

# **CONFLICT OF LAWS IN NORTH CAROLINA**

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## Choice of Law

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### I. CONTRACTS

#### A. The General Rule – Lex Loci Contractus

- a. North Carolina has long adhered to the rule that the law of **the place where the contract is executed** governs the contract. The fancy name for this concept is *lex loci contractus* (“the law of the place of the contract”).<sup>1</sup>

#### B. The Public Policy Exception

- a. This general rule notwithstanding, foreign law will not be given effect or enforced if opposed to the **settled public policy** of North Carolina.
- b. In order to render foreign law unenforceable as contrary to public policy, the courts have held that it must (1) violate some prevalent conception of good morals or fundamental principle of natural justice or (2) involve injustice to the people of North Carolina.
- c. This public policy exception has most commonly been applied in cases involving prohibited marriages, wagers, lotteries, racing, gaming, and the sale of liquor.<sup>2</sup>

#### C. Implied Intent Exception

- a. The North Carolina courts have also recognized that the **implied contrary intent** of the parties can rebut the *lex loci contractus* rule.
- b. In one case, the court concluded that the parties impliedly intended to apply North Carolina law to a separation agreement executed in Maryland based on (1) the caption of the agreement, and (2) the fact that the husband had signed the agreement before a notary, which was legally required in North Carolina but not in Maryland.<sup>3</sup>

#### D. Express Intent Exception

- a. North Carolina case law also stresses that the **express contrary intent** of the parties rebuts the *lex loci contractus* rule.
- b. This express contrary intent is most commonly manifested by a choice-of-law clause selecting the law of a given state.<sup>4</sup>
- c. In 2017, the N.C. General Assembly enacted a law—the Act to Validate Choice of North Carolina Law and Forum Provisions in Business Contracts—that requires North Carolina courts to enforce choice-of-law clauses selecting North Carolina in business contracts. A chart detailing how this law affects

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<sup>1</sup> Beal v. Coastal Carriers, Inc., 794 S.E.2d 882, 893 (N.C. Ct. App. 2016).

<sup>2</sup> Muchmore v. Trask, 192 N.C. App. 635, 639-40, 666 S.E.2d 667, 670 (2008).

<sup>3</sup> Morton v. Morton, 76 N.C. App. 295, 299, 332 S.E.2d 736, 739 (1985).

<sup>4</sup> Citibank, S.D., N.A. v. Palma, 184 N.C. App. 504, 509, 646 S.E.2d 635, 639 (2007).

the decision on whether to enforce a choice-of-law clause is attached as an appendix.

E. The Insurance Contract Exception

- a. The North Carolina Supreme Court has also recognized an exception to the general rule of *lex loci contractus* in the context of **insurance contracts**.
- b. In construing N.C.G.S. § 58-3-1, the court has held that where a close connection exists between North Carolina and the interests insured by an insurance policy, the law of North Carolina should be applied regardless of where the contract was made.
- c. In determining whether a close connection exists under this test, the courts have held that the mere fact that the insured property (e.g., a car) was located in North Carolina at the time of an accident is not enough.<sup>5</sup>

F. The UCC Exception

- a. The Uniform Commercial Code in North Carolina provides that North Carolina law “applies to transactions bearing an **appropriate relation** to this State.”<sup>6</sup>
- b. In light of this statutory directive, the North Carolina Supreme Court has held that it is appropriate to apply the “most significant relationship” test from the Second Restatement of Conflict of Laws to determine the law governing UCC claims.<sup>7</sup>

II. TORTS

A. The General Rule – Lex Loci Delicti

- a. North Carolina has long adhered to the rule that the law of **the place where the injury occurred** governs resolution of the substantive issues in a tort claim. The fancy name for this concept is *lex loci delicti* (“the law of the place of the wrong”).
- b. When the injury giving rise to a negligence or strict liability claim occurs in a state other than North Carolina, the law of that state governs.<sup>8</sup>

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<sup>5</sup> Fortune Ins. Co. v. Owens, 351 N.C. 424, 428-29, 526 S.E.2d 463, 466 (2000) (construing N.C.G.S. § 58-3-1). *But see* Beal v. Coastal Carriers, Inc., 794 S.E.2d 882, 893 (N.C. Ct. App. 2016) (applying *lex loci contractus* rule to insurance contract while making no reference to this exception).

