

Choice of Law Issues in the Nonprofit Arena

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Introduction

In contrast to judicial jurisdiction, which determines when a state's courts have the power to adjudicate a party's rights, legislative or regulatory jurisdiction goes to the question of whether a state's law can validly be applied to attach legal consequences to a party's acts. From this perspective, the choice of law question can be understood as two distinct subquestions. First, has a particular state *tried* to extend its law to attach consequences to some particular act? This subquestion might be answered by an explicit statutory or administrative statement about the scope of a law, or, in the absence of such a statement, it might be answered on the basis of the state's general approach to choice of law. The possible scope of state law is also limited by the Constitution, though not to a very significant degree. The second subquestion is what to do when two or more states have tried to attach different legal consequences to the same action--for example, when one state authorizes conduct another forbids. This sort of issue is the classic "conflict of laws," and a court will resolve it by applying the relevant choice-of-law methodology.

Charitable organizations need to be concerned about both of these questions. Pure scope questions arise when the charity conducts certain acts, notably solicitation, and wants to know what type and degree of activity will trigger registration or other

requirements under the law of a particular state. (These are scope questions, rather than conflict questions, because no other law is relevant--no state law purports to authorize a charitable organization *not* to register in another state.) This issue is particularly acute with respect to internet activity. Conflicts questions arise when the legal obligation imposed by one law is inconsistent with that imposed by another, or when one state's law authorizes conduct that another's forbids—where, for instance, a charity is required not simply to register but to adopt a particular corporate structure not required by the law of its state of incorporation.¹ They also arise in the areas in which all corporate entities active in more than one state face them—contracts, tort claims, and employment disputes that have connections to more than one state.

This paper will look at both types of questions, starting with the scope issues presented by charitable solicitation, moving on to attempts by states to regulate the structure of charities (and the relation of these attempts to the internal affairs doctrine), and last considering the classic choice-of-law problems of torts, contracts, and employment law.

I. Choice of Law in Charitable Solicitation

State regulation of charitable solicitation takes basically two forms. First, based on a certain *general* degree of connection between a charity and a state, which may take the form of solicitation or some other activity, states require charities to register or, less

¹ Less so in enforcement actions based on impermissible solicitation activity. You don't get choice of law analysis in actions brought by a state. Look at the cal case, and the ny gambling one.

frequently, to observe particular rules regarding their structure and nonsolicitation activity. Second, with reference to *specific* acts of solicitation, states regulate the form that such solicitations may take via anti-fraud and disclosure requirements, and they may bring enforcement actions against those who violate their laws. (As we will see, these two forms of regulation relate to the general and specific judicial jurisdiction we heard about earlier.) The key questions are, first, what activities will trigger these different assertions of legislative jurisdiction, and second, what are the substantive requirements the laws impose? I will discuss these questions in the context of three significant regulatory regimes: the one adopted by Pinellas County, the Charleston Principles approved by the National Association of State Charity Officials (“NASCO”), and the recently-enacted California Nonprofit Integrity Act. I will also say a little bit about the constitutional limits on assertions of legislative jurisdiction.

A. General Rules: The Charleston Principles

The Charleston Principles arose from a National Association of Attorneys General/NASCO conference in Charleston, South Carolina, in October 1999 and were approved by the NASCO Board as advisory guidelines on March 14, 2001. They deal with one of the more vexing choice-of-law issues: how to characterize and treat internet activity.

The internet famously confounds the traditional territorial organizing principles of choice of law. Locating speakers, listeners, and transactions becomes much more difficult when activity occurs on the Internet, and continuing technological evolution means that

distinctions that were useful at one point may become obsolete in a matter of years. (Indeed, the Charleston Principles are quite old by Internet time, and they include an acknowledgment that the Principles “are necessarily dynamic” and “may change as laws, technology, and business models change.”²)

