Washington and Lee Law Review

Volume 43 | Issue 1 Article 8

Winter 1-1-1986

Choice Of Law Stipulations By Litigants

NOTES

CHOICE OF LAW STIPULATIONS BY LITIGANTS

American courts almost always honor reasonable contractual provisions stipulating the law to govern a contract.[1] Choice of law stipulations made during litigation, however, have not commanded respect from the courts

---

1. *See* R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS § 7.3C, at 355-56 (1980) (in United States, parties to contract have power to choose law governing contract); A. EHRENZWEIG, A TREATISE ON THE CONFLICT OF LAWS § 176, at 467-70 (1962) (American law always has permitted parties to contract to stipulate applicable law). One of the primary methods by which courts resolve conflicts of law problems in contractual disputes is through the application of the law stipulated by the parties in a choice of law clause. *See* A. EHRENZWEIG, *supra,* § 176, at 468 (citing bibliographical surveys on use of contractual choice of law stipulations as method for resolving conflict problems). Courts have long recognized party autonomy in the choice of law decision. *See, e.g.,* Lauritzen v. Larsen, 345 U.S. 571, 588-89 (1953) (in contract disputes, American courts apply body of law parties intended to apply); Liverpool and Great Western Steam Co. v. Phenix Ins. Co., 129 U.S. 397, 448 (1889) (same); Siegelman v. Cunard White Star, Ltd., 221 F.2d 189, 195 (2d Cir. 1955) (same); Blalock v. Perfect Subscription Co., 458 F. Supp. 123, 126 (S.D. Ala. 1978) (same), *aff'd per curiam,* 599 F.2d 743 (5th Cir. 1979).

The autonomy extended parties in the choice of law to govern contracts, however, is not without limitation. In determining whether courts should honor a stipulation, courts consider whether the stipulation is contrary to public policy of the forum. *See* Fine v. Property Damage Appraisers, Inc., 393 F. Supp. 1304, 1308 (E.D. La. 1975) (refusing to apply stipulation of Texas law because applying Texas law would offend Louisiana's public policy against enforcing agreements not to compete). The forum also may consider the public policy concerns of the state whose rules of decision would apply absent the stipulation. *See* Palmer v. Chamberlin, 191 F.2d 532, 536 (5th Cir. 1951) (parties to contract may stipulate governing law if not contrary to public policy or law of state where parties executed contract or place of performance). Typically, a stipulation in a contract is enforceable when the parties have made the stipulation in good faith and when the parties have not intended to avoid otherwise applicable law. *See* Travelers Ins. Co. v. American Fidelity & Casualty Co., 164 F. Supp. 393, 398 (D. Minn. 1958) (insurer may not contractually stipulate that law of another state governs if resulting contract is repugnant to law of state where insurance policy issued). The chosen state also must bear some rational relationship to the transaction underlying the contract. *See* Farris Eng'g Corp. v. Service Bureau Corp., 406 F.2d 519, 521 (3d Cir. 1969) (stipulation of New York law significantly related to transaction since New York was place of contracting); National Union Fire Ins. Co. of Pittsburgh v. D & L Constr. Co., 353 F.2d 169, 172 (8th Cir. 1965) (stipulation of California law rejected since bonding agreements central to dispute had no ties to California), *cert. denied,* 384 U.S. 941 (1966).

Section 187 of the Restatement (Second) of Conflict of Laws recognizes the validity of choice of law stipulations, but distinguishes between matters that the parties could have determined by explicit agreement and those that the parties could not have resolved by an explicit provision in their contract. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (1971). When the parties to a contract choose a body of law solely to govern the interpretation or construction of the contract, courts do not restrict the parties' choice. *See id.* § 187(1); *see also* E. SCOLES & P. HAY, CONFLICTS OF LAWS § 18.3, at 637 n.1 (1982) (citing cases recognizing unrestricted freedom of parties to choose law interpreting or construing terms of contract). The rule permitting parties to a contract to stipulate the law to govern the interpretation or

with similar consistency.[2] The Seventh Circuit's recent decision in *Twohy v. First National Bank of Chicago*[3] gave effect to a choice of law stipulation made during the pretrial stage.[4] The *Twohy* case raises the interesting and novel question of whether courts should extend the autonomy that parties exercise in selecting the applicable law of a contract to tort cases and to contract cases in which the parties agree to the applicable law after the initiation of litigation.[5]

---

construction of the contract allows the parties to incorporate by reference terms of their contractual engagements. *See* RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 187 comment c (1971). If the choice of law will govern issues of contractual capacity, formalities or substantial validity, courts will honor the stipulation only if the chosen state is related substantially to the transaction and application of the law of the chosen state is not contrary to a fundamental policy of the state whose law would govern absent the stipulation. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 comment d (1971). American courts have adopted the view of the Restatement. *See, e.g.,* Action Eng'g v. Martin Marietta Aluminum, 670 F.2d 456, 459 (3d Cir. 1982) (citing Restatement as support in upholding stipulation of California law since issue of whether good faith or reasonableness standard governed termination of contract was proper subject of explicit stipulation in contract); Blalock v. Perfect Subscription Co., 458 F. Supp. at 127 (following Restatement in refusing to give effect to stipulation of Pennsylvania law because covenant not to compete was contrary to fundamental public policy in Alabama); Stauffer Chem. Co. v. Keysor-Century Corp., 541 F. Supp. 234, 238-39 (D. Del. 1982) (citing Restatement, contractual stipulation of Connecticut law honored despite objection by one party at trial).

2. *Compare* Lloyd v. Loeffler, 694 F.2d 489, 495 (7th Cir. 1982) (upholding litigants' stipulation at oral argument that Wisconsin law applied) and Johnson v. Eli Lilly & Co., 577 F. Supp. 174, 175 (W.D. Pa. 1983) (upholding parties stipulation in court that New York law applied) *with* Ezell v. Hayes Oilfield Constr. Co., Inc., 693 F.2d 489, 492 (5th Cir. 1982) (rejecting parties' pretrial stipulation that Mississippi law governed), *cert. denied,* 104 S. Ct. 79 (1983) *and* System Operations Inc. v. Scientific Games Dev. Corp., 555 F.2d 1131, 1136-37 (3d Cir. 1977) (rejecting litigants' attempt to stipulate that general common law principles would govern).

3. 758 F.2d 1185 (7th Cir. 1985).

4. *Id.* at 1190-91; *see infra* notes 26-47 and accompanying text (discussing *Twohy* and Seventh Circuit's acceptance of litigants' choice of law stipulation).

5. 758 F.2d at 1190. Courts and commentators have noted the absence of cases and writings concerning litigants' choice of law stipulations in the United States. *See* Lloyd v. Loeffler, 694 F.2d 489, 495 (7th Cir. 1982) (noting absence of cases considering tort litigants' choice of law stipulations); System Operations, Inc. v. Scientific Games Dev. Corp., 555 F.2d 1131, 1137 n.4 (3d Cir. 1977) (finding no decision in any state allowing litigants to stipulate governing law); A. EHRENZWEIG, *supra* note 1, at 469-70 (noting that theoretical foundation supporting litigants' choice of law stipulations rarely has been topic of discussion in United States); 1 S. SPEISER, C. KRAUSE & A. GANS, THE AMERICAN LAW OF TORTS § 2:1, at 190-91 (1983) (commenting on lack of decisions addressing validity to tort litigants' choice of law stipulations). Recently, the Eleventh Circuit encountered a choice of law stipulation proffered by litigants and was uncertain on the stipulation's validity. *See* Menendez v. Perishable Distribs. Inc., 744 F.2d 1551, 1553 (11th Cir. 1984), *ctfd. ques. ans.,* 254 Ga. 300, 329 S.E.2d 149, *ans. conformed to,* 763 F.2d 1374 (1985). Unable to ascertain whether Georgia courts would enforce litigants' choice of law stipulations, the Eleventh Circuit in *Menendez* certified the question to the Georgia Supreme Court. *See* 744 F.2d at 1553. Because of the Georgia Supreme Court's responses to two additional questions certified by the Eleventh Circuit, the Georgia Supreme Court found the question concerning the validity of litigants' choice of law stipulations moot and, therefore, did not answer the Eleventh Circuit's certified question. *See* Menendez v. Perishable Distribs. Inc., 254 Ga. 300,____, 329 S.E.2d 149, 152 (1985).

For many years American courts have permitted the parties to a contract to choose the law that will govern disputes arising from the contractual relationship and to incorporate that choice of law in the contract.[6] The Restatement (Second) of Conflict of Laws[7] as well as the Uniform Commercial Code[8] recognize choice of law stipulations when the parties have included the stipulation in the contract.[9] Other countries similarly recognize party autonomy in the choice of law applicable to a contract.[10] Accordingly, choice of law clauses are common in modern contracts[11] and often permit courts to forego complex analyses under varying choice of law formulas.[12]

---

6. *See, e.g.*, Lauritzen v. Larsen, 345 U.S. 571, 588-89 (1953) (courts will apply law parties intended to apply unless forbidden by public policy); Sarlot-Kantarjian v. First Pennsylvania Mortg. Trust, 599 F.2d 915, 917 (9th Cir. 1979) (courts will respect contractual choice of law provisions unless chosen state is not related substantially to parties or transaction, or chosen state's laws would be contrary to fundamental policies of forum state); Siegelman v. Cunard White Star, Ltd., 221 F.2d 189, 195 (2d Cir. 1955) (courts will permit parties' choice of law to govern validity of contract if parties' choice bears some relation to place of making or performance of contract and if parties stipulated to choice of law in good faith); National Sur. Corp. v. Inland Properties, Inc., 286 F. Supp. 173, 188-89 (E.D. Ark. 1968) (contractual stipulation to choice of law honored only if chosen state has substantial connection with contract), *aff'd*, 416 F.2d 457 (8th Cir. 1969).

7. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (1971); *see supra* note 1 (discussing Restatement's limitations on contractual choice of law stipulations).

8. U.C.C. § 1-105(1) (1978). Section 1-105(1) of the Uniform Commercial Code provides that when a transaction reasonably is related to the forum state and also to another state or nation, the parties may agree that the law of either state or nation shall govern their rights and duties. *Id.* If the parties do not stipulate a choice of law, the Uniform Commercial Code applies as adopted by the forum state, as long as the transaction bears an appropriate relation to the forum state. *Id. See generally* Nordstrom, *Choice of Law and the Uniform Commercial Code*, 24 OHIO ST. L.J. 364, 372-74 (1963) (discussing Uniform Commercial Code § 1-105 as adopted in Ohio).

9. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 comment a (1971) (parties to contract may include choice of law clause in contract since choice of law clause is best method of protecting parties' expectations); U.C.C. § 1-105 comment 1 (1978) (parties have right to stipulate in contract law applicable to multistate transaction).

10. *See generally* A. EHRENZWEIG, *supra* note 1, at 470 (concluding that countries around the world honor contractual choice of law stipulations that are not violative of public policy); 2 E. RABEL, THE CONFLICT OF LAW: A COMPARATIVE STUDY 370-76 (2d ed. 1960) (discussing party autonomy in selecting applicable law with reference to foreign statutes); G. DELAUME, TRANSNATIONAL CONTRACTS, Law and Practice, booklet 8, at 2-4 (1983) (concluding that parties to transnational contracts enjoy extensive freedom in selecting applicable law); Yntema, *"Autonomy" in Choice of Law*, 1 AM. J. COMP. L. 341, 345-52 (1952) (discussing foreign courts' acceptance of choice of law autonomy and foreign statutory provisions permitting contractual choice of law clauses).

