

10 Ways To Beat a Choice of Law Clause

CLE Live Quick Webcast

1:00 P.M. – 2:00 P.M., Jonathan L. Hilton

Hilton Parker LLC | www.hiltonparker.com

jhilton@hiltonparker.com

Introduction



A Thought to Get Started



- What's wrong with this choice of law provision?

"This Agreement shall be construed under the laws of Ohio."

Tip #1: Argue Party Conduct is at Issue, Not Interpretation

- Example: *McGuffin v. Deluca*, 2018 MSC 00096 (Mont. Cty. Probate Ct., Sep. 4, 2018)
- Trust provision at issue: "This Agreement shall be construed according to the laws of Ohio."
- Argument: The "meaning and effect" of the instrument's terms (**interpretation**) isn't the same thing as the law governing trust administration (**party conduct**).
- Trustee resided in Florida, so Florida law governed her conduct—despite Ohio choice of law provision.

What Should the Clause Have Said?

- “This Agreement shall be construed according to the laws of Ohio, and Ohio law will govern the administration of this Agreement and the conduct of all parties acting in relation to this Agreement. In any dispute relating to this Agreement, Ohio substantive law will apply to **all aspects of that dispute**, without regard to Ohio’s choice of law principles.”
- The Agreement could have added a forum selection clause to guarantee that all disputes were litigated in Ohio, too.



Tip #2: Use *Dépeçage*

- An Ohio court may use another state's laws for some aspects of a claim, but not others—a practice known as *dépeçage*.
 - *Estate of Sample v. Xenos Christian Fellowship, Inc.*, 2019-Ohio-5439, ¶ 26 (10th Dist. Ct. App.) (applying North Carolina's contributory negligence rules).
- When the defendant is out of state, Courts select that state's:
 - Punitive damages caps
 - Veil piercing and alter ego laws



Tip #3: Find a Controlling State Statute

- Example: For disputes among LLC members, the **state of formation** governs internal affairs. R.C. 1706.51(A).
- But is it possible to register the LLC in Ohio, but select another state's laws—like Delaware—to govern internal affairs?
 - *Maybe*, so long as there is a substantial relationship to the other state.



Tip #4: Argue Ohio's Law *is* to Apply Another State's Law

- Ohio's law *includes* its choice of law rules
 - These include concepts like *dépeçage*
- This trick is worth a shot if the clause doesn't say "without regard to its choice of law rules" or something similar



Tip #5: Boomerang Back with *Renvoi*

- Ohio applies its own choice of law rules if the dispute is filed here. *Pevets v. Crain Communs., Inc.*, 6th Dist. No. OT-10-023, 2011-Ohio-2700, ¶ 32.
- Ohio may select the laws of another state, for instance, Delaware
- But what if Delaware's law is to apply Ohio's law?
 - Enter the 19th-century European concept of *Renvoi*



***Renvoi* (cont'd)**



- One Ohio court has rejected *renvoi*
- But it made an exception for title to real estate.

Nolan v. Borger, 32 Ohio Op. 2d 255, 203 (Mont. Ct. Com. Pl. 1963)

Renvoi—A Real-Life Example

- Consider an insurance contract signed in Ohio governing reimbursement for a car crash in Kentucky
- In *Nixon v. Allstate Ins. Co.*, the E.D. Kentucky held that Kentucky's law required the application of Ohio insurance law. 818 F. Supp. 215, 217 (S.D. Ohio 1992)
- The case was then transferred to Ohio, where the S.D. Ohio applied Kentucky's choice of law once again—and Kentucky law required the application of Ohio law.
- "In the United States, unlike in Europe, Renvoi is used only once."



Avoiding *Renvoi*: Terminology

Courts use different terms

- **Whole law** = all laws, including a state's choice of law rules
- **Internal law, local law, or municipal law** = a state's substantive laws, not including any choice of law rules
- Example: "This Agreement is to be governed by the internal law, and not the laws of conflicts, of the State of Georgia."
 - Does this do the trick?

Avoiding *Renvoi*: An Example.