The basic premise of the Principles is that state officials should require registration “of those charities over whom their state courts could constitutionally assert personal jurisdiction to enforce a registration requirement.”³ Enforcement actions, by contrast, can be brought against charitable organizations on the basis of specific acts of fraud or misuse of charitable funds which would not be sufficient to support a registration requirement under this analysis. That is, registration requirements are governed by something akin to a general personal jurisdiction analysis—the “minimum contacts” standard created by *International Shoe Co. v. Washington*⁴ and its progeny—while enforcement actions require only specific jurisdiction. They will be brought against “any entity whose Internet solicitations mislead or defraud persons physically located within a particular state, without regard to whether that entity is domiciled in the state or is required to register in that state.”⁵

The enforcement/specific jurisdiction analysis is not particularly complicated or difficult; it turns on the question of whether the victim of the fraud is physically located in the state. This is a question that is not complicated by the Internet and easy to answer.

² Charleston Principles 3.

³ Id. at I.D.

⁴ 326 U.S. 310 (1945).

⁵ Id. at II.

The difficult issue is the scope of the registration requirement/general jurisdiction analysis. The Principles use a framework that distinguishes between interactive and non-interactive websites. An interactive website allows a visitor to complete a transaction—to make a contribution or buy a product—entirely online. A non-interactive site does not. Non-interactive sites cannot bring an entity within the scope of a registration requirement unless the entity either “invites further offline activity to complete a contribution, or establishes other contacts with that state, such as sending email messages or other communications that promote the Web site.”⁶

If such other contacts exist, or if the website is interactive, registration requirements will apply if the entity either “specifically targets persons physically located in the state for solicitation” or receives contributions from the state through the website on a “repeated and ongoing” or a “substantial” basis.

The interactive/noninteractive distinction is drawn from cases about personal jurisdiction based on internet activity, cases such as *Cybersell, Inc., v. Cybersell, Inc.*⁷ and *Zippo Mfg. Co. v. Zippo Dot Com.*⁸ The “repeated and ongoing” or “substantial” requirements also echo personal jurisdiction themes, notably the “continuous and systematic” requirement of *Helicopteros Nacionales v. Hall.*⁹ Thus, in keeping with the general approach articulated in Part I of the Principles, Part III.B sets the scope of state registration requirements co-extensive with the personal jurisdiction of state courts.

⁶ III.B.c

⁷ 130 F.3d 414 (9th Cir. 1997).

⁸ 952 F.Supp. 1119 (W.D. Pa. 1997).

⁹ 466 U.S. 408 (1984). *Helicopteros* sets a standard for general jurisdiction, and it seems unlikely that the mere maintenance of a website, regardless how substantial the stream of contributions, could give a state general jurisdiction over a charitable organization. Enforcement of a registration requirement on the grounds that individuals within the state have been making donations, however, is probably better characterized as an example of the exercise of specific jurisdiction.

It remains to be seen whether the interactive/noninteractive distinction will remain relevant. As technology advances, it seems likely that all sites will become interactive, in which case courts might attach more importance to issues such as steps the website operator has taken either to solicit visitors from particular states or to screen visitors on the basis of their geographical location—something that technology may make relatively cheap and easy in the future, or may make increasingly difficult.

Setting legislative jurisdiction equivalent to personal jurisdiction might not be such a bad idea when you can have overlapping registration requirements without too much trouble. They don't conflict. From the conventional choice of law perspective, this would be very aggressive, but since there's no conflict, it's not so bad.

B. State Regulation: California Law

The Charleston Principles, the product of a dialogue between state officials and charitable organizations, explicitly recognize the need to balance state authority and regulatory burdens. The 2005 enactment of the California Nonprofit Integrity Act (the "NPIA")¹⁰ suggests that states may not pay close attention to the balance. Though California reportedly adheres to the Charleston Principles, the NPIA is quite aggressive, both in terms of its scope (the subject of this section) and in terms of its apparent intrusion into the internal affairs of organizations created under the laws of other states (the subject of Part II).

¹⁰ Sections 12580-12599 of the California Government Code.