11. *See generally* 2 E. RABEL, *supra* note 10, at 378 (asserting that parties are utilizing express choice of law stipulations in ever increasing types of contracts); A. EHRENZWEIG, *supra* note 1, at 468 (express choice of law stipulations are becoming one of primary means of resolving conflicts of law problems).

12. *See* James, *Effects of the Autonomy of the Parties on Conflict of Laws Contracts*, 36 CHI. KENT. L. REV. 34, 57 (1959) (choice of law stipulations are less burdensome on courts than traditional choice of law formulas); Siegelman v. Cunard White Star, Ltd., 221 F.2d at 189, 195 (2d Cir. 1955) (courts should view choice of law stipulations as reducing litigation rather than usurping function of legislature).

Important policy considerations underlie the stature of contractual choice of law stipulations.[13] Permitting the parties to a contract to select the law that will govern their contract protects the parties' expectations[14] and promotes a sense of certainty in commercial transactions.[15] Choice of law stipulations incorporate into the contract a body of law that provides guidelines by which the parties may conduct a course of business.[16] In addition, choice of law stipulations relieve courts of the time consuming and costly exercise of resolving ambiguities in parties' intentions concerning rights and obligations under the contract.[17]

Although choice of law clauses have become quite common, many contracts still do not contain choice of law provisions.[18] One reason for the absence of choice of law provisions in contracts is that parties entering a contract may believe that a choice of law clause is not necessary.[19] The parties may not realize fully the conflicts that may arise under the contract until long after the execution of the contract when litigation is pending.[20]

---

13. *See infra* notes 14-17 and accompanying text (discussing certainty and predictability gained in contracts through choice of law clauses).

14. *See* Fricke v. Isbrandtsen Co., Inc., 151 F. Supp. 465, 467 (S.D.N.Y. 1957) (allowing parties to choose governing law better protects parties' expectations under contract than rule that law of state where parties executed contract applies); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 comment e (1971) (choice of law stipulations promote certainty and predictability in contracts); E. SCOLES & P. HAY, *supra* note 1, at 632 (same).

15. *See* Siegelman v. Cunard White Star, Ltd., 221 F.2d 189, 195 (2d Cir. 1955) (courts accept choice of law clauses in contracts primarily to avoid conflicts of law problems and to promote contractual certainty); Nordstrom, *supra* note 8, at 367 (acceptance of choice of law clauses allows parties to predict applicable law used to determine rights and duties under contract); Reese, *Power of Parties to Choose Law Governing Their Contract,* 1960 PROC. AM. SOC. INT'L L. 49-50 (conventional choice of law analysis does not promote certainty and predictability in contract cases).

16. *See* Nordstrom, *supra* note 8, at 367 (choice of law stipulations in contracts provide parties predictability in rights and duties governing transaction at execution of agreement).

17. *See* Siegelman v. Cunard White Star, Ltd., 221 F.2d 189, 195 (2d Cir. 1955) (choice of law stipulations allow courts to avoid conflicts of law problems and therefore reduce litigation); El Hoss Eng'g & Transp. Co. v. American Indep. Oil Co., 183 F. Supp. 394 (S.D.N.Y. 1960) (choice of law agreements reduce litigation and relieve courts of problems of resolving ambiguities in parties intentions), *rev'd on other grounds,* 289 F.2d 346, *cert. denied,* 368 U.S. 837 (1961).

18. *E.g.,* Ezell v. Hayes Oilfield Constr. Co., Inc., 693 F.2d 489, 492 n.2 (5th Cir. 1982) (no choice of law clause included in contract), *cert. denied,* 104 S. Ct. 79 (1983); Tannerfors v. American Fidelity Ins. Co., 397 F. Supp. 141, 144-45 n.4 (D.N.J. 1975) (same) *aff'd* 535 F.2d 1247 (3d Cir. 1976); El Hoss Eng'g & Transp. Co. v. American Indep. Oil Co., 183 F. Supp. 394, 399 (S.D.N.Y. 1960) (same), *rev'd,* 289 F.2d 346, *cert. denied,* 368 U.S. 837 (1961); *see* G. DELAUME, TRANSNATIONAL CONTRACTS § 2.04, at 18 (1982) (parties to contract often fail to include choice of law clause in contract believing no conflicts of law problems exist under contract).

19. G. DELAUME, *supra* note 18, at 18 (parties engaged in swift commercial transactions may not give much thought to choice of law clause or may assume conflicts problems adequately addressed elsewhere in contract).

20. *See id.* (emphasizing effects of time constraints on perception of potential conflicts in contract).

The initial question in determining if the parties to a contract may stipulate to the applicable law while litigation is pending is whether the policies justifying judicial adherence to contractual stipulations also support choice of law stipulations made subsequent to the execution of a contract.[21] The Seventh Circuit recently concluded that since courts honor the parties' choice of law when included in the contract, courts also should honor choice of law stipulations made while litigation is pending.[22] The Fifth Circuit[23] and the Third Circuit,[24] however, have reached the opposite conclusion, holding that no reasons exist for extending party autonomy to choice of law in a pending contract dispute.[25]

In *Twohy v. First National Bank of Chicago,*[26] the Seventh Circuit extended party autonomy in choice of law to the postdispute stage.[27] In *Twohy,* the majority shareholder in a Spanish corporation alleged breach of contract, fraud, misrepresentation, and libel on the part of the defendant, First National Bank of Chicago (First Chicago).[28] The plaintiff claimed that First Chicago failed to provide financing to the corporation pursuant to an alleged loan agreement and that First Chicago issued libelous reports to the corporation's prospective clients and to other potential lenders.[29]

After having responded to the plaintiffs' complaint in *Twohy,* First Chicago filed a motion for judgment on the pleadings.[30] The bank claimed that Twohy, as a private person and shareholder, lacked standing to assert a claim for damages to the corporation.[31] First Chicago attached to its

---

21. *See supra* notes 14-17 and accompanying text (discussing policies underlying acceptance of contractual choice of law clauses).

22. *See* Twohy v. First Nat'l Bank of Chicago, 758 F.2d 1185, 1191 (7th Cir. 1985) (upholding choice of law stipulations by litigants); *see also infra* notes 26-47 and accompanying text (discussion of *Twohy).*

23. *See* Ezell v. Hayes Oilfield Const. Co., Inc., 693 F.2d 489, 492 n.2 (5th Cir. 1982) (rejecting litigants' choice of law stipulation), *cert. denied,* 104 S. Ct. 79 (1983); *see also infra* notes 49-59 and accompanying text (discussion of *Ezell). But see* Calloway v. Manion, 572 F.2d 1033, 1036 (5th Cir. 1978) (upholding litigants' choice of law stipulation); *infra* notes 60-69 and accompanying text (discussion of *Calloway); infra* notes 70-73 and accompanying text (comparing *Ezell* and *Calloway* decisions).

24. *See* Consolidated Water Power & Paper Co. v. Spartan Aircraft Co., 185 F.2d 947, 949 (3d Cir. 1950) (rejecting litigants' choice of law stipulation); *see also infra* notes 74-82 and accompanying text (discussion of *Consolidated Water).*

25. *See Ezell,* 693 F.2d at 492 n.2 (rejecting litigants' choice of law stipulations); *Consolidated Water,* 185 F.2d at 949 (rejecting litigants' choice of law stipulation).

26. 758 F.2d 1185 (7th Cir. 1985).

27. *Id.* at 1191 (upholding litigants' choice of law stipulation).

28. *Id.* at 1187. In *Twohy v. First National Bank of Chicago,* a Spanish corporation was engaged in the business of producing and installing beverage dispensing machines in Spain. *Id.* The corporation sought additional funds to expand its business to other locations. *Id.* The corporation claimed that First National Bank of Chicago pulled out of a loan agreement and began a campaign of issuing negative reports to other banks and resorts for whom the corporation sought to provide beverage dispensing machines. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

motion for judgment on the pleadings affidavits of Spanish attorneys asserting that under Spanish conflict of law rules, Spanish law governed the actions.[32] The affidavits further provided that under Spanish law, a person does not have standing to bring an action based on a transaction involving a corporation of which the person is a shareholder.[33] Twohy's answer also included affidavits from Spanish attorneys supporting the conclusion that Twohy had stated a valid personal action under Spanish law.[34] At the hearing on First Chicago's motion,[35] the judge asked both parties whether they had agreed that the law of Spain would govern the substantive issues of the case.[36] Both parties responded in the affirmative.[37] The United States District Court for the Northern District of Illinois found that under Spanish law no genuine issue of material fact existed, and that the defendant was entitled to judgment as a matter of law.[38]

The Seventh Circuit affirmed the district court's decision to dismiss the plaintiff's claim as required under Spanish law.[39] The *Twohy* court adhered to the procedural rule that a federal court exercising diversity jurisdiction must look to the choice of law rules of the forum state.[40] The law of Illinois, the forum state, recognized the enforceability of a choice of law stipulation

---

32. *Id.*

33. *Id.* In *Twohy,* an affidavit attached to the defendant's motion for judgment on the pleadings asserted that under Spanish law, the plaintiff, as a shareholder, lacked standing to sue for damages to the corporation, but the affidavit cited no authority in support of that conclusion. *Id.*

34. *Id.*

35. *Id.* The *Twohy* court initially denied the defendant's motion for judgment on the pleadings. *Id.* at 1188. The hearing at which the judge asked both parties to affirm the choice of law stipulation was a rehearing on the motion for judgment on the pleadings. *Id.*

36. *Id.* at 1188.

37. *Id.*

38. *Id.* In *Twohy,* the plaintiff filed an amended complaint in the district court asserting that Spanish law was inapplicable. *Id.* at 1189. The plaintiff contended that the attorney who had made the stipulation was only the plaintiff's local counsel and was neither familiar with the legal issues of the case nor authorized to make the stipulation on the plaintiff's behalf. *Id.* at 1189-90. Twohy further argued that at all times he intended to bring the action under the laws of the United States. *Id.* at 1189. The district court rejected the plaintiff's arguments, finding that the use of the term "local counsel" was misleading because the attorney representing Twohy at the hearing was the only counsel of record and because nothing indicated any limitation on the attorney's authority to act on behalf of the plaintiff. *Id.* at 1190. The district court also noted that the plaintiff never suggested during the course of the litigation that Spanish law might be inapplicable. *Id.* The district court also found inaccurate the plaintiff's assertion that affidavits attached to the plaintiff's answer to the defendant's motion for summary judgment clearly established an intent to bring the action under the laws of the United States. *Id.*

39. *Id.* at 1191.