- “This Agreement, and all rights, remedies, liabilities, powers, duties, and obligations of the parties shall be governed by and enforced in accordance with the laws of the State of Delaware, as applied to contracts between Delaware residents, entered into and to be performed entirely within the State of Delaware, without regard to the conflict of laws principles thereof.”
- The author leaves no doubt that Delaware law applies to all aspects of a future dispute.

Tip #6: Move Quickly for Preliminary Relief



- Ohio courts have “some authority” to issue preliminary relief even when the parties have selected another forum. *Saucier v. Accent Energy Holdings, LLC*, 2011 Ohio Misc. LEXIS 152, at *2 (Franklin Ct. Com. Pl. Mar. 14, 2011)
- Moving quickly may allow you to score an initial victory before subtleties in choice of law issues are identified and researched

Tip #7: Claim Another Agreement Controls

Example from the Foreclosure World:
Even if the *mortgage* has a choice of law provision, the *promissory note* might not!

In Ohio, promissory notes are governed by the place of payment per § 195 of the Restatement (Second) of Conflicts of Law—potentially meaning the bank's headquarters or payment processor



Another Agreement (cont'd)



A common blunder:

Using Delaware law in your Operating Agreement, but Ohio law in your employment contracts with each individual officer and director.

Battle of the “Choice of Law” Provisions

- Can the Court knock out one of the agreements?
- Example: *Zayicek v. JG3 Holdings, L.L.C.*, 2021-Ohio-1816 (8th Dist. Ct. App.)
 - One party to the dispute had not signed the Operating Agreement, which had a Delaware choice of law provision
 - So, a more specific agreement side-agreement with an Ohio choice of law provision governed

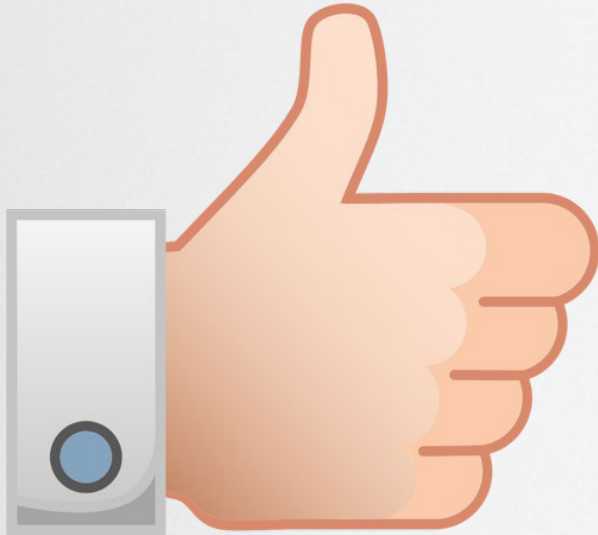


Battle of the “Choice of Law” Provisions (cont’d)

- Consider the scope of each agreement
- Do any of the agreements have a “merger clause” so that they stand alone, rather than being read with the other documents?
- Can the Court ignore the choice of law issue and rule on the merits—are the state laws “close enough”?
- Would one state’s whole law apply another state’s internal law?

Best Practice: Keep it Consistent

You want the Court to hold this:



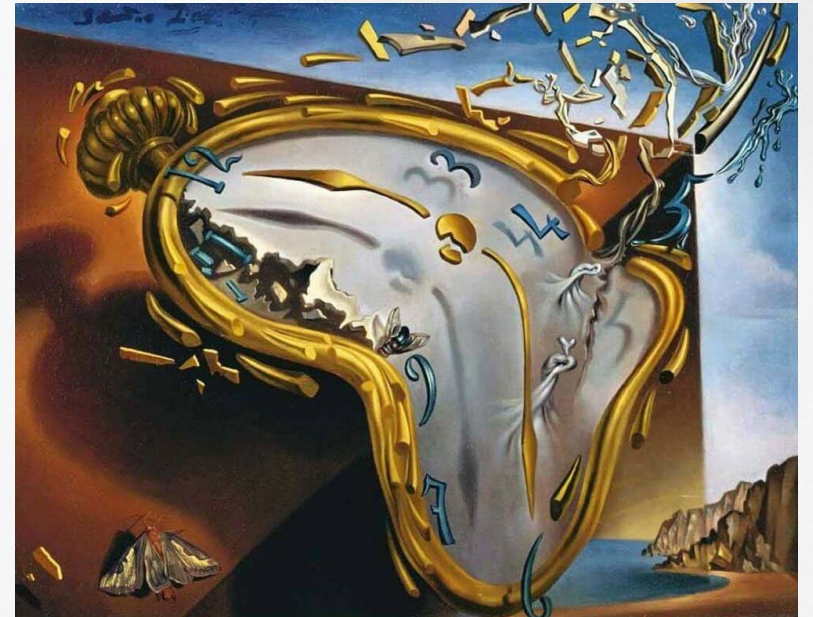
- “The parties included an Ohio choice of law provision in every agreement they drafted—the Employment Agreement, the Operating Agreement, and the Redemption Agreement. Accordingly, Ohio law governs this dispute.” *Innomark Communs., LLC v. Marth*, 2016 U.S. Dist. LEXIS 160357, at *10 (S.D. Ohio Nov. 18, 2016)
- If you *must* carve out something for another state’s law to apply, be specific about which document controls!