The NPIA states that it “applies to all charitable corporations, unincorporated associations, trustees, and other legal entities holding property for charitable purposes, ... over which the state or the Attorney General has enforcement or supervisory power.”¹¹ The two elements--enforcement and supervisory power--presumably correspond to specific and general jurisdiction, but the use of the disjunctive “or” seems to suggest that *all* of the Act’s requirements apply to organizations over whom specific jurisdiction could be asserted. Similarly, Section 12582.1 of the Government Code defines a “charitable corporation” as “any nonprofit corporation organized under the laws of this State for charitable or eleemosynary purposes and any similar foreign corporation doing business or holding property in this State for such purposes.” The point of including such foreign corporations within the definition is presumably to bring them within the scope of the Act’s requirements, but using “holding property” as a sufficient criterion seems to set the scope of legislative jurisdiction equivalent to that of in rem jurisdiction. Thus, the broadest reading of the Act’s scope is that it applies to any charitable corporation over whom California courts could exert any type of jurisdiction.

The California Attorney General’s office, in a Frequently Asked Questions website link,¹² does little to allay concerns about broad application of the Act. FAQ number 1 is whether the NPA applies only to California-domiciled organizations. The answer invokes the “supervisory or enforcement” language of the statute and explains that the act applies to “all charities that solicit donations and conduct sales solicitations in California,” and also to “all foreign charitable corporations ... doing business or holding property in

¹¹ Cal. Gov’t Code § 12581.

¹² <http://ag.ca.gov/charities/faq.htm#charities-nonprofitintegrityact2004>

California for charitable purposes.”¹³ “Doing business” is explained as soliciting donations or any of a nonexhaustive list of other activities: “holding meetings of the board of directors or corporate members here, maintaining an office here, having officers or employees who perform work here, conducting charitable programs here, and/or maintaining financial accounts or investments at an office of a financial institution located here.”¹⁴

The California law seems to go beyond the Charleston principles for regulation based on internet activity in that it does not include the “repeated and ongoing” or “substantial” standards. And it is quite aggressive with regard to non-internet activity as well. A single act of solicitation is apparently enough to trigger a registration requirement, as is holding a corporate meeting or retreat or even, imaginably, maintaining a bank account—and these last are enough even in the absence of solicitation.¹⁵ However, given that California courts would not likely be able to assert personal jurisdiction to enforce a registration requirement based on isolated or minimal contacts, such enforcement actions should be rare.¹⁶ It is also possible, though unlikely, that constitutional constraints on legislative jurisdiction would prevent application of the NPIA in such circumstances. This issue is discussed in more detail in Section III.

¹³ Id.

¹⁴ Id.

¹⁵ One might think that a charitable organization maintaining a bank account is not necessarily holding property “for charitable purposes,” as the statute requires, but the Attorney General’s FAQs explicitly offer “maintaining financial accounts or investments” as a basis for the application of the NPA.

¹⁶ California courts could gain jurisdiction based on a defendant’s temporary presence in the state, see *Burnham v. Superior Court*, 495 U.S. 604 (1990), and state authorities might also seek forfeiture of assets located within the state, but see *Shaffer and Rush*.

C. Local Regulations: Pinellas County

Multiple state registration requirements can become burdensome,¹⁷ but far more alarming is the prospect of additional local requirements. Notoriously, Pinellas County adopted an unusually severe registration regime in 1993 and enforced it increasingly aggressively as the years passed. The county ordinance had a number of unusual features. It required registration by fundraising consultants--people or organizations who assisted charitable organizations but did not engage in solicitation themselves--if any charity they assisted solicited in Pinellas County, regardless of whether the consultants had any contacts with the County. And it required charitable organizations to provide an unusual amount of information about their structure, members, and activities.

In response to these requirements, some organizations stopped soliciting in Pinellas County, and some also sued. One challenge, brought in 1998, was based on a choice of law argument.¹⁸ It was brought by fundraising consultants who performed services such as providing solicitation scripts for charities but had no direct contacts with Pinellas County and no input into or awareness of where their scripts would be used. They argued that the Due Process Clause prevented Pinellas County from exercising legislative jurisdiction over them by applying its registration requirement.

