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CHOICE-OF-LAW IN CONTRACTS—SOME THOUGHTS ON THE WEINTRAUB APPROACH

Aaron D. Twerski*

Two score less three years ago Professor Beale brought to this country the First Restatement of Conflicts dedicated to two propositions. The first of these propositions was that the basic organizing principle in the conflict of laws was a "territorial" one.¹ The second was that "territorialism" rigidly dictated the result in every choice of law case since only the territory in which a given juridical event took place had the power to vest rights in the future parties litigant.² In his chapter on Contracts, Professor Weintraub has demonstrated that the rigid rules dictated by the vested-rights theory are untenable. He has indeed replaced them with a set of rules for the resolution of true conflict cases which appear to be both flexible operationally and substantively just.³ Yet, it seems to me, there are two major flaws in the Weintraub-Contracts chapter. First, he evades or avoids almost entirely the impact of territorial considerations on choice-of-law in Contracts. Second, he bases his solution to real conflicts on a wholly unexamined presumption of validation for contract-conflicts in an interstate setting.⁴ I find the first omission most serious since it does not come to grips with the most vexing philosophical problem which courts must face in deciding choice-of-law cases today—the problem of how to resolve a conflicts case in which overwhelming territorial contacts clash with interest analysis. I find the second omission crucial since Weintraub mounts a militant attack on the Second Restatement primarily on the grounds that it has not organized the solution to real conflicts cases around a validating principle. To do so on the basis of an unexamined premise requires considerable explanation. As a long time fan of Professor Weintraub's penetrating and incisive work in the field of conflicts, I offer these remarks with full expectation of sharp rebuttal and look forward with anticipation to his response.

The first half of Professor Weintraub's contracts chapter is dedicated to a searching examination of the myriad choice-of-law rules both of ancient vintage and of more modern stock which have been used by the

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¹ J. BEALE, CONFLICT OF LAWS §§ 5.2-3 (1935).

² J. BEALE, CONFLICT OF LAWS § 73 (1935).

³ R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 292 (1971) [hereinafter cited as COMMENTARY].

⁴ See *id.* at 284.

courts for resolving conflicts dealing with the validity of a contract. Weintraub hammers home the point that all of the available rules suffer a common weakness—they tend to impose a rule-oriented solution even though the conflict may analytically be a false one.⁵ On the other hand, in cases in which the conflict is real, the rules tend to be too narrow in their scope and thus fail to rationally resolve the policy conflicts.⁶ Professor Weintraub's position is crystal clear—in a situation where a real conflict does not exist, any choice-of-law rule that would impose a solution other than that of the only "interested" jurisdiction deserves outright condemnation.⁷ To hold otherwise would seem foolish in a "false conflict" case. I would suggest that Professor Weintraub can be accurately described as a "true believer" in the total validity of the interest-analysis approach. In fact, he does not purport to introduce rules for the resolution of choice-of-law problems until he is thoroughly convinced that the issue involves a "real conflict." He believes that if we look long enough and hard enough at the policies behind the supposedly conflicting rules we can come up with a "realistic" determination as to whether a real conflict exists.⁸ I am extremely skeptical about this pronouncement especially as it applies to the contracts area. In part, my skepticism arises from the failure of Professor Weintraub to check out his thesis against the hard cases in the field. I shall pose two such cases for consideration.

I. THE IMPACT OF TERRITORIAL CONSIDERATIONS ON CHOICE-OF-LAW IN CONTRACTS

The first case is a hypothetical variant of *Bernkrant v. Fowler*⁹ conjured up by Professor Cavers.¹⁰ In *Bernkrant* the California Supreme Court had in issue before it an oral contract to make a will which was negotiated in Nevada in favor of a Nevada plaintiff. The consideration for the promise to make the will was that the plaintiff refinance his obligation to the decedent and pay a substantial part of the indebtedness on a piece of Nevada land before the due date of the debt. In return the decedent promised forgiveness if there was any amount due

⁵ Sections 187 and 188 of the RESTATEMENT (SECOND) OF CONFLICT OF LAWS (1971) are heavily criticized by Professor Weintraub even though the rule-orientation is of a more flexible nature because he conceives the Restatement rule may operate even in a false conflict situation. When a true conflict exists Professor Weintraub offers his own choice-of-law rule to resolve the conflict. See COMMENTARY 292.

⁶ COMMENTARY 264-84.

⁷ See *id.* at 284.

⁸ *Id.* at 267.

⁹ 55 Cal. 2d 588, 360 P.2d 906, 12 Cal. Rptr. 266 (1961).