40. *See id.* at 1189. When a federal court exercises diversity jurisdiction, the court must look to the choice of law rules of the forum state to determine the applicable law. *See* Klaxon v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496-97 (1941) (finding that *Erie* doctrine necessitates that federal courts exercising diversity jurisdiction apply forum's choice of law rules); Erie R.R. v. Tompkins, 304 U.S. 64, 78 (1938) (federal courts exercising diversity or pendent jurisdiction must apply the law of the forum state).

embodied in a contract, but did not address choice of law stipulations made during the course of litigation.[41] Although acknowledging that decisions in other circuits had found litigants' choice of law stipulations no more binding than stipulations pertaining to the scope or meaning of the law,[42] the *Twohy* court attempted to distinguish litigants' choice of law stipulations.[43]

The Seventh Circuit cited two district court decisions that upheld litigants' choice of law stipulations.[44] The *Twohy* court ruled that, similar to stipulations that are included in a contract, Illinois courts would honor choice of law stipulations made while litigation is pending provided that the stipulations do not violate public policy or destroy the court's subject matter jurisdiction.[45] The Seventh Circuit found the parties' stipulation of Spanish law to be effective since the law of Spain bore a significant relationship to the parties and to the dispute.[46] To reinforce its decision, the Seventh Circuit

---

41. 758 F.2d at 1190. In *Twohy,* the Seventh Circuit noted that Illinois courts recognize the enforceability of choice of law clauses in contracts. *Id.* (citing *Keller v. Brunswick Corp.,* 54 Ill. App. 271, 275, 369 N.E.2d 327, 329-30 (1977) and *Carter v. Catamore Co.,* 571 F. Supp. 94, 95 (N.D. Ill. 1983)).

42. *Id.* at 1190-91. The *Twohy* court cited the Fifth Circuit's decision in *Ezell v. Hayes Oilfield Construction Co.,* and the Third Circuit's decision in *Consolidated Water & Power Co. v. Spartan Aircraft Co.* as taking a position contrary to the Seventh Circuit's finding that choice of law stipulations differed in effectiveness from stipulations to the content or meaning of the law, and denying effect to choice of law stipulations by litigants. *Id.; Ezell,* 693 F.2d 489 (5th Cir. 1982), *cert. denied,* 104 S. Ct. 79 (1983); *Consolidated Water,* 185 F.2d 947 (3d Cir. 1950); *see infra* notes 49-59 and accompanying text (discussion of *Ezell); infra* note 74-82 and accompanying text (discussion of *Consolidated Water).*

43. 758 F.2d at 1190-91. The *Twohy* court distinguished choice of law stipulations from stipulations concerning the meaning or content of the law, which the Seventh Circuit concluded were clearly ineffective. *Id.* The Seventh Circuit previously had concluded in another decision that stipulations concerning the meaning or content of the law are ineffective because the stipulations do not promote the judicial function of precedent production. *See* Lloyd v. Loeffler, 694 F.2d 489, 495 (7th Cir. 1982) (distinguishing stipulations on content of law in upholding tort litigants choice of law stipulation); *infra* notes 102-24 and accompanying text (discussion of *Lloyd).* Other courts similarly have found stipulations concerning the content or meaning of the law wholly ineffective. *See, e.g.,* Swift & Co. v. Hocking Valley Ry., 243 U.S. 281, 289 (1917) (stipulations concerning legal effect of admitted facts are inoperative); Hegeman-Harris & Co. v. United States, 440 F.2d 1009, 1012 (Ct. Cl. 1971) (courts not bound by parties' stipulation concerning legal effect of contract); John Hancock Mut. Life Ins. Co. v. Neill, 79 Idaho 385,____, 319 P.2d 195, 198 (1957) (stipulation that bonds have no relation to plaintiff's business in forum state is ineffective because matter stipulated would be conclusion of law); State *ex rel.* Weldon v. Thomason, 142 Tenn. 527,____, 221 S.W. 491, 495 (1920) (meaning of statutory language was not proper subject of parties' stipulation).

44. 758 F.2d at 1191; *see* Robbins v. Ogden Corp., 490 F. Supp. 801, 806 n.2 (S.D.N.Y. 1980) (litigants' choice of law stipulation effective since chosen law reasonably related to transaction); Tannerfors v. American Fidelity Fire Ins. Co., 397 F. Supp. 141, 144-45 n.4 (D.N.J. 1975) (improper to relieve litigants of choice of law stipulation when neither objected to rules of decision until after trial).

45. 758 F.2d at 1191; *see infra* notes 117-18 and accompanying text (discussing manner in which courts may lose subject matter jurisdiction if courts give effect to parties' choice of law stipulations).

46. *Id.* at 1191 n.2. The *Twohy* court found that the choice of Spanish law was reasonable on the basis that the parties dealt with each other in Spain, the parties executed the alleged

noted that allowing the plaintiff to back out of the stipulation of Spanish law maintained steadfastly throughout the litigation would result in unfairness to First Chicago and a waste of judicial resources.[47]

While the Seventh Circuit in *Twohy* was concerned with the inequity and inefficiency of allowing a party to escape a choice of law stipulation,[48] the Fifth Circuit in *Ezell v. Hayes Oilfield Construction Co.*[49] refused to give effect to a choice of law stipulation proffered by litigants despite application of the chosen law in the district court.[50] In *Ezell,* an employee injured himself in the course of his employment and brought a Jones Act claim[51] against his employer.[52] When the employer's insurer failed to defend the claim, the employer joined the insurance company as a third party defendant.[53] Based upon a pretrial stipulation by all the litigants, the United States District Court for the Eastern District of Louisiana applied Mississippi law to the employer's third party complaint against the insurer for failure to defend the employer in the employee's Jones Act clam.[54] The jury found for the employee and awarded punitive damages to the employer based on the insurance company's failure to defend the suit.[55]

On appeal to the Fifth Circuit, the insurance company asserted that Louisiana law should apply, despite the parties' stipulation at trial that the court shoula apply Mississippi law.[56] Although avoiding the need to rule directly on the issue,[57] the Fifth Circuit noted that Louisiana choice of law rules allow parties to agree contractually to the law that will govern disputes

---

loan agreement in Spain, the contract was performable in Spain, and the plaintiff allegedly sustained injury in Spain. *Id.*

47. *Id.* at 1191; *see infra* notes 163-66 and accompanying text (discussing binding effect of choice of law stipulations honored by courts).

48. 758 F.2d at 1191.

49. 693 F.2d 489 (5th Cir. 1982), *cert. denied,* 104 S. Ct. 79 (1983).

50. *Id.* at 492 n.2.

51. *Id.* at 491. In *Ezell v. Hayes Oilfield Construction Co.,* the plaintiff brought suit against his employer under the Jones Act. *Id.; see* 46 U.S.C. § 688 (1982). The Jones Act provides that a seaman injured in the course of his employment may maintain an action for damages at law against his employer. 46 U.S.C. § 688 (1982).

52. 693 F.2d at 491.

53. *Id.*

54. *Id.* at 492.

55. *Id.* at 491. In *Ezell,* the jury awarded the employer $2,000,000 in punitive damages in the employer's action against the insurance company for failure to defend against an employee's suit. *Id.* The district court reduced this amount to $500,000 by remittitur. *Id.* Both the insurance company and the employer appealed the decision of the district court to the Fifth Circuit. *Id.*

56. *Id.* at 492. The insurance company in *Ezell* argued that the forum's choice of law rules should apply and that the forum state's choice of law rules required application of Louisiana law. *Id.*

57. *See id.* The *Ezell* court determined that Louisiana and Mississippi case laws were identical on the issue of punitive damages for failure to defend. *Id.* Louisiana and Mississippi case laws also were identical on the issue of when a conflict of interest justifies an insurer's failure to defend a suit against a policy holder, since both states' case laws were void of any decisions on point. *Id.* Because of the similarity in Mississippi and Louisiana case laws, the

arising out of the contract.[58] Since the parties had stipulated during the pretrial stage that Mississippi law would apply, however, the Fifth Circuit found the stipulation no more binding on the court than a stipulation pertaining to the content of Louisiana law.[59]

The Fifth Circuit's decision in *Ezell* arguably conflicts with its earlier decision in *Calloway v. Manion.*[60] In *Calloway,* the plaintiff brought an action alleging breach of warranty and misrepresentation by the defendant in connection with an exchange of horses.[61] The parties exchanged horses in Illinois, the domicile of the defendant, and the plaintiff trailered a mare back to his home state of Texas.[62] The plaintiff brought suit in the United States District Court for the Northern District of Texas when the plaintiff discovered that the mare was unfit.[63] At trial, the parties agreed that the Texas Uniform Commercial Code governed the transaction.[64] Applying Texas law, a jury found that the plaintiff contractually had limited his remedy to an exchange for another horse and denied the plaintiff rescission of the contract.[65]

On appeal to the Fifth Circuit, the plaintiff in *Calloway* argued that the sections of the Texas Uniform Commercial Code which authorized contractual restrictions of remedies did not preclude a remedy of rescission based upon misrepresentation.[66] The *Calloway* court recognized that a federal court must apply the forum's choice of law rules when exercising diversity jurisdiction.[67] Section 1-105 of the Texas Uniform Commercial Code permits parties to a contract to agree on the governing law provided that the state whose law the parties chose bears a reasonable relation to the transaction.[68] The Fifth Circuit explained that although the choice of law rule set out in the Uniform Commercial Code referred generally to predispute agreements,

---

court did not make a choice of law. *Id.* The *Ezell* court determined that general principles of insurance law applied to the issues in dispute. *Id.*

58. *Id.* at 492 n.2. The *Ezell* court found that Louisiana allows parties to agree contractually concerning the law applicable to disputes under a contract. *Id.* (citing *Associated Press v Toledo Inv., Inc.,* 389 So.2d 752, 754 (La. Ct. App. 1980) and *Davis v. Humble Oil & Ref. Co.,* 283 So.2d 783, 788 (La. Ct. App. 1973)).

59. *Id.; cf. supra* note 43 and accompanying text (distinguishing choice of law stipulations from stipulations on content or meaning of law).

60. 572 F.2d 1033 (5th Cir. 1978).

61. *Id.* at 1035.

62. *Id.* at 1036.

63. *Id.* at 1035.

64. *Id.* at 1036; *see* TEX. BUS. & COM. CODE ANN. Art. 2 (Vernon 1968) (governing sales).

65. 572 F.2d at 1035.

66. *Id.* at 1036; *see* TEX. BUS. & COM. CODE ANN. §§ 2.316, 2.718, 2.719 (Vernon 1968) (governing exclusion or modification of warranties and remedies).