The Eleventh Circuit noted that the due process test for permissible exercises of legislative jurisdiction is similar to the test for adjudicatory jurisdiction. The obvious

¹⁷ Fortunately, many states allow standard form registration.

¹⁸ See *American Charities for Reasonable Fundraising Regulation v. Pinellas County*, 32 F.Supp.2d 1308 (M.D. Fla. 1998); affirmed in part, vacated in part 221 F.3d 1211 (11th Cir. 2000), on remand 189 F.Supp.2d 1319 (M.D. Fla. 2001).

personal jurisdiction analog to the situation of the fundraising consultants would be that of an individual or organization who manufactures some product and releases it into the stream of commerce, with no definite idea as to where the actions of third parties will take it. In such cases, the splintered Supreme Court decision *Asahi Metal Industry Co. v. Superior Court*¹⁹ has generally been read to indicate, the manufacturer has not taken the necessary step of directing the product towards a particular state. Relying in part on *Asahi*, the Eleventh Circuit held this application of the registration requirement unconstitutional.²⁰

In a subsequent suit, filed in 2002, charities challenged the ordinance on First Amendment grounds, with some success.²¹ The district court found three constitutional problems. First, by allowing the director to promulgate forms requiring information beyond what the ordinance specified, the ordinance vested excessive discretion in the director. Second, by not providing a fixed time period after which charities could solicit even if their applications had not been acted upon, the ordinance allowed county official to impose indefinite delays. And third, the county had failed to show that its sliding scale of application fees was actually related to the costs of processing applications. However, the court rejected the arguments that had a choice-of-law aspect--that the registration requirement impermissibly burdened interstate commerce or violated the First Amendment because it largely duplicated requirements already in place at the state level.

¹⁹ 480 U.S. 102 (1987). The assertion that merely placing into the stream of commerce a product that eventually ends up in the forum is not enough to support personal jurisdiction is found in Part II.A of the opinion, which commanded the votes of only four Justices. Others supported different analyses of the stream of commerce issue, but lower courts have generally followed Part II.A.

²⁰ See *American Charities for Reasonable Fundraising Regulation v. Pinellas County*, 221 F.3d 1211, 1217 (11th Cir. 2000)

²¹ See *Public Citizen v. Pinellas County*, 321 F.Supp.2d 1275 (M.D. Fla. 2004).

Pinellas County did not appeal the district court decision. Instead, it appears to have responded by amending the ordinance to reduce the amount of disclosure required and to set tighter constraints on administrative discretion. An earlier amendment eliminated a section of the ordinance (Section 42-310) that had required charities receiving contributions from Pinellas County residents through the internet to register within thirty days or return the contribution. However, the current application form, which asks charities to indicate their method of solicitation, has a space for Internet solicitation, and thus the registration requirement does seem to apply to some Internet activity.

The lesson of the Pinellas County litigation is ultimately not an encouraging one for charities, at least from the choice of law perspective. While aspects of the ordinance were struck down, courts did not seem receptive either to pure choice-of-law arguments, except in the case of parties with no real connection to the County, or to substantive arguments based on the burdens of duplicative filing. If localities want to impose registration requirements on charities that solicit contributions from their residents, the example of Pinellas County suggests that they can.

D. Constitutional Limits

The constitutional limits on state choice of law derive largely from two constitutional provisions, the Due Process Clause and the Full Faith and Credit Clause. The Supreme Court has merged the requirements of the two clauses into a single test, which requires that a state have “a significant contact or significant aggregation of

contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair.” *Allstate Ins. Co. v. Hague*.²²

Despite the merger, the two clauses protect distinct values, which can still be discerned within the unitary test. Due process, by requiring certain contacts between the individual and the state, protects individuals against unfair surprise. Full faith and credit requires that the state whose law is to be applied have an interest--roughly put, that application of the law will serve its purpose.

