusetts standard for a directed verdict in a case based on New York tort law,[188] and applied its own law in determining whether *res ipsa loquitur* applied to a case based on New Jersey tort law.[189]

Section 122 of the *Second Restatement* provides that a court "usually applies its own local law rules prescribing how litigation shall be conducted" even if it applies the substantive law of another state.[190] Succeeding sections specify procedural issues that should be governed by forum law, including the proper court within the local court system to hear a claim,[191] the form of proceeding that may be brought to enforce a claim,[192] service and notice, [193] "pleading and conduct of proceedings,"[194] the right to jury trial,[195] and methods of enforcing a judgment.[196] For some "procedural" issues, however, the *Second Restatement* leaves the court discretion to look to the law of another state. For example, section 125 provides that forum law governs who may be parties, "unless the substantial rights and duties of the parties would be affected by the determination of this issue."[197] As an example, the commentary on this section states that forum law will not apply to determine whether parties are jointly liable in tort, but will be applied in determining whether they can be sued together in a single action.[198] Similarly, section 133 provides that forum law applies on the issue of burden of proof, "unless the primary purpose of the relevant rule of the state of the otherwise applicable law is to affect decision of the issue rather than to regulate the conduct of the trial."

Provisions like these reflect the underlying premise of modern conflicts doctrine, that choice of law should further the substantive policies underlying state laws. If the court recognizes that State A has adopted an otherwise "procedural" rule to further a substantive interest, a court that adopts the substantive law of State A to govern an issue may, for example, also adopt an associated burden of proof rule meant to further that interest. It is relevant, in this regard, whether the burden of proof rule is a general one, found in a procedural section of the state's statute, or a specific one tied to the substantive issue before the court. "A rule which singles out a relatively narrow issue from the general norm and gives it peculiar treatment may have been designed primarily to affect decision of the particular issue."[199]

B. The Likely Approach of Massachusetts Courts to the Procedure v. Substance Distinction

While Massachusetts is not formally a *Second Restatement* state, our courts have relied on it in solving choice-of-law problems.[200] Thus, while some cases continue to cite the proposition that "Massachusetts will apply its own law on procedural issues,"[201] Massachusetts courts will probably look to the *Second Restatement* provisions when confronted with issues that hover between substance and procedure.

Some state rules governing court process go beyond case management, and appear intended to further substantive state policy apart from litigation efficiency or fairness. In such cases, Massachusetts courts are likely to undertake a functional analysis under the *Second Restatement* to determine which state's law to apply, even though the issue might traditionally be classified as a "procedural" matter. For example, in *Commerce Insurance Co. v. Cameron*,[202] the right of an insurer to demand a release of the claim against its insured when it tendered the policy limits to a plaintiff raised a conflicts issue. While this practice is barred in Massachusetts, it is permitted in Connecticut. *Cameron* involved a Massachusetts insurer, a Connecticut accident victim and a Connecticut accident. Judge Francis Fecteau recognized that the practice might be characterized as a matter of procedure, but noted that "where it is not clear that a rule of law is procedural in the Commonwealth for choice-of-law purposes, we take a functional approach to determining the choice of law issue."[203] He characterized the release issue as "substantive"

176. Restatement of Conflict of Laws § 585 (1934).
177. *Id.* § 587.
178. *Id.* § 588.
179. *Id.* § 591.
180. *Id.* § 589.
181. *Id.* § 592.
182. *Id.* § 594.
183. *Id.* § 596.
184. *Id.* §§ 597, 598, 599.
185. *Id.* § 600.
186. Levy v. Steiger, 233 Mass. 600, 601 (1919); *see also* Gregory v. Maine Cent. R.R., 317 Mass. 636, 639-40 (1945).
187. *Levy*, 233 Mass. at 601.
188. Murphy v. Smith, 307 Mass. 64, 66 (1940).
189. Leventhal v. American Airlines, Inc., 347 Mass. 766, 767 (1964).
190. Restatement (Second) of Conflict of Laws § 122 (1971).
191. *Id.* § 123.
192. *Id.* §124.
193. *Id.* §126.
194. *Id.* §127.
195. *Id.* §129.
196. *Id.* §131.
197. *Id.* §125.
198. *Id.* §125.
199. *Id.* §133 cmt. b.
200. *See, e.g.*, Bushkin Assoc., Inc. v. Raytheon Co., 393 Mass. 622, 631 (1985).
201. Rhode Island Depositors' Econ. Prot. Corp. v. Katsarakes, No. CA942831, 1995 WL 808929, at *2 (Mass. Super. Ct. Jan. 31, 1995).
202. No. 970073, 1998 WL 1181687, at *1 (Mass. Super. Ct. Nov. 4, 1998).
203. *Id.*

and applied Connecticut law. Alternatively, he held that, under section 6(2) of the *Second Restatement*, Connecticut had "the more significant relationship to the facts at bar." Either way, its law should apply.