67. 572 F.2d at 1036; *see supra* note 40 and accompanying text (discussing rule of *Klaxon.)*

68. *Id.; see* TEX. BUS. & COM. CODE ANN. § 1.105 (Vernon 1968) (governing parties' power to choose applicable law); *see also* Tuchler, *Boundaries to Party Autonomy in the Uniform Commercial Code: A Radical View,* 11 ST. LOUIS U.L.J. 180 (1967) (discussing section 1-105 of Uniform Commercial Code); Nordstrom, *supra* note 8, at 365-68 (discussing choice of law clauses under Section 1-105 of Uniform Commercial Code).

the *Calloway* court saw no reason to question the litigants' stipulation since the choice of law bore a reasonable relation to the transaction.[69]

The Fifth Circuit's decisions in *Calloway* and *Ezell* appear contradictory because the *Calloway* court honored a choice of law stipulation of the litigants[70] whereas the *Ezell* court refused to consider the parties' choice of law stipulation because the parties proffered the stipulation after the dispute arose.[71] The Fifth Circuit may have allowed the stipulation in *Calloway* because Illinois, the state whose laws might apply absent the stipulation to Texas law, had adopted the Uniform Commercial Code in substantially similar form.[72] Affording the *Calloway* litigants' choice of law stipulation any weight, however, is inconsistent with the Fifth Circuit's decision in *Ezell,* which found that litigants' choice of law stipulations were wholly ineffective.[73]

In accord with *Ezell* is the Third Circuit's decision in *Consolidated Water Power & Paper Co. v. Spartan Aircraft Co.*[74] In *Consolidated Water,* a paper company brought suit to recover the unpaid balance of the purchase price of floor covering sold to Spartan Aircraft.[75] Consolidated Water, a Wisconsin corporation with its principal place of business in Wisconsin, and Spartan Aircraft, a Delaware corporation with its principal place of business in Oklahoma, stipulated in the United States District Court for the District of Delaware that Wisconsin law would govern the breach of warranty issues in the case and that Oklahoma law would control the claim of fraud.[76] The

---

69. 572 F.2d at 1036. In *Calloway v. Manion,* the plaintiff traveled from his home state of Texas to Illinois to exchange a horse for a mare. *Id.* Upon returning to Texas with the mare, the plaintiff discovered that the mare had an incipient ovary condition that caused the horse to injure its hock. *Id.* at 1035. The Fifth Circuit found upon these facts that the parties' choice of Texas law was reasonably related to the transaction. *Id.* at 1036.

70. *See id.* at 1036; *see also supra* notes 60-69 and accompanying text (discussion of *Calloway).*

71. *See* 693 F.2d at 492 n.2; *see also supra* notes 49-59 and accompanying text (discussion of *Ezell).*

72. *See* 572 F.2d at 1036. In *Calloway,* the Fifth Circuit applied Texas law, as stipulated by the litigants in the district court. *Id.* Absent the stipulation, Illinois law might have governed the dispute since Illinois was both the situs of the transaction and the defendant's state of domicile. *Id.; see* Castilleja v. Camero, 414 S.W.2d 424, 426 (Tex. 1967) (law of place of performance governs contract executed in one jurisdiction but performable in another jurisdiction). Since both Illinois and Texas had adopted the Uniform Commercial Code in substantially similar form, however, the court may have found no need to distinguish between the laws of the two states. *See* ILL. REV. STAT. ch. 26 (1973); TEX. BUS. & COM. CODE ANN. Art. 2 (Vernon 1968).

73. *See* 693 F.2d at 492 n.2 (litigants' choice of law stipulations are not binding on court); notes 49-59 and accompanying text (discussion of *Ezell).*

74. 185 F.2d 947 (3d Cir. 1950).

75. *Id.* at 949-50. In *Consolidated Water,* Spartan Aircraft Co., a manufacturer of trailers, contracted with the plaintiff to purchase floor covering. *Id.* Spartan Aircraft made several orders for floor covering, but later gave notice of cancellation on an undelivered portion of an order. *Id.* at 950. The plaintiff sued for the unpaid portion of the order, and Spartan Aircraft defended on claims of breach of warranty and deceit in the insulating characteristics of the floor covering. *Id.*

76. *Id.* at 949.

district court honored the choice of law stipulation,[77] but the Third Circuit refused to bind itself to the parties' choice of law even though the choice of law would not affect the outcome of the case.[78] The Third Circuit found that Delaware conflict of law rules permit the parties to stipulate in a contract the laws to govern disputes arising out of the contract.[79] The parties in *Consolidated Water,* however, stipulated the choice of law after the initiation of litigation.[80] Finding no decisions recognizing a choice of law stipulation proffered after litigation had begun, the Third Circuit rejected the parties' stipulation.[81] In addition, the Third Circuit commented that a court likely would not honor a choice of law stipulation proffered after litigation had begun.[82]

Other circuits have encountered litigants' choice of law stipulations in contract cases and have honored the stipulations without discussing the validity of litigants' choice of law stipulations.[83] Although American courts have not discussed extensively the policies supporting the decision to accept or reject litigants' choice of law stipulations in contract cases,[84] obvious

---

77. *Id.*

78. *Id.* The Third Circuit in *Consolidated Water* determined that the outcome of the case did not depend on the choice of law. *Id.* Because an Oklahoma statute on innocent misrepresentation did not become operative on the facts of the case, the Third Circuit found that the court would render a decision based upon an examination of the facts and not rules of law. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. *See* Rich v. Clayton Mark & Co., 250 F.2d 622, 623 (8th Cir. 1957); Wells v. J.C. Penney Co., 250 F.2d 221, 225 (9th Cir. 1957); Hulme v. Sweetman Constr. Co., 230 F.2d 66, 68 (10th Cir. 1956). The Eighth Circuit allowed litigants to stipulate the applicable law in *Rich v. Clayton Mark & Co. See Rich,* 250 F.2d at 627. In *Rich,* Clayton Mark & Co., an Illinois company, brought an action in the United States District Court for the Eastern District of Missouri to recover the unpaid purchase price from the guarantors of a sale of steel tubing to a Missouri corporation. *Id.* The litigants agreed that the law of Illinois controlled the action, and the Eighth Circuit honored the parties' stipulation. *Id.*

Likewise, in *Wells v. J.C. Penney Co.,* the Ninth Circuit considered a choice of law stipulation in an action brought by former participants in a profit sharing retirement plan who sought to have the plan declared illegal and void. *See Wells,* 250 F.2d at 224-26. The parties stipulated in the United States District Court for the District of Oregon that New York law applied. *Id.* at 225-26. The Ninth Circuit did not disturb the stipulation. *Id.* at 226.

The Tenth Circuit similarly accepted a choice of law stipulation proffered by the parties after the initiation of litigation in *Hulme v. Sweetman Construction Co. See* Hulme, 230 F.2d at 68 n.4. In *Hulme,* a supplier of crushed rock brought suit to recover the unpaid balance on a contract with the defendant. *Id.* at 68. The defendant counterclaimed seeking damages allegedly resulting from the supplier's failure to furnish rock pursuant to the defendant's requests. *Id.* The litigants stipulated in the United States District Court for the District of Kansas that the law of South Dakota controlled each claim. *Id.* at 68 n.4. The district court and the Tenth Circuit applied South Dakota law as stipulated by the parties. *Id.*

84. *See, e.g.,* Eckhart v. Plastic Film Corp., 129 F. Supp. 277, 279 (D. Conn. 1955) (counsel for both parties agreed in oral argument that New York law governed issues of construction and validity of contract); Commercial Travelers Mut. Acc. Ass'n v. White, 406 S.W.2d 145, 147-48 (Ky. 1966) (stipulated in trial court that New York law governed rights of

reasons exist for allowing litigants' choice of law agreements.[85] Permitting litigants to choose the applicable law does not enable the parties to avoid disputes under the contract since a dispute already has arisen under the contract.[86] Ground rules for transactions adopted after the transactions have failed are not effective in guiding the parties' performance of contractual duties.[87] If a tacit understanding between the parties concerning the applicable law is evident, however, a court's decision to allow the litigants to stipulate the applicable law will protect the expectancies of the parties.[88] Since American courts give considerable weight to the reasonable, objective intentions of the parties to a contract,[89] no countervailing policy exists for refusing to give effect to an otherwise valid choice of law stipulation when evidenced by a tacit agreement.[90]

In addition to the potential for protecting the expectancies of the parties, choice of law stipulations arising during the course of litigation may remedy inequalities in existing contracts.[91] A party to a contract in an originally

---

parties under insurance contract); Productora E Importada De Papel, S.A. De C.V. v. Fleming, 376 Mass. 826,____, 383 N.E.2d 1129, 1135 n.9 (1978) (court accepted litigants' tacit stipulation that Massachusetts law applied despite choice of law clause in contract that made Mexican law applicable).

85. *See infra* notes 86-100 and accompanying text (examining litigants' choice of law stipulations in light of policies supporting choice of law clauses in contracts).

86. *But cf. supra* notes 14-16 and accompanying text (discussing role of choice of law stipulations in providing stable ground rules for business relationships).

87. *Id.*

88. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 comment a, at 561 (1971) (when contract does not refer to state whose laws shall govern contract, forum nevertheless may apply parties' intended choice of law when evidenced by tacit understanding); *see also supra* note 14 (choice of law stipulations protect expectations of parties to contract).

89. *See* Siegelman v. Cunard White Star, Ltd., 221 F.2d 189, 195 (2d Cir. 1955) (parties intended choice of law controls as long as laws of state that parties choose are reasonably related to transaction); Fricke v. Isbrandtsen Co., 151 F. Supp. 465, 467 (S.D.N.Y. 1957) (same); William Whitman Co. v. Universal Oil Prods. Co., 125 F. Supp. 137, 147 (D. Del. 1954) (same). *See generally* 4 W. JAEGER, WILLISTON ON CONTRACTS § 610B, at 533-34 (3d ed. 1961) (contract not only includes express terms but also includes reasonable objective intentions of parties included through implication).

90. *See supra* note 89 (discussing American courts' recognition of intent of parties as guiding contract interpretation).

91. *See* G. DELAUME, *supra* note 2, § 2.04, at 24-25. Delaume argued that litigants' choice of law stipulations may remedy inequalities in support of the adoption of Article 3(2) of the 1980 European Convention of the Law Applicable to Contractual Obligations, which allows parties to agree on the law to govern a contract at any time. *Id.* While Delaume made the argument in reference to international contracts, arguably no need exists for distinguishing rules and techniques of choice of law applicable to international conflicts cases from cases involving interstate conflicts. *See* Prebble, *Choice of Law to Determine the Validity and Effect of Contracts: A Comparison of English and American Approaches to the Conflict of Laws*, 58 CORNELL L. REV. 433, 486 (1973) (no difference exists in rules or techniques in resolving interstate versus international conflicts problems, although results may be different due to factors peculiar to international contracts); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 10 (1971) (rules in Restatement apply to international as well as interstate conflicts of laws). *But cf.* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 10 comment d (1971) (courts may apply

weaker position may perceive conflicts problems and, through stipulation, may be able to take advantage of this newly acquired perception.[92] Arguably, to deny the weaker party the opportunity to strengthen his position is unfair.[93] While courts should not permit litigants to affect the interests of third parties, no compelling reason exists for denying litigants the right to stipulate a choice of law that the parties could have stipulated in their contract.[94]

Moreover, courts can save time by giving effect to litigants' choice of law stipulations.[95] When a contract that lacks a choice of law provision becomes the subject of litigation in this country, courts may need to apply a wide variety of rules to determine the applicable body of substantive law.[96] An agreement between the parties concerning the laws controlling the contract not only saves the trial court time in making a determination of the applicable law through analysis of the forum's choice of law rules, but also averts any possibility of remand due to choice of law error.[97]

One commentator has suggested that American courts, consistent with courts around the world, will extend the autonomy afforded parties to a contract in deciding the governing law to the postdispute stage.[98] In light of the policies supporting litigants' choice of law stipulations, and absent overriding public policy concerns of the forum or any other state, American

---

general principles of Restatement to reach just and predictable decisions in novel situations resulting from some significant differences between interstate and international cases).