In general, the *Allstate* test is fairly weak, and its application to solicitations and registration requirements is no exception. A state seeking to enforce an anti-fraud law regulating the form or content of solicitations will almost always have adequate contacts and an interest, each of which will be supplied by the noncompliant solicitation.²³

Registration requirements can also be applied based on acts of solicitation. The potentially unconstitutional exercises of legislative jurisdiction with respect to solicitation and registration would be things such as applying a registration requirement to a charity that does not solicit in the state, based on unrelated contacts such as the charity’s maintenance of a bank account or holding a corporate retreat in the state. In such cases, a charity would have a plausible argument that the contacts are so minimal as to make application of a registration requirement arbitrary and unfair, and also that the state has no cognizable interest in applying the requirement to an organization that does not solicit within the state.

²² 449 U.S. 302 (1981).

²³ The possible exception would be if a state defined solicitation to include the sort of internet activity that would not give rise to personal jurisdiction under the *Zippo* standard—that is, some isolated and unpredictable contact.

II. Choice of Law in Governance

A. The Internal Affairs Doctrine

In stark contrast to registration requirements, laws about the internal governance of charitable organizations present an example of a situation in which multiple applicable laws are quite likely not merely to cumulate but to conflict. Multiple laws may impose inconsistent requirements or, more likely, one law will authorize something another law forbids. To avoid such conflicts, the widely-accepted internal affairs doctrine provides that rights and obligations *among* members of a corporation--such matters as, for instance, the extent of fiduciary duties owed by directors to shareholders--are to be determined by the law of the state of incorporation.

The rationale for the internal affairs doctrine can be understood in two, related, ways. First, it could be understood as simply a choice made in the name of the standard choice-of-law values of uniformity and predictability: because it is more than usually important to have a single, identifiable law governing such questions, the law of the state of incorporation is selected. Second, we could understand the doctrine as recognizing the fact that participants in a corporate venture have, at least implicitly, *chosen* to have their rights and duties governed by the law under which the corporation is organized.

The key question is how to distinguish internal affairs from external affairs. Courts have not been entirely consistent on this question.²⁴ The conventional formulation

²⁴ For instance, a California court characterized inspection of a shareholder list as not an internal affair in *Valtz v. Penta Investment Corp.*, 139 Cal. App. 3d 803 (Cal. Ct. App. 1983).

characterizes internal matters as those that relate to “the relations inter se of the corporation, its shareholders, directors, officers, or agents.”²⁵ The Restatement, Second, of Conflict of Laws also offers a definition of paradigmatic “external” affairs: rights and liabilities with respect to a third person arising from a corporate act “of a sort that can likewise be done by an individual.” Moreover, even when a matter concededly falls within the internal affairs doctrine, courts have departed from it in some cases.²⁶

B. Charitable Investing

One area in which the internal affairs doctrine is generally followed is the regulation of the management, investment, and expenditure of charitable funds. The significance of the internal affairs doctrine in this area is also reduced by the substantial substantive uniformity among states. The Uniform Management of Institutional Funds Act (“UMIFA”) has been adopted by 48 states. Recent proposed revisions to the UMIFA culminated in the Uniform Prudent Management of Institutional Funds Act (“UPMIFA”), which has been approved by the National Conference of Commissioners on Uniform State Laws. If approved by the American Bar Association, the UPMIFA will soon be introduced in state legislatures. Patchwork acceptance could create substantive disuniformity, a possibility that should be monitored, but the broad acceptance of the internal affairs doctrine should keep conflicts problems to a minimum.

²⁵ Restatement, Second, of Conflict of Laws Section 302, comment a.

²⁶ For instance, a California court imposed California’s cumulative voting law on a Utah corporation, whose business was located in California and more than 50% of whose shareholders were California residents. See *Louisiana-Pacific Resources Inc.*, 138 Cal. App. 3d 216 (1982); see also, e.g., *Stephens v. National Distillers and Chemical Corp.*, 1996 U.S. Dist. Lexis 6915 (SDNY 1996) (declining to follow internal affairs doctrine to determine fiduciary standards to case with all relevant contacts in New York).

C. California Law

The California NPIA departs from the internal affairs doctrine in some striking ways. It imposes substantial internal governance and accounting requirements on charitable organizations that have gross revenues of \$2 million or more and are required to file a report with the Attorney General [does this mean register?].²⁷ The governance requirements include an audit requirement, an audit committee requirement, and a disclosure requirement related to the compensation of the President and the Chief Financial officer.