<sup>6</sup> N.C. Gen. Stat. § 25-1-105(1).

<sup>7</sup> Boudreau v. Baughman, 322 N.C. 331, 338, 368 S.E.2d 849, 855 (1988); *see also* Bernick v. Jurden, 306 N.C. 435, 442, 293 S.E.2d 405, 410 (1982); Terry v. Pullman Trailmobile, Div. of Pullman, Inc., 92 N.C. App. 687, 692-93, 376 S.E.2d 47, 50 (1989).

<sup>8</sup> Mosqueda v. Mosqueda, 218 N.C. App. 142, 148, 721 S.E.2d 755, 759 (2012).

## B. Tangible Harms

- a. The state **where the injury occurred** is considered the situs for purposes of tangible harms.
- b. *Example: Negligence in operating a motor vehicle.* The car accident occurred in Calhoun County, Alabama. The plaintiff's injuries were therefore suffered in Alabama. The court applied Alabama law to resolve the negligence claims brought by the passenger against the driver.<sup>9</sup>

## C. Intangible Harms

- a. The state **where the injury occurred** is considered the situs for purposes of intangible harms. It is not always clear, however, where an "injury" has occurred where no physical harm is suffered by the plaintiff.
- b. When a plaintiff has suffered its pecuniary loss in a particular state, the *lex loci* test requires application of the law of the state where the plaintiff has actually suffered the loss irrespective of that plaintiff's residence or principal place of business. The location of a plaintiff's residence or place of business may only be used to determine the place of the injury in those rare cases where, even after a rigorous analysis, the place of injury is difficult or impossible to discern.<sup>10</sup>
- c. *Example: Unfair or deceptive trade practices.* A defendant was alleged to have committed an unfair trade practice by falsely representing that it had a buyer who would pay \$150k for a plane in Norfolk, Virginia. The plane was subsequently sold in Richmond, Virginia, for only \$55k. The plaintiff was headquartered in North Carolina. The court reasoned that the last act giving rise to the plaintiff's claim occurred in Virginia because no actionable injury occurred until the plane was sold below the promised price in Virginia. Virginia law therefore governed even though the plaintiff was based in North Carolina.<sup>11</sup>
- d. *Example: Negligent misrepresentation.* A defendant was alleged to have negligently misrepresented that its financial statements had been audited. The plaintiff was headquartered in Illinois. The defendant was based in Pennsylvania. After reviewing all the facts, however, the court concluded that the place of injury was North Carolina because the plaintiff's funds were located in North Carolina at the time they were seized and that this seizure was the last act giving rise to the plaintiff's claim. North Carolina law therefore governed the claim even though the plaintiff was based in Illinois.<sup>12</sup>

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<sup>9</sup> Mosqueda v. Mosqueda, 218 N.C. App. 142, 148, 721 S.E.2d 755, 759 (2012); see also Hensley v. Nat'l Freight Transp., Inc., 193 N.C. App. 561, 563, 668 S.E.2d 349, 351 (2008); GBYE v. GBYE, 130 N.C. App. 585, 585-86, 503 S.E.2d 434, 434-35 (1998); Lormic Dev. Corp. v. N. Am. Roofing Co., 95 N.C. App. 705, 711, 383 S.E.2d 694, 697 (1989).

<sup>10</sup> Harco Nat'l Ins. Co. v. Grant Thornton LLP, 206 N.C. App. 687, 697, 698 S.E.2d 719, 726 (2010)

<sup>11</sup> United Va. Bank v. Air-Lift Assocs., 79 N.C. App. 315, 321-22, 339 S.E.2d 90, 94 (1986); see also Lloyd v. Carnation Co., 61 N.C. App. 381, 387-88, 301 S.E.2d 414, 418 (1983).