This characterization problem is most likely to arise with regard to evidence law. The *Second Restatement* provides that forum law generally governs admissibility of evidence,[204] but includes special provisions governing privileges,[205] parol evidence[206] and statutes of frauds.[207] These sections either specify that general choice of law principles for substantive issues will apply,[208] or, in the case of privilege, require consideration of the underlying policy for the privilege in deciding whether to apply forum law on a privilege issue or the law of another interested state.

Privileges present a classic example of issues that have both substantive and procedural aspects. In *MacIntosh v. Interface Group Massachusetts-Com, Inc.*,[209] a Massachusetts-bound airline passenger who was removed from a flight in Connecticut sued for libel. The defendant raised the defense that it had a privilege to communicate information concerning an alleged crime by the plaintiff to the police.[210] The judge, in analyzing the applicability of the privilege, properly looked to Connecticut law.[211] Here, the privilege is a substantive defense to a tort, not solely a matter of evidence, so the court appropriately applied the law of the state that would govern the elements of the libel claim.

A closer call on this issue is illustrated by *Commonwealth v. Fitzpatrick*.[212] In that case, E-ZPass transponder records from a New Hampshire toll booth were used in a Massachusetts prosecution.[213] Both states have statutes that arguably bar evidentiary use of such records, though the scope of the privilege to exclude them varies slightly under the two statutes.[214] Judge Thomas Billings suggested, *in dicta*, that the Massachusetts privilege statute would be applied, even though the toll transaction happened in New Hampshire.[215] He reasoned, in part, that this is a matter of procedure. He further suggested that, if the privilege issue is treated as substantive, the law of the place of the crime should apply, since that state has the more significant contacts with the case.[216] Under the *First Restatement*, a court would likely resolve this conflict by labeling the privilege issue "procedural" and looking to local law. Massachusetts courts today would likely look to the *Second Restatement* to resolve conflicts in this murky area, and focus on section 139(2), dealing with "privileged communications." That section provides:

> Evidence that is privileged under the local law of the state which has the most significant relationship with the communication but which is not privileged under the local law of the forum will be admitted unless there is some special reason why the forum policy favoring admission should not be given effect.[217]

In *Fitzpatrick*, the state with the "most significant relationship with the communication" at issue is probably New Hampshire, where the E-Z Pass transactions took place.[218] If correct, the court must then ask whether there is a "special reason" to look to the privilege law of the non-forum state, instead of applying local evidentiary law. Thus, if that state had an important policy protecting the communication, and the parties had relied on that policy, the interest balancing that follows likely would lead to application of the evidence law of the state where the communication took place. In this respect, section 139(2) suggests that forum privilege law will ordinarily apply, but gives the court flexibility in considering the policies underlying the privilege law of the interested states.

Commonwealth v. Miller[219] also considered a choice-of-law issue regarding admissibility of evidence. The defendant, who was arrested in New York, argued that his confession should be suppressed, since the Massachusetts police officers who interrogated him in New York did not comply with New York statutory procedures requiring presence of counsel to waive *Miranda* rights.[220] The *Miller* judge noted that courts ordinarily apply their own procedural rules, but went on to consider (without citing the *Second Restatement*) whether Massachusetts or New York had the most significant relationship to the prosecution.[221] Because he concluded that the Massachusetts contacts prevailed, he applied Massachusetts law on the validity of the *Miranda* waiver.[222] The judge also concluded that applying New York law would not further the statutory purposes of either state.[223] Here again, the court declined to solve the choice-of-law problem by simply labeling the issue procedural, analyzing instead the interests of each state in applying its law to the case.[224]

C. Choice-of-Law in Massachusetts Federal Courts in Diversity Cases

Every veteran of the first-year civil procedure course remembers that federal courts, in cases based on diversity jurisdiction, must apply state substantive law, not make up their own substantive law.[225] However, law school veterans will also recall that federal courts do not exactly mimic state law in every regard. They are generally free to apply their own procedural rules in diversity cases even though they look to state law on applicable rules of substantive law. Thus, federal courts must draw a divide between "procedure" and "substance," somewhat akin to the distinction just described in state law cases. However, this distinction, mandated by *Erie*, is analytically

204. Restatement (Second) of Conflict of Laws § 138 (1971).

205. Restatement (Second) of Conflict of Laws § 139 (1988 Revisions).

206. *Id.* For a Massachusetts case applying the parol evidence standards of the state that provided the governing substantive law in a contracts case, see *Metrics, Inc. v. Source Healthcare Analytics, Inc.*, No. 054791BLS1, 2006 WL 3201065, at *1 (Mass. Super. Ct. Sept. 5, 2006).