¹⁰ Cavers, *Oral Contract; To Provide By Will and the Choice-of-Law Process: Some Notes on Bernkrant*, in PERSPECTIVES OF LAW—ESSAYS FOR AUSTIN WAKEMAN SCOTT 38, 60 (R. POUND, E. GRISWOLD, & A. SUTHERLAND eds. 1964).

and owing at the time of his death. The decedent died domiciled in California, a state whose Statute of Frauds declares oral contracts to make a will invalid. The Nevada rule is to the contrary. Justice Traynor, in an opinion which will remain an all-time classic in the field of conflicts, decided that it was not the purpose of the California Statute of Frauds to reach a contract so heavily centered in Nevada.¹¹ Now for the hypothetical. Let us suppose that plaintiff is a Californian, and that the promise was made and the property was located in California. Furthermore, assume that the decedent was a California domiciliary at the time of the refinancing. If the decedent were to move to Nevada shortly before his death and die domiciled in Nevada, what kind of case would we have? If the purpose of the California statute is to protect estates of California decedents from depletion by fraudulent claims, then we have a "false conflict" case. Nevada is obviously willing to permit these kinds of oral-contract claims to be proven against the estates of its decedents. California should have no objection to its plaintiffs enforcing contracts against Nevada decedents. In fact, the argument would be that by enforcing the contract, California is giving effect to a subsidiary goal to validate contracts.

But does this case truly present a false conflict? Are we to say that with regard to a contract entered into in California by California domiciliaries concerning the refinancing of a mortgage on California land, California law has no claim to application? Surely only a scholar schooled in the nuances of "interest analysis" could reach such a conclusion. Yet, if we are not to make allowances for "territorial contacts" we are left with inadequate analytical tools to consider application of California law to an almost wholly domestic California contract.

What makes this hypothetical case all the more interesting for a Weintraub-type analysis is that if he were to find this case to be a true conflict, I am confident that under the rules he proposes for resolving true conflict cases Weintraub would resolve this case in favor of the defendant and against enforcement of the contract, thus achieving the same result that would obtain if territorial contacts were considered. This would be true because, although Weintraub proposes a validating presumption in true conflict cases, his rule mandates that where the policy differences between the validating rule and its opposing counterpart are considered to be basic in nature and where the parties would be "unfairly surprised" if the validating rule were applied, then a court should hold the contract invalid.¹² We are thus faced with a curious situation; if we could only make out a bona fide California interest we would invalidate the contract and find for the defendant. It is in this

¹¹ *Bernkrant v. Fowler*, 55 Cal. 2d 588, 596, 360 P.2d 906, 910, 12 Cal. Rptr. 266, 270 (1961).

¹² COMMENTARY 287, 292.

kind of situation that Professor Weintraub's choice-of-law rule would work against validation. Yet, traditional analysis will not give us a California interest. Admittedly, if we stretch we may find a California interest of some sort.¹³ But we dare not stretch since we have been admonished by Professor Weintraub to read California's interest "realistically" without imposing fanciful interests.¹⁴ It is strange that the very factors which Professor Weintraub claims are important in resolving a true conflict case in favor of California are unimportant unless and until we make out traditional "true conflict."¹⁵ On the other hand, to say that this almost totally domestic California contract is not part of California jurisprudence seems to me to be close to preposterous. I suggest that territorial considerations cannot be so lightly discarded. They are an integral part of the choice-of-law scene and will have their due without regard to our ability to create interests out of them.¹⁶ For all the Second Restatement's faults, it has retained a sense of balance.¹⁷ Interests are to be considered, but territorial considerations are discarded. The Restaters, unlike Professor Weintraub, have not boxed themselves into a corner. If contact counting is, as Professor Weintraub claims,¹⁸ antithetical to interest analysis, it provides some necessary antithesis to aid us in facing tough territorial cases.

My second illustrative case presents in the form of a true-to-life case the problem which I have raised in the form of a hypothetical. In *Intercontinental Planning, Ltd. v. Daystrom, Inc.*¹⁹ the New York Court of Appeals had to decide whether to apply the New York Statute of Frauds—which requires brokerage contracts to be in

¹³ Professor Cavers suggests that the California Statute of Frauds may be designed not merely to balk frauds and perjury after the testator's death but also to exert pressure upon people to put their testamentary promises in signed writings to discourage people from making plans on the strength of oral promises of this sort. Cavers, *supra* note 10, at 60. It is doubtful that this subsidiary interest would qualify under the Weintraub test as a realistic reading of statutory purpose.

¹⁴ COMMENTARY 242, 267.

¹⁵ Professor Weintraub may be facing the same problem which confronted Professor Cavers in the development of his Principles of Preference. Although Cavers first believed these Principles to be applicable only to the resolution of true conflict cases he later took the position that his Principles shed light on the presence or absence of a true conflict. See Cavers, *The Value of Principled Preferences, Symposium—Conflict of Laws Round Table*, 49 TEXAS L. REV. 211, 222 (1971).

¹⁶ See Twerski, *Enlightened Territorialism and Professor Cavers—The Pennsylvania Method*, 9 DUQUESNE L. REV. 373, 381-88 (1971).