<sup>12</sup> Harco Nat'l Ins. Co. v. Grant Thornton LLP, 206 N.C. App. 687, 698, 698 S.E.2d 719, 726 (2010).

#### D. The Public Policy Exception

- a. The general rule of *lex loci delicti* notwithstanding, foreign law will not be given effect or enforced if opposed to the **settled public policy** of North Carolina.
- b. To render foreign law unenforceable as contrary to public policy, it must either (1) violate some prevalent conception of good morals or fundamental principle of natural justice or (2) involve injustice to the people of North Carolina.<sup>13</sup>
- c. *Example: Workers' compensation.* The North Carolina Supreme Court has invoked the public policy exception to hold that the rule of *lex loci delicti* does not apply when dealing with conflicting workers' compensation laws.<sup>14</sup>

### III. SUBSTANCE VS. PROCEDURE

#### A. The General Rule

- a. Matters affecting the substantial rights of the parties are determined by the law of the **situs of the claim**.
- b. Remedial or procedural rights, by contrast, are determined by the law of the **forum**.<sup>15</sup>
- c. *Example: Statutes of limitations.* The plaintiff and the defendant jointly owned a parcel of property located in Virginia. The plaintiff sued the defendant in North Carolina in an attempt to collect unpaid property taxes.<sup>16</sup> The court applied the substantive law of Virginia to the plaintiff's underlying claims. However, it applied the North Carolina statute of limitations to conclude that the claim was timely. In reaching this outcome, the court reasoned that statutes of limitations are procedural and that procedural issues are always governed by the law of the forum.

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<sup>13</sup> Mosqueda v. Mosqueda, 218 N.C. App. 142, 148, 721 S.E.2d 755, 759 (2012).

<sup>14</sup> Braxton v. Anco Elec., Inc., 100 N.C. App. 635, 638-39, 397 S.E.2d 640, 642 (1990).

<sup>15</sup> Mosqueda v. Mosqueda, 218 N.C. App. 142, 148, 721 S.E.2d 755, 759 (2012).

<sup>16</sup> Martin Marietta Materials, Inc. v. Bondhu, LLC, 772 S.E.2d 143, 146 (N.C. Ct. App. 2015).

## Enforcement of Judgments

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### I. ENFORCING A JUDGMENT RENDERED BY ANOTHER U.S. STATE

#### A. The General Rule

- a. When another U.S. state has rendered a final money judgment (other than a judgment for child support) entitled to full faith and credit under the U.S. Constitution, the judgment creditor may seek to enforce that judgment by filing it in the office of the clerk of superior court of any North Carolina county in which the judgment debtor resides, or owns real or personal property.<sup>17</sup>
- b. The filing shall include the foreign judgment and an affidavit which states that that judgment is final and unsatisfied and sets forth the amount remaining unpaid.<sup>18</sup>
- c. Thereafter, notice of the filing must be served upon the judgment debtor. The notice must set forth the name and address of the judgment creditor, the name and address of his attorney if any, and the name and address of the clerk's office in which the foreign judgment is filed. The notice must also state that the judgment debtor has 30 days from the date of receipt of the notice to seek relief from the enforcement of the judgment and that if the judgment is not satisfied and no such relief is sought within that 30 days, the judgment will be enforced in this State in the same manner as any judgment of this State.<sup>19</sup>

#### B. Grounds for Non-Enforcement

- a. The judgment debtor may defend against the enforcement action by showing that (1) the foreign judgment has been appealed or the time for taking an appeal has not yet expired, (2) enforcement of the foreign judgment has been stayed by the rendering court, or (3) there exists some other grounds for relief that would be available if the judgment were a North Carolina judgment.<sup>20</sup>

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<sup>17</sup> N.C.G.S. § 1C-1703.