92. *See* G. DELAUME, *supra* note 2, § 2.04, at 24 (discussing advantages of litigants' choice of law stipulations).

93. *Id.*

94. *Id.; see* Freeman v. Kohl & Vick Mach. Works, Inc., 673 F.2d 196, 198 n.2 (7th Cir. 1982) (third party defendant not bound by choice of law stipulation of original litigants due to strong federal policies against collusion and forum shopping).

95. *See* El Hoss Eng'g & Transp. Co. v. American Indep. Oil Co., 183 F. Supp. 394, 399 (S.D.N.Y. 1960) (litigants' choice of law stipulations further judicial economy by reducing litigation and relieving court of having to resolve ambiguities), *rev'd on other grounds,* 289 F.2d 346, *cert. denied,* 368 U.S. 837 (1961); *see also supra* note 12 (choice of law stipulations allow courts to forego choice of law analysis under varying formulas and permit courts to save time in resolving ambiguities in intent of parties).

96. *See* Jansson v. Swedish Am. Line, 185 F.2d 212, 219 (1st Cir. 1950) (because of infinite variety of fact situations presented in contract cases, no simple rule exists for choosing applicable law); William Whitman Co. v. Universal Oil Prods. Co., 125 F. Supp. 137, 146 (D. Del. 1954) (American conflict of law rules differ concerning law applicable when conflict exists between place of execution and place of performance of contract); Cooper v. Cherokee Village Dev. Co., 236 Ark. 37,____, 364 S.W.2d 158, 161-62 (1963) (in determining law governing issue of validity of interstate contracts, American courts commonly utilize four different choice of law rules, three of which have been used in Arkansas).

97. *See, e.g.,* Gonzalez v. Volvo of Am. Corp., 752 F.2d 1221, 1227 (7th Cir. 1984) (remanding case to district court because district court failed to clarify choice of law conclusions); Barnes Group, Inc. v. C & C Prods., Inc., 716 F.2d 1023, 1032-33 (4th Cir. 1983) (remanding case because district court incorrectly applied law of place of contracting on issue of covenant not to compete); Acme Circus Operating Co. v. Kuperstock, 711 F.2d 1538, 1546 (11th Cir. 1983) (remanding case based on Eleventh Circuit's disagreement with district court's choice of law under government interest analysis).

98. *See* EHRENZWEIG, *supra* note 1, at 469-70 (discussing domestic and foreign acceptance of litigants' choice of law stipulations).

courts should give effect to litigants' choice of law stipulations in contract disputes.[99] Courts should not discard this alternative approach to the traditional choice of law analysis, which saves time and money for both courts and litigants, without closer examination.[100]

Aside from contract disputes, American courts also have considered litigants' choice of law stipulations in tort actions.[101] For example, in *Lloyd v. Loeffler,*[102] which the Seventh Circuit cited for support in *Twohy,*[103] the father of a child brought an action against the child's mother, the mother's husband and the maternal grandparents, alleging that the defendants conspired to interfere with the custody of the father's child by concealing his daughter's location.[104] The United States District Court for the Eastern District of Wisconsin, applying Wisconsin substantive law, entered judgment for the plaintiff.[105]

The maternal grandparents appealed to the Seventh Circuit, challenging the district court's finding that complete diversity existed and that an intentional interference with the custody of a child claim was a valid cause of action under Wisconsin law.[106] The Seventh Circuit noted that a threshold choice of law issue existed concerning the plaintiff's intentional interference claim.[107] The district court applied Wisconsin substantive law, concluding that the United States Supreme Court's decision in *Erie Railroad v. Tompkins*

---

99. *See supra* notes 88-97 and accompanying text (discussing policies supporting acceptance of litigants' choice of law stipulations).

100. *See supra* notes 14-17 and accompanying text (outlining benefits that accrue when courts honor parties' choice of law); *supra* notes 88-97 and accompanying text (discussing benefits gained when courts honor litigants' choice of law stipulations).

101. *See, e.g.,* Freeman v. Kohl & Vick Mach. Works, Inc., 673 F.2d 196, 198 n.2 (7th Cir. 1982) (honoring litigant's choice of law stipulation in products liability claim); Davis v. Wyeth Laboratories, Inc., 399 F.2d 121, 127 (9th Cir. 1968) (litigants' stipulation of Montana law honored, although Montana law devoid of precedent on issue of manufacturer's duty of potential dangers in use of drugs); Casella v. Norfolk & W. Ry., 381 F.2d 473, 475 (4th Cir. 1967) (litigants' stipulation of New York law honored in negligence action, although New York case laws contained leading case against plaintiffs' claim); *see also infra* notes 102-38 and accompanying text (discussing recent federal circuit decisions concerning tort litigants' choice of law stipulations).

102. 694 F.2d 489 (7th Cir. 1982).

103. 758 F.2d at 1190.

104. Lloyd v. Loeffler, 539 F. Supp. 998, 999 (E.D. Wisc.), *aff'd,* 694 F.2d 489 (7th Cir. 1982).

105. *Id.* at 1003, 1005-06. The district court in *Lloyd* found that *Erie Railroad v. Tompkins* required application of Wisconsin substantive law. *Id.* at 1003; *see Erie R.R.,* 304 U.S. 64 (1938). The United States Supreme Court in *Erie Railroad* ruled that federal courts exercising diversity or pendent jurisdiction must apply the law of the forum state. 304 U.S. at 78.

106. 694 F.2d at 490. In *Lloyd,* the appellants' claim that the parties lacked complete diversity arose out of the uncertainty of the domicile of both the mother and her husband. *Id.* The Seventh Circuit considered the mother and her husband fugitives, and the *Lloyd* court found that a fugitive's domicile is the last domicile a fugitive had before beginning his flight from justice. *Id.* The *Lloyd* court, therefore, ruled that the mother and her husband were domiciled in Maryland, and that complete diversity existed. *Id.*

107. *Id.* at 495.

demanded application of the forum's substantive law.[108] The Seventh Circuit observed that the district court should have determined whether Wisconsin choice of law rules required application of Wisconsin substantive law or the law of another state.[109] The *Lloyd* court noted that Wisconsin choice of law rules may have required application of the substantive law of Maryland, where a state court had issued a custody decree, or the law of Virginia, where the father was domiciled and where the defendants may have formed the tortious intent.[110]

In a supplementary brief, the appellants in *Lloyd* contended that Maryland rather than Wisconsin substantive law applied under Wisconsin choice of law rules.[111] The appellants had not asserted that Maryland law applied either in their main brief or while the action was pending in the district court.[112] At oral argument before the Seventh Circuit, counsel for both parties confirmed that the parties had stipulated in the district court that Wisconsin law applied to all issues in the action.[113] The Seventh Circuit was unwilling to release the appellants from the stipulation of Wisconsin law during this latter stage in the proceedings.[114]

Recognizing that courts often honor choice of law stipulations in contract cases, the Seventh Circuit in *Lloyd* held that litigants' choice of law stipulations in tort cases deserve equal respect.[115] Although the Seventh Circuit noted that courts have a significant interest in applying a body of law that is in force somewhere, the *Lloyd* court concluded that courts have less interest in the particular body of law applied.[116] The *Lloyd* court stated, for example, that if the parties stipulated that the Code of Hammurabi[117] applied, a court would not render a decision on that basis because the ruling would have no precedential value.[118] The Seventh Circuit explained that the production of precedent is a major function of judicial decision making and

---

108. 694 F.2d at 495. In *Klaxon Co. v. Stentor Elec. Mfg. Co.*, the Supreme Court found that *Erie Railroad v. Tompkins* requires federal courts exercising diversity or pendent jurisdiction to consider the forum state's choice of law rules to determine the applicable law, not simply application of the forum's substantive law. 313 U.S. 487, 496-97 (1941). Erie R.R. v. Tompkins, 304 U.S. 64 (1938).

109. 694 F.2d at 495.

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.* While the record in *Lloyd* was void of a written choice of law stipulation, the Seventh Circuit found no difference between the effectiveness of an oral and a written choice of law stipulation by litigants. *Id.*

114. *Id.*; *cf. supra* note 47 and accompanying text (discussing *Twohy* court's unwillingness to allow parties to renounce stipulation in latter stages of proceedings).

115. 694 F.2d at 495.

116. *Id.*

117. *Id.* The Code of Hammurabi was a set of laws prepared by a Babylonian King and was among the earliest bodies of law in human history. BLACK'S LAW DICTIONARY 644 (5th ed. 1979).

118. 694 F.2d at 495; *cf. infra* note 173 and accompanying text (courts will not honor litigants' choice of law stipulations if law chosen is not in force somewhere).

that courts may disregard stipulations by litigants concerning the content of the law for failure to promote this judicial function.[119] Because the *Lloyd* court concluded that tort litigants' choice of law stipulations are consistent with the judicial function of precedent production, the Seventh Circuit found no inconsistency in recognizing choice of law stipulations by tort litigants while rejecting stipulations concerning the content or meaning of the law.[120]

Upon concluding that courts should honor choice of law stipulations by tort litigants, the Seventh Circuit proceeded to assess the reasonableness of the stipulation proffered in *Lloyd.*[121] The *Lloyd* court found that implicit in Wisconsin choice of law principles is the requirement that in the absence of objection, Wisconsin substantive law applies to a suit tried in a Wisconsin court.[122] If the parties in *Lloyd* had not stipulated Wisconsin law, but instead had litigated the case under the laws of Wisconsin without objecting to its application, a federal court sitting in Wisconsin would not question the application of Wisconsin law.[123] The Seventh Circuit, therefore, found that the stipulation of Wisconsin law in *Lloyd* was reasonable.[124]

Although the *Lloyd* court stated that, to its knowledge the issue of litigants' choice of law stipulations had not arisen previously in a tort case,[125] other courts had considered tort litigants' choice of law stipulations prior to the Seventh Circuit's decision in *Lloyd.*[126] For example, the Third Circuit in *System Operations, Inc. v. Scientific Games Development Corp.*,[127] considering allegations of product disparagement, refused to extend the rule allowing parties to agree contractually on the law governing a dispute to allow tort litigants to stipulate the applicable law.[128] In *System Operations,* a New Jersey corporation brought a common-law cause of action for declaratory judgment in the United States District Court for the District of New Jersey against Scientific Games Development Corp., a Michigan corporation with its principal place of business in Georgia.[129] The plaintiff

---

119. *Id.; see supra* note 42 (stipulations on the content or meaning of law are without force).

120. *Id.; contra* Ezell v. Hayes Oilfield Constr. Co., Inc., 693 F.2d 489, 492 n.2 (5th Cir. 1982) (litigants' choice of law stipulations are no more binding than stipulations concerning content or meaning of law), *cert. denied,* 104 S. Ct. 79 (1983); *see supra* notes 49-59 and accompanying text (discussion of *Ezell).*

121. 694 F.2d at 495.

122. *Id.* The *Lloyd* court cited the Seventh Circuit's decision in *Central Soya Co. v. Epstein Fisheries, Inc.* in support of the conclusion that in the absence of objection, Wisconsin law applies to an action tried in a Wisconsin court. *Id.; Central Soya Co.,* 676 F.2d 939, 941 (7th Cir. 1982).

