648 (M.D. La. 1996) (Louisiana choice of law); In re Last Will & Testament of Palecki, 920 A.2d 413, 415 (Del. Ch. 2007); Martin v. Phillips, 347 P.3d 1033 (Kan. App. 2015); Arabie v. Citgo Petroleum Corp., 89 So. 3d 307 (La. 2012); State ex rel. Smith v. Early, 934 S.W.2d 655, 657 (Tenn. App. 1996); Stevenson v. Ford Motor Co., 608 S.W.3d 109 (Tex. Ct. App. 2020); Reddy Ice Corp. v. Travelers Lloyds Ins., 145 S.W.3d 337, 344 (Tex. Ct. App. 2004); Matter of Paternity of M.H., 383 P.3d 1031 (Wash. 2016).

3. *Comment e. Most appropriate law.* See Or. Rev. Stat. § 15.445 (identifying governing law as "the most appropriate").

4. *Comment f. Particular issue.* It is clear that the analysis of the Restatement of the Law Second, Conflict of Laws (AM. L. INST. 1971) proceeds issue by issue. See, e.g., P.V. ex rel. T.V. v. Camp Jaycee, 962 A.2d 453, 460 (N.J. 2008) ("The Second Restatement assessment takes place on an issue-by-issue basis."). The weight of authority to consider the question also holds that a separate analysis may be conducted for different defendants. See, e.g., Ginsberg ex rel. Ginsberg v. Quest Diagnostics, Inc., 117 A.3d 200, 229–230 & n.14 (N.J. Super. Ct. App. Div. 2015) (endorsing "the option of allowing a defendant-by-defendant approach to choice of law" and citing similar cases), aff'd, 227 N.J. 7 (2016). The same is true under New York law. See, e.g., Edwards v. Erie Coach Lines Co., 952 N.E.2d 1033, 1042 (N.Y. 2011). The Louisiana codification explicitly endorses a similar approach. See La. Civ. Code art. 3543, cmt. (i) (prescribing independent choice-of-law analysis for each of multiple victims); id. art. 3544, cmt. (b) (prescribing separate choice-of-law determination for multiple victims and/or tortfeasors).

For academic discussions of *dépeçage*, see, e.g., Willis L.M. Reese, *Dépeçage: A Common Phenomenon in Choice of Law*, 73 COLUM. L. REV. 58 (1973); Symeon C. Symeonides, *Issue-by-Issue Analysis and Dépeçage in Choice of Law: Cause and Effect*, 45 U. Tol. L. Rev. 751 (2014).

5. *Comment g. Limitation on dépeçage.* For discussions of severability analysis, see, e.g., Alaska Airlines, Inc. v. Brock, 480 U.S. 678 (1987); Mark L. Movsesian, *Severability in Statutes and Contracts*, 30 GA. L. REV. 41 (1995); John Copeland Nagle, *Severability*, 72 N.C. L. REV. 203 (1993); Robert L. Stern, *Separability and Separability Clauses in the Supreme Court*, 51 HARV. L. REV. 76 (1937).

For the idea of state rules inextricably bound up with party rights, see, e.g., Byrd v. Blue Ridge Rural Elec. Coop., Inc., 356 U.S. 525, 537–538 (1958).

Illustration 3 is based on Babcock v. Jackson, 191 N.E.2d 279 (N.Y. 1963).

§ 5.03. Manifestly More Appropriate Law

The law selected by the rules of this Restatement will not be used if a case presents exceptional and unaccounted-for circumstances that make the use of a different state's law manifestly more appropriate. In such cases, the court will select the manifestly more appropriate law.

Comment:

a. Exception to the rules. Most choice-of-law systems include exceptions designed to allow users to depart from their rules when following those rules would produce an inappropriate result. This Restatement authorizes such departure when two requirements are satisfied. First, the circumstances of a case must be exceptional and unaccounted-for. They must present factors not considered in the drafting of the otherwise-applicable Restatement rule ("unaccounted-for"), which are not present in the ordinary case governed by the rule ("exceptional"). Second, those factors must make selection of another state's law manifestly more appropriate.

b. Exceptional and unaccounted-for circumstances. Generally speaking, the rules of this Restatement have been drafted by balancing certain factors to identify the most appropriate law. The Sections that state those rules typically describe the factors. To invoke the exception of § 5.03, it is not enough that a court would have balanced the factors differently than this Restatement does. A case must present factors that were not considered in the drafting of the rules ("unaccounted for"), and that are not present in the ordinary case governed by the relevant rule ("exceptional").