<sup>18</sup> *Id.*

<sup>19</sup> N.C.G.S. § 1C-1704.

<sup>20</sup> N.C.G.S. § 1C-1705.

## II. ENFORCING A JUDGMENT RENDERED BY FOREIGN COUNTRY

### A. The General Rule

- a. When a court in a foreign country has rendered a money judgment (other than a judgment for taxes, fines, penalties, alimony, child support, or maintenance), that judgment shall generally be recognized and enforced by a North Carolina court so long as it is final, conclusive, and enforceable under the law of the foreign country where it was rendered.

### B. Mandatory Grounds for Non-Enforcement

- a. A North Carolina court **shall not** enforce a foreign-country judgment if:
  - i. the judgment was rendered under a judicial system that, taken as a whole, does not provide impartial tribunals or procedures compatible with the requirements of due process of law;
  - ii. the foreign court did not have personal jurisdiction over the defendant;<sup>21</sup>
  - iii. if the foreign court did not have jurisdiction over the subject matter;  
or
  - iv. the judgment was obtained by a foreign government entity to compensate for the expenditure of public funds for government programs.<sup>22</sup>
- b. A party resisting recognition of a foreign-country judgment has the burden of establishing that one of the grounds for non-enforcement listed above exists.<sup>23</sup>

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<sup>21</sup> A foreign-country judgment shall not be refused recognition for lack of personal jurisdiction if any of the following exist: (1) the defendant was served with process personally in the foreign country; (2) the defendant voluntarily appeared in the proceeding, other than for the purpose of protecting property seized or threatened with seizure in the proceeding or of contesting the jurisdiction of the court over the defendant; (3) the defendant, before the commencement of the proceeding, had agreed to submit to the jurisdiction of the foreign court with respect to the subject matter involved; (4) the defendant was domiciled in the foreign country when the proceeding was instituted or was a corporation or other form of business organization that had its principal place of business in, or was organized under the laws of, the foreign country; (5) the defendant had a business office in the foreign country and the proceeding in the foreign court involved a cause of action or claim for relief arising out of business done by the defendant through that office in the foreign country; (6) the defendant operated a motor vehicle or airplane in the foreign country and the proceeding involved a cause of action or claim for relief arising out of that operation; or (7) there was any other basis for personal jurisdiction that would be consistent with the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution. N.C.G.S. § 1C-1854.

<sup>22</sup> N.C.G.S. § 1C-1853(b).

<sup>23</sup> N.C.G.S. § 1C-1853(f).

C. Discretionary Grounds for Non-Enforcement

- a. If a North Carolina court finds that any of the following exist with respect to a foreign-country judgment for which recognition is sought, recognition of the judgment **shall be denied unless the court determines, as a matter of law, that recognition would nevertheless be reasonable under the circumstances:**
- i. the defendant in the proceeding in the foreign court did not receive notice of the proceeding in sufficient time to enable the defendant to defend;
  - ii. the judgment was obtained by fraud that deprived the losing party of an adequate opportunity to present its case;
  - iii. the judgment, or the cause of action or claim for relief on which the judgment is based, is repugnant to the public policy of North Carolina or of the United States;
  - iv. the proceeding in the foreign court was contrary to an agreement between the parties under which the dispute in question was to be determined otherwise than by proceedings in that foreign court;
  - v. in the case of jurisdiction based only on personal service, the foreign court was a seriously inconvenient forum for the trial of the action;
  - vi. the judgment was rendered in circumstances that raise substantial doubt about the integrity of the rendering court with respect to the judgment;
  - vii. the specific proceeding in the foreign court leading to the judgment was fundamentally unfair; or
  - viii. the judgment is based on a foreign statute or rule of law which, as applied by the foreign court, would have been contrary to either the United States Constitution or the North Carolina Constitution had it been applied by a court in North Carolina.<sup>24</sup>
- b. A party resisting recognition of a foreign-country judgment has the burden of establishing that a ground for nonrecognition listed above exists. The party seeking recognition of the judgment has the burden of establishing that, as a matter of law, recognition would nevertheless be reasonable under the circumstances.<sup>25</sup>

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<sup>24</sup> N.C.G.S. § 1C-1853(c).