123. 694 F.2d at 495.

124. *Id.*

125. *Id.*

126. *See infra* notes 127-38 and accompanying text (discussing decisions prior to *Lloyd* involving tort litigants' choice of law stipulations).

127. 555 F.2d 1131 (3d Cir. 1977).

128. *Id.* at 1137 n.4.

129. 414 F. Supp. 750, 751 (D.N.J. 1976), *rev'd,* 555 F.2d 1131 (3d. Cir. 1977).

claimed that the defendant had engaged in a campaign to falsely disparage the security of the plaintiff's lottery ticket business in Delaware, Illinois, Michigan, Nebraska, and New Jersey.[130] The district court, finding little difference in product disparagement laws among these states, issued a preliminary injunction against the defendant corporation based on authority from a variety of jurisdictions.[131]

Scientific Games Development Corp. appealed the district court's decision to the Third Circuit.[132] The Third Circuit found that in utilizing authority from several states, the district court had ignored the rule of *Klaxon Co. v. Stentor Electric Manufacturing Co.*,[133] requiring federal courts in diversity and pendent jurisdiction cases to examine the forum state's choice of law rules to determine the applicable body of law.[134] Following the rule of *Klaxon,* the Third Circuit determined that a New Jersey court would have invoked government interest analysis to identify the appropriate law to govern the issues involved.[135] Recognizing that government interest analysis pointed to no less than six possible bodies of law, the parties offered to stipulate to the application of general, common-law principles of product disparagement law.[136] The Third Circuit noted that the court must determine the effectiveness of this stipulation through application of the forum's choice of law principles.[137] Finding no decision in New Jersey nor in any other state upholding a choice of law stipulation in a tort case, the Third Circuit ruled that it could not assume that New Jersey courts would honor tort litigants' choice of law stipulations.[138]

As in the contract cases, most courts that have considered litigants' choice of law stipulations in tort cases have failed to support their decision, but instead have commented on the lack of decisions on point.[139] The absence

---

130. *Id.*

131. *See id.* at 757-64 (citing variety of authority as support for ordering preliminary injunction).

132. 555 F.2d at 1136.

133. 313 U.S. 487 (1941); *see supra* note 108 (discussing *Klaxon).*

134. 555 F.2d at 1136; *see Klaxon,* 313 U.S. at 496-97 (forum state's choice of law rules govern in diversity and pendent jurisdiction cases).

135. *Id.* at 1137. The Third Circuit in *System Operations* determined that New Jersey courts would resolve the choice of law problem in a product disparagement case by identifying and weighing the interest of each related state in having its product disparagement laws govern the case. *Id.* The Third Circuit labeled the process of determining the applicable law through the weighing of states' interests as government interest analysis. *Id.*

136. *Id.* at 1137 n.4. Since the plaintiff in *System Operations* alleged that the plaintiff's product was disparaged in five different states, each of the five states arguably had a substantial interest in having its law applied. *Id.* at 1137. Arguably, Georgia, the defendant's principal place of business, also had a substantial interest in having the product disparagement laws of Georgia apply. *Id.*

137. *Id.; see supra* note 108 (federal courts exercising diversity jurisdiction must apply forum's choice of law rules).

138. 555 F.2d at 1134 n.4.

139. *See* Lloyd v. Loeffler, 694 F.2d 489, 495 (7th Cir. 1982) (upholding tort litigants' choice of law stipulation despite absence of cases on point); System Operations, Inc. v. Scientific

of detailed reasoning concerning why courts should or should not honor tort litigants' choice of law stipulations necessitates an examination of tort stipulations in light of the policies underlying the acceptance of contractual choice of law clauses.[140]

A contractual relationship gains stability when the parties to the contract agree on the law to govern the course of their dealings and when the parties know that courts will honor their choice of law.[141] Some contracts contain choice of law stipulations directed at potential tort actions between the parties, and courts may honor the parties' choice to ensure contractual stability.[142] In noncontractual relationship settings, tort litigants likely cannot claim successfully that a tacit agreement existed between the parties concerning the law to govern the allegedly tortious act prior to performance of the act, because evidence of a tacit agreement concerning the implications of an act may lead to a finding of consent to the tortious act.[143] Allowing the tort litigants to stipulate the substantive law to govern the action, therefore, does not always protect expectancies of the parties.[144]

A second major consideration in judicial acceptance of contractual choice of law stipulations is the time and effort saved by courts in avoiding traditional choice of law analysis.[145] Judicial economy also is the primary reason courts might consider adopting the litigants' choice of law stipulations in tort cases.[146] The need to hold the cost of litigation within bounds and to keep court dockets moving is a valid concern for the courts.[147] Stipulations

---

Games Dev. Corp., 555 F.2d 1131, 1134 n.4 (3d Cir. 1977) (rejecting tort litigants' stipulation of applicable law because of absence of authority).

140. *See supra* notes 14-17 and accompanying text (discussing policies underlying acceptance of choice of law clauses in contracts); *infra* notes 141-55 and accompanying text (examining tort litigants' choice of law stipulations in light of policies supporting acceptance of choice of law clauses in contracts).

141. *See supra* notes 14-15 and accompanying text (parties gain certainty in business transactions when courts honor choice of law clauses).

142. *See, e.g.*, Siegelman v. Cunard White Star, Ltd., 221 F.2d 189, 194-95 (2d. Cir. 1955) (personal injury claim against shipping line dismissed in accord with law of England stipulated in contract of carriage); Piscane v. Italia Societa Per Azioni Di Navigazione, 219 F.Supp. 424, 425 (S.D.N.Y. 1963) (provision in passage ticket stipulating that law of Italy would govern claims for injuries to passengers was not conclusive, but court did consider stipulation in choosing appropriate law); Caruso v. Italian Line, 184 F. Supp. 862, 863 (S.D.N.Y. 1960) (same).

143. *See* M. SPEISER, C. KRAUSE & A. GANS, *supra* note 5, § 5:7 at 797-98 (one does not sustain legal injury from act to which one consents).

144. *But cf. supra* notes 14-17 and accompanying text (discussing protection of party expectancies gained through certainty in choice of law).

145. *See supra* note 12 (choice of law stipulations reduce litigation).

146. *See infra* notes 147-48 and accompanying text (reduction in litigation is legitimate interest of courts and courts reduce litigation through application of litigants' choice of law stipulations).

147. *See* Siegelman v. Cunard White Star, Ltd., 221 F.2d 189, 195 (2d Cir. 1955) (choice of law stipulations save courts time and effort in resolving ambiguities); *see also* United States v. Montgomery, 620 F.2d 753, 757 (10th Cir.) (parties enter into stipulations to dispense with proof over matters not in issue and, therefore, promote judicial economy), *cert. denied*, 449 U.S. 882 (1980).

by tort litigants often further these interests.[148] Honoring litigant's choice of law stipulations based on a concern for judicial economy alone, however, may prompt forceful objections from observers that courts are permitting the parties to exercise powers traditionally reserved to the legislature.[149] Although courts have quieted the concern of usurpation of a legislative function in the realm of contracts, courts may not quell the objection as easily in tort cases.[150] Tort actions often involve strong public policy concerns to raise standards of conduct to levels deemed acceptable by the legislature.[151] Arguably, society should not permit a tort litigant to choose the standards of conduct applicable to his own actions.[152] Courts should consider, however, authorized and deliberate stipulations by parties who have dealt with each

148. *See* Kramer v. United States, 406 F.2d 1363, 1367 (Ct. Cl. 1969) (concerns for judicial economy require that courts dispose of litigation on parties' stipulation, if possible); *supra* note 12 (choice of law stipulations reduce litigation and are less burdensome on courts than tradition choice of law analysis).

149. *See* J.H. BEALE, THE CONFLICT OF LAWS § 232.2, at 1079-80 (1935) (asserting that courts convert any two parties into legislative body when courts honor choice of law stipulations because determination of which of several systems of law apply is act of law). Judge Learned Hand once argued that courts should not honor choice of law stipulations because courts should not permit parties to avoid application of a set of laws on the parties' own initiative. *See* E. Gerli & Co. v. Cunard S.S. Co., 48 F.2d 115, 117 (2d Cir. 1931) (dictum) (considering choice of law provision in bill of lading that asserted application of law of state other than state in which contract executed). American courts have upheld choice of law stipulations in contracts despite the argument that choice of law stipulations allow parties to legislate. *See* Duskin v. Pennsylvania-Central Airlines Corp., 167 F.2d 727, 730 (6th Cir.), *cert. denied,* 335 U.S. 829 (1948). Commentators often cite the Sixth Circuit's reasoning in *Duskin* for its rationale in rejecting the protests of private legislation. *See* A. EHRENZWEIG, *supra* note 1, at 468 (using Duskin reasoning to explain why concerns of usurpation of legislative function are not convincing). The *Duskin* court reasoned that as long as the parties' stipulation does not offend public policy, courts have no more reason for precluding parties to a contract from stipulating that the law of any jurisdiction governs the rights and obligations under a contract than for precluding the parties from expressly stipulating rules of interpretation for terms in the contract. 167 F.2d at 730. This rationale, however, does not refute the allegations of legislation in the tort situation. In a tort case, courts measure the actions of the parties against a standard of conduct that a legislature has deemed acceptable under the law. *See* W. PROSSER & W. KEETON, THE LAW OF TORTS § 1, at 4 (5th ed. 1984) (torts consist of breaches of duties created by law without concern for agreement of parties to assume duties or evade them). Alternatively, in contract cases, courts examine the actions of the parties in light of rights and obligations agreed upon by the parties. 4 W. JAEGER, *supra* note 89, § 601A, at 286 (discussing interpretation and construction of contracts in light of parties' will as determined by applicable law).

150. *See supra* note 149 (discussing concerns of tort litigants' usurpation of legislative function in choice of law stipulations).

151. *See* Daily v. Sombert, 28 N.J. 372, 380, 146 A.2d 676, 681 (1958) (when injurious consequences take place in New Jersey, New Jersey has substantial interest in applying New Jersey law to medical malpractice actions to deter further tortious conduct); Cheatham & Reese, *Choice of the Applicable Law,* 52 COLUM. L. REV. 959, 972-76 (1952) (tort cases often involve strong public policy concerns which may induce forum to apply law of another state to case).