¹⁷ See RESTATEMENT § 183.

¹⁸ COMMENTARY 243.

¹⁹ 24 N.Y.2d 372, 248 N.E.2d 576, 300 N.Y.S.2d 817 (1969).

writing—against a New York plaintiff in order to protect a New Jersey corporation, when the New Jersey statute would not afford its citizens such protection. The “center of gravity” of the contract was in New York, since all the negotiations and most of the significant territorial contacts took place there. Under traditional analysis, I would have supposed that this conflict was a false one; why should New York penalize its plaintiff and refuse to give effect to a subsidiary goal of enforcing contracts against a New Jersey corporation when its home state would not provide such protection?

The New York Court of Appeals went the other way and, in applying the New York Statute of Frauds found a false conflict in the opposite direction. The court reasoned that New York had an interest in attracting business to the state since it is the commercial center of the United States.²⁰ As such, it wanted businessmen to know that New York does not enforce oral brokerage contracts. This tour de force was completed by finding that New Jersey had no opposing interest if New York would give protection to New Jersey corporations against New York plaintiffs.²¹ Professor Weintraub has expressed concern about Restatement “contact counting,” I suggest that the tyranny of “interest manipulation” is a danger of equal magnitude. What happened in *Daystrom* is quite clear. The New York court could not utilize traditional interest analysis because such an approach disregarded the territorial aspects of the case. In lieu of facing the territorial problem directly, the court manipulated the interests. Again the Restatement, which Professor Weintraub so heavily criticizes, would resolve this case without too much difficulty by taking into account the interests, but also allowing for territorial contacts when they are so heavily weighted as they were in this case.

It seems clear that Professor Weintraub has in general treated the territorial dimensions in choice-of-law cases with a cavalier attitude. Although, the topic of my review is the contracts section of his book I cannot help but observe that in a subsection in his Torts chapter entitled “Rejection and Confusion,”²² Professor Weintraub condemns the majority in *Dym v. Gordon*²³ for its failure to understand what interest analysis is all about. He scores them for paying attention to contacts that are not interest-oriented.²⁴ I have no quarrel with Professor Weintraub for his disagreement with the majority in *Dym*; it is certainly his prerogative to differ with the brand of interest analysis which they had to offer. But, to criticize the *Dym* majority as being confused

²⁰ *Id.* at 383-84, 248 N.E.2d at 582, 300 N.Y.S.2d at 826-27.

²¹ *Id.* at 385, 248 N.E.2d at 584, 300 N.Y.S.2d at 828.

²² COMMENTARY 237.

²³ 16 N.Y.2d 120, 209 N.E.2d 792, 262 N.Y.S.2d 463 (1965).

²⁴ COMMENTARY 242.

about interest analysis seems to me unfair. That court, as Professor Cavers has demonstrated,²⁵ struggled as no other court has, with the very serious problem of territorialism. They were deeply concerned, as they well had the right to be, that the State of New York was about to make "a law to bind the whole country" in cases in which one party was a New Yorker. Subsequent cases have proven their concerns to be well founded.²⁶ Thus it seems to me that Professor Weintraub's refusal to consider the validity of territorial considerations in the contracts chapter reflects a bias quite strongly held.

II. THE PRESUMPTION OF VALIDITY FOR INTERSTATE CONTRACT-CONFLICTS

When it comes to the resolution of true conflict problems, Professor Weintraub suggests that in resolving a contract-validity conflict we begin our analysis with a rebuttable presumption of validity.²⁷ This presumption exists in large part because of the need to facilitate the planning of interstate commerce. Furthermore, a validating principle focuses on a policy that all states share—that of making commercial transactions convenient and reliable by enforcing them in the absence of compelling countervailing considerations articulated in a particular invalidating rule. I must admit that in this approach Professor Weintraub has a fair amount of company, but I profess to not understanding the proffered rationale for this presumption.

In attempting to analyze the reasons offered for the validating principle I note several interesting assumptions. The first and most important is that intrastate and interstate commerce in the United States are fundamentally different kinds of endeavors. If we assume that a state has a rule which invalidates a contract, why is it that the rule is presumptively not applicable in a conflicts situation? The need to facilitate commerce would seem every bit as important at the intrastate level as it is at the interstate level. If New York has an invalidating principle there appears to be no sound reason to assume that it is to be presumptively applied only for those minor business affairs which go on in the hamlet of New York and is not applicable to interstate business transactions in which New York residents are parties.

The second reason for the validating principle is even more puzzling. It may be true that all states share a desire to enforce contracts; but in the conflicts setting the states obviously part company with regard to a particular kind of contract. What Professor Weintraub implies in

²⁵ D. CAVERS, *THE CHOICE OF LAW PROCESS*, app. at 293-311 (1965).