For example, the connecting factors considered in resolving conflicts for the purposes of the tort rules of this Restatement are the place of conduct, the place of injury, and the parties' domicile. See Chapter 6, Introductory Note. If a connecting factor not considered in the drafting of the rules, such as a pre-existing relationship between the parties, is of overwhelming importance, that may justify invoking the exception. See Illustration 1. If the forum has no substantive policies at stake and all states with relevant contacts to the issue would clearly select the same state's law, the forum may deem that state's law manifestly more appropriate. See Illustration 2. Still other circumstances outside those considered in drafting the rule may make resort to the exception appropriate. See Illustration 3.

Illustrations:

1. A charity located in state X offers tours by car that originate and conclude in state X. Bettina, a domiciliary of state Y, resides for several months of the year in state X. While there, she signs up for one of the charity's tours. In state Z, the charity's car is involved in an accident and Bettina is injured. She sues for $11,000. State Z has a charitable-immunity statute that would bar recovery. State X has a similar charitable-immunity statute that limits recovery in such cases to $10,000. State Y does not recognize charitable immunity.

State X has a substantial interest in limiting the liability of the charity. State Y has a substantial interest in compensating its domiciliary Bettina according to its more generous law. State Z's interest in loss allocation between two non-state-Z domiciliaries is minimal by comparison. State Z's deterrent interest will not be undermined by the use of state X law. Despite the fact that § 6.xx selects state Z law, the case's additional contacts with state X make selection of its law manifestly more appropriate.

2. Agatha, a state X domiciliary, drives Betty, another state X domiciliary, into state Y, where they are involved in a car accident that injures Betty. State Y has a guest statute that would bar Betty's suit against Agatha; state X does not. Betty sues Agatha in state Z. State X and state Y both clearly follow a territorial approach to choice of law and would clearly select the law of state Y. State Z has no substantive policy at stake in the case. A state's approach to choice of law does not necessarily determine the scope of a state's law, but it does express state policies. Here, all states with relevant contacts to the issue clearly agree on a particular outcome. Despite the fact that § 6.06 selects state X law, the clear agreement between X and Y makes the use of state Y law manifestly more appropriate.

If, however, the choice-of-law approach of state X or state Y was hard to determine or both approaches did not clearly direct the use of state Y law, the Z court would apply the rule of § 6.06.

3. Anne, a State X domiciliary, and Brad, a State Y domiciliary, are driving together in State Z when they are involved in an accident. Anne sues Brad for $500,000. State X has a damages cap of $5,000, State Y a damages cap of $7,500, and State Z has no damages cap. Section 6.07 of this Restatement directs the selection of State Z law to govern the effect of the damages limitation. However, state Z's interest in the issue of loss-allocation among two parties not domiciled in state Z is minimal. State Z does have a significant deterrent interest in imposing liability, but if Anne and Brad were domiciled in the same state, or states with identical laws, § 6.06 would select that law. The similarity between the laws of the domiciliary states suggests that either State X or State Y law will be manifestly more appropriate under § 5.03.

c. Manifestly more appropriate. The rules of this Restatement are intended to provide significant guidance to courts in deciding cases and to parties in structuring transactions. They have been derived by balancing multiple and sometimes conflicting factors, but in most cases they

may be applied without explicit consideration of the factors that underlie them. There may be circumstances in which adherence to the rules would disregard a manifestly more appropriate result and, in such circumstances, they should not be followed.

Whether a result is manifestly more appropriate is to be determined by considering factors including the relevant policies of the forum and other interested states, the relative interests of those states in the particular issue—determined in light of the strength and relevance of the contacts between the states and the issue, and the protection of justified expectations. These "right answer" considerations determine whether a choice of law is sensible or arbitrary, and the exception should be used to avoid arbitrary outcomes.