Tip #8: Go the “Substance vs. Procedure” Route

- Choice of Law rules select substantive rules—not “procedural” ones
- This issue almost always must be researched—every issue is different
- The Ohio Rules of Civil Procedure are typically “procedural”
- The presentation of evidence in court is typically “procedural”
 - But what about the parol evidence rule?
- Privilege issues: it depends
- Laws governing parties’ conduct are typically “substantive”

Special Rules: Statutes of Limitation

- Ohio follows the old common law rule that statutes of limitation are procedural
- Ohio will apply its closest statute of limitation to any dispute filed in Ohio court
- This is counterintuitive: SOLs are outcome-determinative
- Our borrowing statute, 2305.03, can only *shorten* the statute of limitation using another state's laws—it can't extend it



Statutes of Limitation (cont'd)

- Selecting another state's substantive law cannot extend the statute of limitations if the suit is filed in Ohio
- **Best practice:** to extend the statute of limitation, have the other side **expressly waive** any statute of limitation defense
- SOL is a waivable defense
- Tricky lawyering to shorten the SOL: If you want Ohio's SOL to apply rather than a longer SOL in another state, use a forum selection clause to require all suits to be brought here *exclusively*

Special Rules: Statutes of Repose



- Ohio treats statutes of repose as substantive
- At common law, SORs are treated as an element of the claim
- This means in some cases, Ohio's SOL could apply, but another state's SOR could also apply

Statutes of Repose (cont'd)

- If meeting an SOR is an element of the plaintiff's claim, can it be waived or tolled by agreement?
- Ohio cases usually treat SORs as affirmative defenses. *See Adams v. Durrani*, 183 N.E.3d 560, 578 (Ohio Ct. App. 2022) (med mal SOR defense waived by doctor when not raised at pretrial)
- But some decisions suggest SORs "may not be tolled." *In re Nat'l Century Fin. Enters.*, 541 F. Supp. 2d 986, 1008 (S.D. Ohio 2007)
- Courts in other states (like NY) have upheld tolling agreements that explicitly mention that they toll SORs.

Tip #9: Argue Unenforceability—the “No Substantial Relationship Test”

- Ohio recognizes choice of law provisions unless:
 - the chosen state has “no substantial relationship” to the parties or transaction



Tip #10: Public Policy: The “Fundamental Policy” of a “More-Related State”

- Ohio recognizes choice of law provisions unless:
 - Application of another state’s law would be contrary to the “fundamental policy” of a more-related state’s law
 - Do your research!
 - Usury laws *may* be a “fundamental policy,” but this is likely a fact-specific inquiry. *See In re Chari*, 2005 Bankr. LEXIS 2895, at *25 (Bankr. S.D. Ohio Sep. 2, 2005)



Putting it All Together: How to Draft a Solid Choice of Law Clause

- Select a state with a reasonable relationship to the contract
- Know if key provisions are against Ohio's (or another state's) "fundamental policy"
- Make sure the parties' conduct, remedies, and punitive damages are governed by the Choice of Law clause—not just interpretation of the contract
- If statutes of limitation are important, use a forum selection clause and mention SOLs specifically
- Use language to avoid *renvoi*
- Keep all your agreements among the parties consistent