207. Restatement (Second) of Conflict of Laws § 587 (1971).

208. *See id.* § 140 (parol evidence).

209. No. 96-01321, 1999 WL 26914 (Mass. Super. Ct. Jan. 15, 1999).

210. *Id.* at *2.

211. *Id.* at *3.

212. No. 06-1036, 2008 WL 2357244 (Mass. Super. Ct. June 2, 2008).

213. *Id.* at *1.

214. *Id.* at *2.

215. *Id.* at *3.

216. *Id; see also* Commonwealth v. Gonzalez, No. CR-A2002-1445, 2004 WL 503959, at *1 (Mass. Super. Ct. Mar. 8, 2004) (applying Massachusetts law to determine admissibility of conversation between defendant in Massachusetts and another party in New Hampshire, recorded in New Hampshire).

217. Restatement (Second) of Conflict of Laws § 139(2) (1988 Revisions).

218. Note that section 139 focuses on the place of the communication, not the crime for which the defendant is being prosecuted.

219. No. 0177 CR 1169-001, 2002 WL 1489613 (Mass. Super. Ct. July 09, 2002).

220. *Id.* at *1.

221. *Id.* at *2-*3.

222. *Id.* at *3.

223. *Id.*

224. *Id.*

225. *See generally* Erie R.R. v. Tompkins, 304 U.S. 64 (1938).

different from that utilized by a state court deciding whether to apply local procedural rules to a case to which it applies another state's substantive law.

Oceans of academic and judicial ink have been spilled in elucidating the distinction between "substance" and "procedure" under *Erie*. This article does not permit a rehearsal of that commentary. Significantly, for choice-of-law purposes, the crucial point is that a federal district court sitting in Massachusetts must apply the same choice-of-law rules that would be applied if the case were pending in a Massachusetts state court. In *Klaxon Co. v. Stentor Manufacturing Co.*,[226] the Supreme Court held that, in order to assure uniformity of outcomes in diversity cases, federal courts should not only apply state substantive law in such cases, but must use the local choice-of-law rules to decide *which* state's substantive law to apply. If a Massachusetts state court, applying its own choice-of-law rules, would apply the substantive law of Delaware, the Massachusetts federal court should do so as well. If, however, under Massachusetts choice-of-law rules, the Massachusetts state court would apply Massachusetts law, a federal diversity court must follow that regimen.

Occasionally, there may be issues which require a double "procedure v. substance" analysis in a federal diversity case. An example is the statute of limitations. Under *Erie* analysis, statutes of limitations are regarded as substantive, so a federal diversity court must apply state law to determine whether a claim is barred.[227] However, a Massachusetts court facing a limitations issue in a case that has contacts with several states will apply section 142 of the *Second Restatement* to determine whether to apply the Massachusetts statute or look to another state.[228] Thus, while the issue is "substantive" for *Erie* purposes, so that *some* state's law must be applied, the Massachusetts court would do a "horizontal choice of law" analysis in deciding whether to apply its own limitations period or that of the other state. Thus, the federal court, after recognizing that it must look to state law on limitations, must echo the state court's horizontal choice of law analysis in deciding *which* state's limitations period applies. The crucial point is that *Erie* analysis and state choice-of-law analysis proceed from different premises, and should not be commingled.

Conclusion

As we urged at the conclusion of the first part of this article (but which bears repeating here), the SJC can take a step toward a more rational, predictable choice-of-law jurisprudence by explicitly adopting the *Second Restatement*, to the exclusion of any other methodology, for resolving conflict-of-laws issues. The court should specifically focus on applying the principles found in the topic and issue sections, in light of the basic policy factors in section 6(2), to determine the state of the most significant relationship to the issue.

Massachusetts decisions in cases involving choice-of-law clauses and limitations exemplify both how the *Second Restatement* should, and should not, be applied. In the context of limitations, the SJC's decision in *Nierman* is inconsistent with the *Second Restatement* and could potentially result in valid cases being dismissed. In the future, the SJC should focus its initial inquiry in statute of limitations cases on whether Massachusetts has any substantial interest in a case, as required by section 142. Only after determining the commonwealth does not have a substantial interest should the analysis turn to which jurisdiction has a more significant relationship to the claim. Although it was overturned, the Appeals Court's decision in *Nierman* was an example of the proper application of section 142.

By contrast, the courts have correctly used the *Second Restatement* in cases dealing with choice-of-law clauses. The case law in this area consistently applies each part of section 187, contributing to analytic consistency and enhancing predictability. Given the inherent complexity of choice-of-law problems, this may be the best that can be expected from a choice-of-law regime.

226. 313 U.S. 487 (1941).

227. *See* Walker v. Armco Steel Corp., 446 U.S. 740, 753 (1980).

228. *See supra* Part I. A.