The phrase "manifestly more appropriate" is intended to set a high bar for the invocation of the exception of § 5.03. The mere fact that a court balancing these factors might have reached a conclusion different from the one directed by this Restatement does not justify resort to the "manifestly more appropriate" exception. As noted in Comment *b*, a court must first find that the case presents circumstances not contemplated in the drafting of the otherwise-applicable rule. It must then find that those circumstances render the prescribed outcome clearly and substantially less appropriate. The prescribed outcome must be not merely erroneous, based on a balancing of relevant factors, but substantially so. The exception of § 5.03 is not intended for use in close or debatable cases. It is intended for unforeseen cases in which application of a rule produces a significantly arbitrary result.

d. Public policy. This Restatement draws a clear distinction between cases in which a foreign law is offensive to forum public policy and those in which selection of a law other than the one identified by this Restatement is manifestly more appropriate. That the law of the state selected by a rule of this Restatement is contrary to the public policy of the forum is not a justification for invoking the manifestly more appropriate exception of § 5.03. Public policy is sometimes used as an escape device in circumstances in which a traditional choice-of-law analysis would select the law of a state with a substantially weaker interest or less-significant relationship than the forum. See § 5.04. The rules of this Restatement were designed to avoid such arbitrary results and should generally succeed in doing so. In cases where they do not, the court should consider the manifestly more appropriate exception rather than public policy. For a discussion of when a forum may decline to enforce a particular foreign law, dismiss a case on grounds of public policy, or select forum law to promote forum policy, see § 5.04. For a discussion of when a forum may refuse to

recognize or enforce a foreign judgment on grounds of public policy, see §§ 4.xx (sister-State judgments) and 4.xx (foreign-country judgments).

REPORTERS' NOTES

1. *Comment b. Exceptional and unanticipated circumstances.* One example of an exceptional and unanticipated circumstance necessitating the use of a different law would be the selection of a state's law to govern an issue outside its scope. In Elson v. Defren, 726 N.Y.S.2d 407, 412–413 (N.Y. S. Ct., App. Div. 2001), the court noted that its ordinary choice-of-law rules selected a statute to govern an issue outside the statute's geographic scope. Recognizing that this would result in no regulation on the issue, the court selected a different state's law. That precise problem should not arise under this Restatement because this Restatement directs courts to identify relevant laws by determining their scope before selecting one. I*Elson* is an illustration of how far wrong the choice-of-law analysis would have to go before the exception became appropriate.

2. *Comment c. Manifestly more appropriate.* Most choice-of-law systems have escape devices that, explicitly or not, allow courts to avoid unreasonable results. For a discussion of such devices under the traditional territorial approach to choice of law, see, e.g., CLYDE SPILLENGER, PRINCIPLES OF CONFLICT OF LAWS 23–54 (2d ed. 2015). For a survey of escape clauses in codifications, see SYMEON C. SYMEONIDES, CODIFYING CHOICE OF LAW AROUND THE WORLD: AN INTERNATIONAL COMPARATIVE ANALYSIS 190–205 (2014). These escape clauses typically operate in comparative fashion; that is, they specify that a rule may be disregarded if it selects the law of a state whose connection to the case is minimal and some other state has a closer connection. The standard chosen here is intended to set a high bar for invoking the exception. It may be compared to the "manifestly unreasonable" standard used in various uniform laws, see, e.g., Revised Uniform Partnership Act § 103(b)(3)(i) (using standard to limit ability to vary duty of loyalty) and § 103(b)(5) (using standard to limit ability to vary obligation of good faith and fair dealing); Uniform Commercial Code § 1-302(b) (using standard to limit ability to alter duty of good faith and fair dealing) and § 4-103(a) (using standard to limit ability to alter bank's obligation of good faith and ordinary care); Model Bus. Corp. Act § 6.27(d)(3) (using standard to limit ability to restrict transfer of shares). It is not intended for use in close or debatable cases.

3. *Comment d. Public policy.* For examples of the public-policy exception being invoked as a substitute for a comparison of interests or relationships, see, e.g., Mertz v. Mertz, 3 N.E.2d 597 (N.Y. 1936) (refusing to recognize Connecticut interspousal tort immunity for two New Yorkers involved in a car accident in Connecticut); Paul v. National Life, 352 S.E.2d 550 (W. Va. 1986) (refusing to recognize Indiana guest statute for a car accident in Indiana involving two West Virginia domiciliaries). See generally Monrad G. Paulsen & Michael I. Sovern, *"Public Policy" in the Conflict of Laws*, 56 COLUM. L. REV. 969 (1956).