The audit requirement requires charitable corporations, unincorporated associations, charitable trusts, or individuals holding funds for charitable purposes²⁸ to prepare annual financial statements to be audited by an independent certified public accountant and made available for inspection by the Attorney General and members of the public. Charitable organizations with gross receipts of less than \$2 million that have audited financial statements must make their financial statements available for inspection by the Attorney General and available to the public in the same manner.²⁹

The audit committee requirement applies to charitable corporations, but not charitable trusts, unincorporated associations, or other unincorporated charities, with gross revenues of \$2 million or more that are required to file reports with the Attorney General. Such corporations are required to have an audit committee, all of whose

²⁷ Section 12586(e).

²⁸ But not religious corporations, educational institutions, hospitals, or healthcare service plans. See § 12583.

²⁹ Cal. Govt. Code § 12586(f).

members are independent, appointed by the Board of Directors.³⁰ The committee may include directors but not any corporate employees.³¹ If the corporation has a finance committee, members of that committee may not make up more than 50% of the audit committee, and the chair of the audit committee may not serve on the finance committee. The audit committee is required to recommend to the Board of Directors retention or termination of the independent auditor and to confer with the auditor and review the audit and other services of the auditing firm.

The compensation disclosure requirement applies to all charitable organizations subject to the NPA (even those not required to register or file reports) and requires the Board of Directors or an authorized committee to review and approve if “just and reasonable” the compensation and benefits of the President or Chief Executive Officer and the Treasurer or Chief Financial Officer upon hiring, extension or renewal of employment, and modification of compensation.³²

These requirements, at least the audit committee and compensation disclosure requirements, clearly regulate internal affairs. It is unlikely that they require conduct forbidden by the home law of a charitable organization, but quite likely that they forbid conduct authorized by such law--this will be the case any time the home law lacks such requirements. Application of the NPA to foreign charitable organizations will thus frequently depart from the internal affairs doctrine. Similar laws are apparently under consideration in Massachusetts and New York. The question thus arises whether the internal affairs doctrine can block such application.

³⁰ Cal. Govt. Code § 12586(e)(2).

³¹ Attorney General of California, FAQ number 13.

³² Cal. Govt. Code § 12586(g).

D. Enforcing the Internal Affairs Doctrine

The argument against application of such laws would be easiest if the internal affairs doctrine were constitutional in nature. Some courts have accepted this characterization. In 2005, the Delaware Supreme Court stated that application of the doctrine is “mandated by constitutional principles, except in the 'rarest situations.’”³³ Delaware, of course, is a state with a substantial stake in the internal affairs doctrine, but a recent California Court of Appeals decision endorsed the Delaware decision.³⁴

Given these decisions, an argument that the internal affairs doctrine has constitutional force is nonfrivolous and certainly worth making. However, I think it is unlikely that the U.S. Supreme Court would elevate it to the status of a constitutional rule overriding the general *Allstate* test. In consequence, the internal affairs doctrine will likely have constitutional bite only in cases in which application of a state’s law would also fail the *Allstate* test--cases in which the state has no interest.

That set of cases is not empty. As the Supreme Court stated in *Edgar v. MITE Corp.*, states have no distinct interest in regulating the internal affairs of foreign corporations. Application of a state’s law to such affairs must therefore be justified on some other ground, such as the protection of state residents. Some applications of the California law are probably unconstitutional from this perspective. For instance, application of the audit committee or compensation requirements to a charitable

³³ *VantagePoint Venture Partners 1996 v. Examen, Inc.*, 871 A. 2d 1108 (Del. Sup. Ct. 2005).

³⁴ See *Grosset v. Wenaas*, 2005 Cal. App. 2EX15 1643 (Oct. 20, 2005), citing the *VantagePoint* opinion favorably.

organization that does not solicit in California but merely owns property in the state or holds corporate retreats there does not serve any obvious California interest. For charities that do solicit in California, however, a California interest sufficient to meet the constitutional standard likely exists.