152. *See* W. PROSSER & W. KEETON, *supra* note 149, § 1 at 4 (parties to tort dispute have no role in determining standards by which courts will measure parties conduct); *see* Reeg v. Shaughnessy, 570 F.2d 309, 314 (10th Cir. 1978) (parties to medical malpractice action could not stipulate medical standards to apply).

other fairly and at arms length.[153] The position of the Seventh Circuit, as the decision in *Lloyd v. Loeffler* demonstrates, is that courts should honor reasonable choice of law stipulations by tort litigants for the same reasons courts honor choice of law clauses in contract disputes.[154] Although not all of the policies supporting contractual choice of law stipulations translate into the tort situation, the concern for judicial economy should foster judicial acceptance of reasonable choice of law stipulations by tort litigants.[155]

Some courts that have accepted litigants' choice of law stipulations in both tort and contract disputes have commented on the reasonableness of the stipulation.[156] In judging a stipulation's reasonableness, the courts honoring litigants' agreements have considered such factors as the applicable law absent the stipulation,[157] the situs of the transactions or occurrence,[158] the location of the contract negotiations[159] and parties' domicile, or place of incorporation or principal place of business.[160] The courts that have rejected proffered stipulations consistently never have reached the question of the stipulations' reasonableness.[161]

Despite the scarcity of discussion detailing courts' reasons for accepting or rejecting litigants' choice of law stipulations, some general principles can be derived from those cases that have addressed the issue of litigants' choice of law stipulations.[162] For example, if the plaintiff in an action argues the law of a certain jurisdiction in the complaint and the defendant responds in terms of the same set of laws, a court may deem the litigants to have

---

153. *See supra* notes 12 and 17 and accompanying text (discussing choice of law stipulations role in promoting judicial economy).

154. 694 F.2d 489, 495 (7th Cir. 1982); *supra* notes 102-24 and accompanying text (discussion of *Lloyd).*

155. *See supra* notes 145-48 and accompanying text (tort litigants' choice of law stipulations promote judicial economy).

156. *See* Gilbert & Bennett Mfg. Co. v. Westinghouse Elec. Corp., 445 F. Supp. 537, 544 (D. Mass. 1977) (stipulation was reasonable because court would have applied Massachusetts law under appropriate relation test had no stipulation existed).

157. *See id.* (finding stipulation reasonable since same law would apply absent stipulation).

158. *See* Twohy v. First Nat'l Bank of Chicago, 758 F.2d 1185, 1191 (7th Cir. 1985) (litigants' choice of Spanish law was reasonable because alleged contract performable in Spain).

159. *See* Prashker v. Beech Aircraft Corp., 258 F.2d 602, 607 (3d Cir. 1958) (court did not question choice of law stipulation since chosen law was that of state where parties negotiated contract).

160. *See* Business Incentives Co. v. Sony Corp. of Am., 397 F. Supp. 63, 67 (S.D.N.Y. 1975) (despite stipulation in contract that New York law applied, New Jersey law applied because New Jersey had strong public policy of protecting small business incorporated in New Jersey).

161. *See, e.g.,* Ezell v. Hayes Oilfield Constr. Co., Inc., 693 F.2d 489, 492 n.2 (5th Cir. 1982) (litigants' choice of law stipulation rejected without discussing reasonableness of stipulation), *cert. denied,* 104 S. Ct. 79 (1983); System Operations, Inc. v. Scientific Games Dev. Corp., 555 F.2d 1131, 1137 n.2 (3d Cir. 1977) (same); Consolidated Water Power & Paper Co. v. Spartan Aircraft Co., 185 F.2d 947, 949 (3d Cir. 1950) (same).

162. *See infra* notes 163-75 and accompanying text (drawing general conclusions from decisions concerning litigants' choice of law stipulations).

stipulated the applicable law.[163] Further, by not objecting to a judge's application of a set of laws, the parties may find themselves bound to that law as if the parties themselves had so stipulated.[164] Concerns for judicial economy and fairness to the opposing party demand that a party object at the outset if the law applied is unacceptable.[165] Once the parties have stipulated the choice of law, the court should not permit a retraction of the stipulation by one litigant when the other litigant has developed his case based on the stipulated law or when the court has proceeded under the assumption that the parties were in agreement on the applicable law.[166]

Upon application of the forum's choice of law rules, a court may find that several bodies of law might apply.[167] A court likely will honor an agreement between the parties stipulating that one of the possible bodies of

---

163. *See* Scott Paper Co. v. Adair Truck & Equip. Co., 542 F.2d 1257, 1259 n.3 (5th Cir. 1976) (arguably, while either Louisiana law or Alabama law applied to contract case, parties deemed to have stipulated application of Alabama law when in briefs and at oral argument parties argued Alabama law); Gaull v. Abbot Laboratories, Inc., No. 84C 8895 (N.D. Ill. May 10, 1985) (available Oct. 1, 1985, on WESTLAW, Dct database) (argument of summary judgment motion entirely under New York law resulted in application of New York law to defamation case as if parties had so stipulated); Metropolitan Life Ins. Co. v. Skov, 51 F. Supp. 470, 473 (D. Or. 1943) (court deemed parties to contract dispute to have stipulated application of Washington law when parties argued under Washington law and conversed with court in terms of Washington law); *see also* State *ex rel.* Kansas City Stockyards Co. of Me. v. Clark, 536 S.W.2d 142, 146 (Mo. 1976) (court gave significant weight to fact that plaintiff's complaint and defendant's answer alleged that Missouri law was applicable in giving effect to pretrial choice of law stipulation in wrongful death case).

164. *See* Casio, Inc. v. S.M. & R. Co., Inc., 755 F.2d 528, 531 (7th Cir. 1985). In *Casio,* the Seventh Circuit found that the district court incorrectly had applied the forum's rules of decision. *Id.* at 531. Since the parties in *Casio* never objected to the district court's application of Illinois law to the contract dispute, however, the Seventh Circuit deemed the parties to have stipulated the application of Illinois substantive law. *Id.; see also* International Adm'rs Inc. v. Life Ins. Co. of N. Am., 753 F.2d 1373, 1376-77 n.4 (7th Cir. 1985) (applying Illinois law since parties made no objection to district court's decision to apply Illinois law on issues of tortious interference with contractual relations, although Illinois law likely would not govern under choice of law analysis).

165. *See supra* note 47 and accompanying text (unwillingness of *Twohy* court to free plaintiff of pretrial choice of law stipulation); *supra* note 164 (citing courts that have refused to apply law of another state since parties did not object to application of law chosen by lower court).

166. *See* Tannerfors v. American Fidelity Fire Ins. Co., 397 F. Supp. 141, 144-145 n.4 (D.N.J. 1975) (refusing to apply Florida law at request of one party when that party had stipulated application of New Jersey law and had not raised objection to application of New Jersey law to good faith issues of case until after trial), *aff'd,* 535 F.2d 1247 (3d Cir. 1976); Gilbert & Bennett Mfg. Co. v. Westinghouse Elec. Corp., 445 F. Supp. 537, 544 (D. Mass. 1977) (court would not relieve plaintiff of stipulation that Massachusetts law applied to breach of contract issues when defendant had prepared case under Massachusetts law based on parties' stipulation).

167. *See* System Operations, Inc. v. Scientific Games Dev. Corp., 555 F.2d 1131, 1137 (3d Cir. 1977) (under government interest analysis, law of six different states could apply to product disparagement claim).

law should govern the issues of the case.[168] Again, courts may accept the litigants' choice of law stipulation because of concerns for judicial economy.[169] An agreement between the parties will allow the court to avoid making a complex choice of law decision and also will avert the possibility of remand due to choice of law error.[170]

While European courts have tended to honor the litigant's choice of law only when the parties have stipulated the law as that of the forum,[171] American courts have not so confined the litigants.[172] American courts, however, will not honor a stipulation that calls for a resolution of the dispute using general, legal principles or by using laws which currently are not in force somewhere.[173] A stipulation that calls for resolution of the dispute under nonstatutory rules does not promote the judicial function of precedent production[174] and may destroy the court's subject matter jurisdiction.[175]

Aside from questions of validity in litigants' choice of law stipulations, questions of interpretation may arise when a court encounters a choice of law stipulation by litigants.[176] If courts are willing to accept stipulations by litigants in either tort or contract cases, courts must decide whether to look to the whole law of the chosen state, including the state's choice of law rules, or only to the substantive law of the state chosen.[177] When the parties

---

168. *See* Commercial Credit Corp. v. Stan Cross Buick, Inc., 343 Mass. 622, 625, 180 N.E.2d 88, 90-91 (1962) (Massachusetts conflicts principles would apply Maine law to action for conversion, but since parties had not demonstrated that differences existed in law of two states, Massachusetts courts should assume laws are identical).

169. *See supra* notes 12 and 17 and accompanying text (stipulations concerning governing law save court time and effort in resolving conflicts problems).

170. *Id.*

171. *See* G. DELAUME, *supra* note 10, at 21-22 (concluding that common feature of foreign court decisions honoring choice of law stipulations is that stipulation is to law of forum); *but see infra* note 172 and accompanying text (finding that American courts have not restricted litigants' choice of law stipulations to that of law of forum).

172. *See, e.g.*, Twohy v. First Nat'l Bank of Chicago, 758 F.2d 1185, 1191 (7th Cir. 1985) (applying law of Spain in Illinois forum); Commercial Travelers Mut. Acc. Ass'n. v. White, 406 S.W.2d 145, 147-48 (Ky. 1966) (law of New York applied in Kentucky forum); *cf.* Gonzalez v. Volvo of Am. Corp., 752 F.2d 295, 299 (7th Cir. 1985) (preferable to apply substantive law of forum rather than allow choice of law stipulation when parties fail to show clearly that conflict of laws exists).

173. *See* Central Soya Co., Inc. v. Epstein Fisheries, Inc., 676 F.2d 939, 941 (7th Cir. 1982) (under *Erie* doctrine, federal court cannot allow parties to stipulate that general common law principles apply); *supra* notes 116-18 and accompanying text (stipulated law must be operative in some state or country).

174. *See supra* notes 116-120 and accompanying text (discussing judicial function of precedent production).

175. *See supra* notes 116-18 and accompanying text (if stipulated law is not operative in some jurisdiction, stipulation is ineffective).

176. *See infra* notes 178-95 and accompanying text (concluding that courts should construe litigants' choice of law stipulations as referencing only substantive law of chosen state, unless expressly provided otherwise).

177. *See infra* notes 183-95 and accompanying text (discussing policies against viewing choice of law stipulations as referencing chosen state's choice of law rules).

include a choice of law clause in a contract, the Restatement (Second) of Conflict of Laws[178] instructs that, unless there is a clear indication to the contrary, the forum should apply only the substantive law of the stipulated state.[179] American courts have accepted the view of the Restatement and rarely look beyond the substantive law of the stipulated state.[180] Courts enforcing litigants' stipulations similarly have looked only to the chosen state's substantive law.[181]

In choice of law stipulations by litigants in either tort or contract disputes, the forum should not look beyond the substantive law of the stipulated state for several reasons.[182] First, American courts have refused to play the interstate or international "ping-pong"[183] which may result if a choice of law stipulation is deemed to reference the chosen state's choice of law rules.[184] If the forum looks to the stipulated state's choice of law rules,

---

178. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(e) (1971).

179. *Id.* When parties to a contract stipulate the applicable law, one logically may conclude that the parties are referring to the chosen state's local law only. *Id.*, comment h, at 569. Applying the whole law, which includes the choice of law rules of the chosen state, destroys the predictability and certainty which the parties intended the stipulation to attain. *Id.* If courts were to apply the whole law of a chosen state, the parties no longer would be able to ascertain the governing law since the stipulated state's choice of law rules may require application of a third state's laws. *Id.*

180. *See* Born v. Norwegian Am. Line, Inc., 173 F. Supp. 33, 34-36 (S.D.N.Y. 1959) (stipulation of Norwegian law construed to refer only to local law of Norway), McGill v. Hill, 31 Wash. App. 542, 547, 644 P.2d 680, 683 (1982) (stipulation that Pennsylvania law would govern resulted in application of Pennsylvania substantive law without consideration of Pennsylvania choice of law rules).