<sup>25</sup> N.C.G.S. § 1C-1853(g).

## Choice-of-Law Clauses

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### I. DRAFTING THE PERFECT CHOICE-OF-LAW CLAUSE

#### A. Choosing a Jurisdiction

- a. In theory, you could do extensive research on which jurisdiction's law is most likely to be advantageous to your client in the event of litigation. In practice, you're probably just going to force the other side to accept North Carolina law.
- b. If the other side refuses to accept North Carolina, you're going to negotiate for the law of New York or Delaware as a neutral jurisdiction.
- c. If the other side refuses to accept a neutral jurisdiction, you're going to wind up with the law of the counterparty's home jurisdiction.

#### B. Defining the Scope of the Clause

- a. If you only want to select the **contract law** of the chosen jurisdiction—leaving open the question of what law would apply to govern a tort or statutory claim—then you'll want to draft the clause narrowly. Here's an example of a narrow clause:
  - i. "Any claims *regarding the interpretation or fulfillment of this agreement* shall be governed by the laws of the State of North Carolina."
- b. If you want the clause to select the **contract, tort, and statutory law** of the chosen jurisdiction, then you'll want to draft the clause broadly. Here's an example of a broad clause:
  - i. "Any and all claims *arising out of or relating to this agreement* shall be governed by the laws of the State of North Carolina."<sup>26</sup>

#### C. Statutes of Limitation

- a. Another question is whether you want to select the statute of limitations of the chosen jurisdiction. Courts across the United States are split as to whether to classify statutes of limitations as substantive or procedural. If they're classified as substantive, then they're covered by the choice-of-law clause. If they're classified as procedural, then they're not covered by the clause and the courts will apply the forum's statutes of limitation. To ensure that you're getting the statute of limitations of the chosen state along with the rest of its law, therefore, it's generally a good idea to specifically select both the substantive and procedural law of that jurisdiction. Here's an example of such a clause:

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<sup>26</sup> John F. Coyle, *The Canons of Construction for Choice-of-Law Clauses*, 92 WASH. L. REV. 631 (2017)

- i. “Any and all claims arising out of or relating to this agreement shall be governed by the substantive and procedural laws of the State of North Carolina.”<sup>27</sup>

D. Conflict of Laws Rules

- a. When you’re choosing the law of a particular state, it’s generally a good idea to carve out that state’s conflicts rules to avoid the possibility of getting bounced out of the chosen state in favor of another jurisdiction’s laws. See below for an example of a clause that does this:
  - i. “Any and all claims arising out of or relating to this agreement shall be governed by the substantive and procedural laws of the State of North Carolina *without regard to conflicts principles.*”<sup>28</sup>

E. Federal Law

- a. When one selects the “law” of North Carolina to govern one’s contract, it is important to recognize that one is also selecting any relevant provisions of federal law. If these federal provisions conflict with the law of North Carolina, the courts will apply federal law to the exclusion of state law. This issue arises most frequently when the courts are dealing with the United Nations Convention on Contracts for the International Sale of Goods (CISG). The CISG functions as an “international” version of UCC Article 2 and will supply the governing law for contracts for the sale of goods when the parties to their agreement have their places of business in different nations. Many parties are surprised to discover that, in selecting North Carolina law to govern their international sales contracts, they are actually selecting the CISG. There is, however, an easy way to avoid this outcome. One need only state in the choice-of-law clause that the CISG shall not apply:
  - i. “Any and all claims arising out of or relating to this agreement shall be governed by the substantive and procedural laws of the State of North Carolina without regard to conflicts principles. *The United Nations Convention on Contracts for the International Sale of Goods shall not apply to this agreement.*”<sup>29</sup>

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<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

## Appendix: Is a Choice-of-Law Clause Enforceable in North Carolina?