²⁶ *Tjepkema v. Kenney*, 298 N.Y.S.2d 175 (Sup. Ct., App. Div., 1st Dept. 1969) (mem.).

²⁷ COMMENTARY 284.

his validating principle is that not all invalidating principles should be applied with equal fervor. He says so specifically—some contracts are invalidated because of matters of detail and these matters of detail should not be enough to invalidate an interstate contract.²⁸ As an example of this kind of situation Professor Weintraub points to the usury cases.²⁹ In fact, he lauds the Restatement³⁰ for establishing a presumption of validity in usury cases and laments the fact that this presumption was not made general policy for the entire contracts section.³¹ Well and good, let us talk about usury. Let me, if I may, relate a personal problem. Three years ago I purchased a home and included in the offer to purchase a standard subject-to-financing clause. I almost had to use it. The reason had nothing to do with my credit rating or character references. Pennsylvania at the time had a 6% ceiling on home mortgage interest rates and since the money market was tight, the banks found it wise to lend their money to corporate lenders seeking short term commercial loans which produced a higher rate of interest. Now, I should like to pose this question. How would Professor Weintraub respond to a New York lender who entered the Pennsylvania market and contracted for home mortgages at an 8% interest rate? If I have read him correctly he would enforce the contract against the charge of usury.³² His justification for such a result would be based upon the existing validating principle, strengthened by the fact, that the conflict between the policies of the two states was one of detail, and not a matter of basic importance. Funny thing is that the banks thought it was more than a mere detail—they turned off the spigot on home mortgage loans.³³ I believe that the point is clear. Any time a state decides to invalidate a contract where under similar facts another state would validate the selfsame contract, the difference between the policies of the two states must be considered basic in nature. If the difference isn't of basic importance, the state ought to send its legislators to their local psychiatrists for invalidating perfectly good business transactions.

²⁸ See *id.* at 287.

²⁹ *Id.*

³⁰ RESTATEMENT § 203.

³¹ COMMENTARY 274.

³² RESTATEMENT § 203, Comment c, Illustration 3, specifically covers this situation and opts for validation under the higher interest rate even though the negotiations took place in the state which had put a lower ceiling on interest rates. But for the validating principle the Restatement acknowledges that if the negotiation takes place in the borrower's home state he should be granted the protection of its laws.

³³ As an aside, next time any of my colleagues find out when the Federal Reserve will lower its discount rates by ¼% I would appreciate the tip on that insignificant matter of detail. I could make a killing on the stock market.

I believe that we all know what is behind the usury rule of the Restatement, and this same factor apparently underlies Professor Weintraub's validating principle. Most of the problems that arise in this area are a result of inert state legislatures and an inactive, unworkable system of federalism that permits states to resolve national problems. State usury laws oftentimes do not reflect realities. In the Pennsylvania home mortgage situation, the state legislature after considerable pressure recognized as a fact of life that it is the Chase Manhattan Bank in New York which dictates interest rates in the United States, and they changed the usury law to conform with that reality.³⁴ But why should we in the conflicts area provide an out for this type of inactive federalism? This seems to me out of our province. By focusing on concepts such as "commercial convenience" and "differences in detail," the rules proposed by Professor Weintraub appear to address themselves to this misdirected escape valve.

It does seem to me that Professor Weintraub's criticism of the Restatement as going "too far or not far enough"³⁵ in its utilization of the validating principle is hard to rebut. The Restatement has taken the rather odd position that when parties write a choice-of-law clause into the contract opting for law which would validate the contract it should be given effect if the state whose law was chosen has a substantial relationship to the parties or the transaction.³⁶ If in absence of a choice-of-law clause the Restatement will not recognize a validating principle, then I cannot see why writing a choice-of-law clause into the contract should help any. This rule granting the parties autonomy,³⁷ which almost automatically validates a contract based on the theory that party expectations are of prime importance, cannot be reconciled with the more balanced choice-of-law section of the Restatement which considers party expectations as only one of the factors to be considered in a choice-of-law problem.³⁸

III. CONCLUSION

My critique notwithstanding, I believe that Professor Weintraub's contracts chapter is a most successful one. He has laid bare the weaknesses of the rules which are presently competing for judicial acceptance, and has indicated that no single rule can in this complex area of the law accomplish just results. He has also made a valiant attempt to isolate the factors which courts do consider in their resolu-

³⁴ PA. STAT. ANN. tit. 41, § 3 (1971).

³⁵ COMMENTARY 273.

³⁶ RESTATEMENT § 187.

³⁷ See *id.*

³⁸ RESTATEMENT § 188.

tion of contract-conflicts cases and has woven these considerations into a fabric which provides a rational and flexible method of resolving tough choice-of-law problems. Both this chapter, and the book in its entirety, make for stimulating and exciting reading. Students of this mind-boggling area of the law have been served well indeed.