181. *See, e.g.*, Casella v. Norfolk & W. Ry. Co., 381 F.2d 473, 475 (4th Cir. 1967) (applying New York substantive law in case on appeal from United States District Court for Western District of Virginia based upon litigants' stipulation); Johnson v. Eli Lilly & Co., 577 F. Supp. 174, 175 (W.D. Pa. 1983) (upon stipulation by parties that New York law applied, Pennsylvania choice of law rules demand application of New York substantive law), *aff'd*, 738 F.2d 422 (3d. Cir.), cert. denied, 105 S.Ct. 184 (1984). Metropolitan Life Ins. Co. v. Skov, 51 F. Supp. 470, 473 (D. Or. 1943) (district court construed stipulation of Washington law to require application of Washington substantive law only).

182. *See infra* notes 183-95 and accompanying text (discussing policies against viewing choice of law stipulations as referencing whole law of chosen state).

183. *See* Falconbridge, *Renvoi, Characterization and Acquired Rights,* 17 CAN. BAR REV. 369, 379 (1939) (asserting that game of "ping-pong" often results from court's examination of another country's choice of law rules).

184. *See* Polglase v. Greyhound Lines, Inc., 401 F. Supp. 335, 337 (D. Md. 1975). Once a Maryland court concludes that the law of another state applies, Maryland courts will look only to the substantive law of the chosen state. *Id.* If a Maryland court construed the choice of law to reference the conflicts rules of the chosen state, those rules might cause the court to reconsider Maryland law. *Id.* The chain of events described above would result in a renvoi which is contrary to the view espoused by the Restatement (Second) of Conflict of Laws. *Id.; see* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(3) (1971); *infra* notes 185-88 and accompanying text (discussing policies underlying rejection of renvoi doctrine in United States); *see also* McAvoy v. Texas Eastern Transmission Corp., 187 F. Supp. 46, 50 (W.D. Ark. 1960) (in determining applicable body of law, Arkansas courts would look only to law relevant to precise question and not to chosen state's choice of law rules); Pfau v. Trent Aluminum Co., 55 N.J. 511, 526, 263 A.2d 129, 136-37 (1970) (once applicable law determined through

and if those rules differ from the choice of law rules of the forum, the forum may find that the forum state's law is applicable.[185] If the court, however, may apply logically the chosen state's choice of law rules, application of the forum state's choice of law rules is just as logical.[186] Since the litigants have stipulated that the laws of the second state are applicable, the search for the appropriate substantive law could continue *ad infinitum*.[187] Courts avoid this endless circle, commonly known as renvoi, when courts only look to the substantive law of the stipulated state.[188]

A second reason why courts should look only to the substantive law of the chosen state is that the recognition of a choice of law stipulation demonstrates the forum's acceptance of at least some party autonomy.[189] To construe the litigants' stipulation as a submission to the law determined

---

government interest analysis, New Jersey courts will not look to choice of law rules of chosen state since court would not serve government interest analysis goals of simplicity and uniformity). *See generally* Falconbridge, *supra* note 183, at 379 (asserting that reference to choice of law rules of chosen state may lead countries into endless game of "ping-pong"); Cormack, *Renvoi, Characterization, Localization and Preliminary Question in the Conflict of Laws*, 14 So. CALIF. L. REV. 221, 250 (1941) (discussing insoluble logical dilemma of renvoi which may arise when courts view applicable law as including choice of law rules of state whose law court applies).

185. *See* Haumschild v. Continental Casualty Co., 7 Wis.2d 130,____, 95 N.W.2d 814, 820 (1959). In *Haumschild v. Continental Casualty Co.* the Wisconsin Supreme court rejected the renvoi doctrine, maintaining that the doctrine leads courts on a never ending circle. *Id.* at ____, 95 N.W.2d at 820. In *Haumschild*, the Wisconsin Supreme Court considered the issue of whether a wife could sue her husband for damages as the result of injuries she suffered in an automobile accident in California. *Id.* at ____, 95 N.W.2d at 820. The *Haumschild* court explained that because the husband and wife were domiciled in Wisconsin a conflict of laws existed. *Id.* at ____, 95 N.W.2d at 820. If the court followed the then existing conflicts rule in Wisconsin concerning interspousal capacity to sue, a Wisconsin court would examine the law of the state where the wrong occurred. *Id.* at ____, 95 N.W.2d at 820. Accordingly, a Wisconsin court would look to the law of California to see whether a wife could sue her husband in tort. *Id.* at ____, 95 N.W.2d at 820. While California substantive law provided that a wife could not sue her husband in tort, California had adopted a conflicts of law principle which states that the law of the domicile is determinative. *Id.* at ____, 95 N.W.2d at 820. The California conflicts of law principle would refer the court back to Wisconsin law since the parties were domiciled in Wisconsin. *Id.* at ____, 95 N.W.2d at 820. Since the conflicts rule in Wisconsin required application of the law where the wrong occurred without reference to the law of the state where the parties were domiciled, an endless circle would occur. *Id.* at ____, 95 N.W.2d at 820. Recognizing that this result would produce chaos in the field of conflict of laws, the *Haumschild* court ruled that whenever a conflict of laws arises in a case involving interspousal capacity to sue in tort, Wisconsin courts will apply the law of the parties' domicile. *Id.* at ____, 95 N.W.2d at 820.

186. *See* Cormack, *supra* note 184, at 250 (discussing how renvoi is encountered); *see also supra* note 185 (discussion of renvoi in *Haumschild).*

187. *See* Cormack, *supra* note 184, at 250 (endless circle may occur when courts view applicable law as including chosen state's choice of law rules); *Haumschild,* 7 Wis.2d at ____, 95 N.W.2d at 820 (same); Pfau v. Trent Aluminum Co., 55 N.J. 511, 526, 263 A.2d 129, 136-37 (1970) (same).

188. *See supra* notes 184-87 and accompanying text (viewing choice of law as referencing only substantive law of chosen state avoids problems of renvoi).

189. *See supra* note 6 (discussing American courts' acceptance of party autonomy in contractual choice of law clauses).

applicable through the application of unfamiliar choice of law rules, is not consistent with the concept of party autonomy.[190] Unless the stipulation clearly calls for the application of the chosen state's conflict rules, courts should not deem the parties to have gambled on the governing law.[191]

Finally, since courts honor choice of law stipulations, for the most part, in the interest of judicial economy, applying the whole law of the chosen state would be self-defeating.[192] By effectuating a stipulation, a court may forego choice of law analysis.[193] If the stipulation references the whole law of another jurisdiction, the forum not only will conduct choice of law analysis, but will have to deal with what may be quite unfamiliar rules.[194] No saving of time or effort will result, and the court will lose much of the incentive for accepting stipulations.[195]

Accepting the proposition that courts should apply the rules of decision of the state's laws to which the parties stipulated,[196] most of the discussion regarding choice of law provisions in contracts focuses on the limits of the parties' recognized autonomy.[197] With respect to litigants' choice of law stipulations, courts first must determine whether courts should consider giving effect to the stipulations.[198] With a few exceptions, courts that have rejected stipulations by litigants have not moved beyond this first important question.[199]

The increasing court congestion in the United States necessitates that courts elevate considerations of judicial economy.[200] Since litigants may ease

---

190. *See supra* notes 179-87 and accompanying text (examining Restatement's view that courts should apply substantive law of state chosen by parties).

191. *See supra* notes 14-16 and accompanying text (choice of law stipulations are means by which parties to contract protect their expectancies under contract).

192. *See supra* note 12 (choice of law stipulations reduce litigation); *see infra* notes 193-95 (application of whole law of chosen state does not promote judicial economy).

193. *See supra* note 12 (choice of law stipulations reduce litigation by allowing courts to forego traditional choice of law analysis).

194. *See* Cormack, *supra* note 184, at 257-58 (concerns of judicial economy necessitate that judges apply only substantive law of chosen state).

195. *See supra* note 17 and accompanying text (choice of law stipulations honored in part because of benefits to judicial economy).

196. *See supra* notes 184-85 and accompanying text (discussing American courts and commentators rejection of view that courts should examine choice of law rules of chosen state).

197. *See supra* notes 1 and 156-60 (discussing public policy and reasonableness constraints on choice of law by parties).

198. *See infra* note 199 (asserting that courts rejecting litigants' choice of law stipulations did not examine whether stipulated body of law was reasonable or was violative of public policy).

199. *See, e.g.*, Ezell v. Hayes Oilfield Constr. Co., 693 F.2d 489, 492 n.2 (5th Cir. 1982) (litigants' choice of law stipulations are no more binding on court than stipulations concerning content of law), *cert. denied*, 104 S. Ct. 79 (1983); System Operations, Inc. v. Scientific Games Dev. Corp., 555 F.2d 1131, 1137 n.4 (3rd Cir. 1977) (absence of authority on point resulted in rejection of litigants' choice of law stipulation); Consolidated Water Power & Paper Co. v. Spartan Aircraft Co., 185 F.2d 947, 949 (3d Cir. 1950) (court will not honor choice of law stipulation if not included in contract).

200. *See* J. LIEBERMAN, THE LITIGIOUS SOCIETY 3-6 (1981) (asserting that American courts

the dockets of the courts through choice of law stipulations, courts should at least pause to consider the benefits of reduction in litigation to the court, the parties, and the system in general.[201] If a choice of law stipulation proffered by litigants is reasonable and does not offend any public policy interests of the forum or any other state, a court should honor the litigants' choice of law.[202] While courts are not in agreement concerning the validity of litigants' choice of law stipulations,[203] a shared concern for reducing litigation should move more courts toward accepting reasonable choice of law stipulations proffered by litigants in both contract and tort disputes.[204]

TYLER BROWN

---

are filled with increasing volume of lawsuits constituting "legal explosion"); Manning, *Hyperlexis: Our National Disease,* 71 NW. U.L. REV. 767, 767-70 (1977) (asserting that rapid growth in litigation is damaging to American judicial system).

201. *See supra* notes 12-17 and accompanying text (discussing policy reasons supporting party autonomy in choice of law when included in contractual choice of law clause).

202. *See supra* notes 1 and 156-60 (discussing reasonableness and public policy constraints on party autonomy in choice of law).

203. *See, e.g.,* Twohy v. First Nat'l Bank of Chicago, 758 F.2d 1185, 1191 (7th Cir. 1985) (honoring litigants' choice of law stipulation in contract dispute); Lloyd v. Loeffler, 694 F.2d 489, 495 (7th Cir. 1982) (honoring tort litigants' choice of law stipulation); Ezell v. Hayes Oilfield Constr. Co., 693 F.2d 489, 492 n.2 (5th Cir. 1982) (rejecting litigants' choice of law stipulation in contract dispute), *cert. denied,* 104 S. Ct. 79 (1983); System Operations, Inc. v. Scientific Games Dev. Corp., 555 F.2d 1131, 1137 (3d Cir. 1977) (rejecting tort litigants' choice of law stipulation).

204. *See supra* notes 146-48 and accompanying text (reduction of litigation is valid concern for courts).