The other way in which the internal affairs doctrine might be enforced is through a conventional choice-of-law analysis. The Second Restatement, for instance, indicates that application of a corporation's home law to internal affairs is the correct result except in highly unusual cases. California follows an approach called comparative impairment, which directs courts to resolve conflicts by applying the law of the state whose policy would be most impaired if its law were not applied.

How comparative impairment analysis comes out with respect to organizations that solicit in California is not entirely clear. A court might well choose California law on the grounds that refusal to apply the NPA requirements would completely frustrate California's aims, while applying them would trench only marginally on the policies of a more permissive state of incorporation.³⁵ But a more serious problem with the choice-of-law argument is that in enforcement actions (state vs. private party), courts frequently skip the choice-of-law analysis entirely.³⁶

The rationale for this approach is not entirely clear. It may be that courts assume that the simple act of bringing an enforcement action represents a state's determination

³⁵ For instance, in *Kearney v. Salomon Smith Barney, Inc.*, 137 P.3d 914 (Cal. 2006), the California Supreme Court found that comparative impairment directed the application of a California law prohibiting the recording of telephone conversations without the consent of both parties (rather than Georgia's one-party-consent law) to a telephone call from Georgia to California.

³⁶ See *People v World Interactive Gaming Corp.*, 714 N.Y.S.2d 844 (N.Y. Sup. 1999)..

that its law governs, at least as to transactions within the statute's scope. In any event, the tendency to omit an explicit choice-of-law analysis makes it more likely that actions to enforce the NPA would end up being governed by California law.

III. Choice of Law in Other Areas

Though enforcement actions frequently skip choice-of-law analysis, such analysis does occur in cases involving only private parties. Charitable organizations need to be aware of choice-of-law issues in such cases for the same reasons as any organization or individual. This part will discuss the major approaches to choice of law and their application in three contexts: employment law, tort law, and commercial law.

There exist three main approaches to choice of law: territorialism (associated with the First Restatement of Conflict of Laws), interest analysis (associated with the scholar Brainerd Currie, and currently taking several different forms), and the methodology of the Second Restatement.

Territorialism, as the name implies, seeks to identify a jurisdiction with authority to regulate by geographically locating the relevant event. For tort cases, territorialism prescribes the law of the place where the tort occurred, and for contracts, the law of the place where the contract was formed. Subject to some exceptions, territorialism will apply the geographically-appropriate law to all issues in a case.

Interest analysis conceives of the choice-of-law problem in terms of state interests, or policies. It begins by considering the policies of the relevant state laws in light of the

facts of the particular case and asking whether application of those laws would promote those policies. If application of a state's law would promote the policies behind the law, the state is interested; if not, it is not interested. If only one state is interested, the solution is relatively clear: that state's law should be applied. (Such cases are called "false conflicts.") If more than one state is interested, the case presents a "true conflict," which must be resolved somehow. The different variations of interest analysis have arisen largely because different states have taken different approaches to the resolution of true conflicts. Some use territorial tiebreakers, while others, such as California, seek to evaluate the competing interests and break the tie on that basis.

The Second Restatement tells courts to consider each issue in a case separately and to resolve that issue according to the law of the state with the most significant relationship. To determine which state has the most significant relationship, the Second Restatement offers a grab-bag of factors: the needs of the interstate and international systems; the relevant policies of the forum; the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue; the protection of justified expectations; the basic policies underlying the particular field of law; certainty, predictability and uniformity of result; and ease in the determination and application of the law to be applied.³⁷ Because the Second Restatement does not instruct courts as to the relative significance of these factors, its application can be quite unpredictable.

³⁷ Restatement, Second, of the Conflict of Laws § 6.

A. Employment Law

Employment law cases that are contractual in nature will be governed by a contractual choice-of-law analysis. Most jurisdictions, and the Second Restatement, allow parties to choose the law applicable to a contract with few exceptions so long as the state whose law is chosen has some reasonable relation to the contract. The Second Restatement's exceptions arise when the contract is contrary to a fundamental policy of a state whose law would govern in the absence of a choice-of-law clause--a state with the most significant relationship to the relevant issue.³⁸ For instance, a contract for services illegal in the state where they are to be rendered cannot be saved by a choice-of-law clause.³⁹

Tort claims between employers and employees will generally be governed by a conventional tort analysis, the subject of the following section. Statutory employment law cases, such as discrimination, harassment or worker's compensation claims, generally do not involve a choice-of-law analysis because such statutes tend to specify their scope--they apply to employment relations formed within a state, for instance, or to employment performed there.

³⁸ Id. § 187.

³⁹ See, e.g., *Wood Bros. Homes, Inc. v. Walker Adjustment Bureau*, 601 P.2d 1369 (1979).

B. Tort Law

Under all choice-of-law approaches, the rules governing the question of whether a tort has been committed--such as the relevant standard of care and the existence of a cause of action--are generally drawn from the law of the state where the alleged tort occurred. (For cases where the elements of a tort are dispersed across state lines, territorialism locates the tort by focusing on the last event necessary to the cause of action, usually injury.) This is because even the approaches that focus on state interests tend to concede that the geographically-appropriate state has the dominant interest in prescribing standards of conduct within its borders.⁴⁰

With respect to laws that do not regulate conduct but instead allocate losses, however, interest analysis and the second restatement tend to give more weight to domiciliary connecting factors than to territorial ones. Perhaps most significant, charitable immunity is generally considered a loss-allocating rule. Thus, courts using interest analysis or the second restatement will sometimes give charities the benefit of immunity based on the law of their state of incorporation or principal place of business⁴¹ even if the law of the state where a tort occurred denies it. This will happen most frequently in cases where the tort victim is also domiciled in a state whose law recognizes charitable immunity (a “common domicile” case). In a “split domicile” case, where the tort victim resides in a no-

⁴⁰ Interest analysis and the second restatement may, however, allow individuals from a state that recognizes a given cause of action to pursue such claims against other individuals or entities whose domiciliary law also recognizes the cause of action even if the relevant events took place in a state whose law does not.

⁴¹ For choice of law purposes, a corporation is generally associated with the state where its principal place of business is located.

immunity state and is injured there, that state's law will generally prevail in a conflict with the law of a state that grants immunity.

C. Commercial Law

Recent revisions to the Uniform Commercial Code have changed its approach to choice of law in the direction of greater party autonomy. Most notably, current UCC § 1-301 allows (with few exceptions) parties to choose the law applicable to their transaction regardless of whether the state whose law is chosen has a relation to the transaction. The notable exception is that § 1-301 applies to business-to-business transactions. If one of the parties to the transaction is a consumer, the chosen law must be that of a state with a reasonable relation to the transaction. Additionally, choice of law may not deprive consumers of nonwaivable protections afforded by their home law, or, for sales transactions, by the law of the state in which the consumer makes the contract and takes delivery. Last, § 1-301 incorporates a restriction similar to that of the Second Restatement: for all transactions, a choice of law is invalid if application of the chosen law would be “contrary to a fundamental policy” of the state whose law would govern in the absence of a choice. In the absence of a choice by the parties, something that should be rare in well-planned transactions, the UCC directs courts to apply their ordinary choice-of-law rules.

The significance of new § 1-301 is hard to gauge because its adoption has thus far been relatively rare. Of the states that have adopted the new Article 1, a majority have

chosen to retain the wording of the older §1-105.⁴² § 1-105 authorized parties to choose only the law of states bearing a reasonable relation to the transaction, and in the absence of an effective choice directed courts to apply their UCC to transactions “bearing an appropriate relation to this state,” a test most commonly understood to incorporate the Second Restatement’s “most significant relationship” standard.⁴³

⁴² See Weintraub, *Commentary on the Conflict of Laws* 484 n.24 (5th ed. 2006).

⁴³ See, e.g., *In re Merritt Dredging Co.*, 839 F.2d 203 (4th Cir. 1988).