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Examination No. ____

UNM School of Law
Professor Occhialino

May 11, 2000
Four Hours

Semester II: 1999-2000
Final Examination

# Conflict of Laws

INSTRUCTIONS

1. This is a closed book examination.

2. This examination consists of four questions. **You are to answer only two of the questions**. You may choose which two of the four questions you prefer to answer.

3. At the beginning of the exam period you will receive this examination, containing four questions, and scrap paper. You should spend the first hour reviewing the four questions, choosing the two you are going to answer, and, perhaps, outlining one or both answers.

   Bluebooks will be handed out at the end of the first hour. You then have three hours to answer the two questions you choose.

4. Please begin each essay in a separate bluebook. Mark on the cover of the bluebooks the number of the question you are answering.

5. Please write on only one side of a page and only on every other line. Thank you.

**Question One**
**Suggested Time: Ninety Minutes**

Hunter, Inc. is a Maryland corporation, with its headquarters in Maryland. It provides computer consulting services for businesses that use human resources software. Hunter maintains a branch office in New York.. Although its business is centered primarily in the eastern United States, Hunter has provided and continues to provide consulting services to customers in all fifty states including significant consulting to businesses located in California.

All of Hunter's employees reside outside of California. All Hunter employees, where ever they reside, sign a standard contract with Hunter. The contracts each contain a "covenant not to compete", which prevents employees from working for any of Hunter's competitors for up to one year from termination unless the employee is laid off by Hunter for economic reasons. Such clauses are valid and enforceable under Maryland law.

Application Group, Inc. (AGI) is a California corporation, with its headquarters in San Francisco, California. Like Hunter, AGI provides its customers with the services of trained, specialized computer consultants who frequently travel substantial distances to work directly at the customer's premises and who sometimes work long distance via inter-computer communications from their corporate headquarters to the offices of their customers. Sometimes these consultants travel from their home state to the customer's location for a project.

Competition for the limited number of qualified computer consultants among prospective employers--including Hunter and AGI--is "stiff." Hunter and AGI both often compete for the same contracts.

AGI conducts both its in-state and out-of-state business from its San Francisco headquarters. AGI's employees are treated as California employees; all AGI employees are residents of, work in, or are managed from California, and have employment agreements governed by California law. AGI does not require a covenant forbidding employment with its competitors.

Dianne Pike is an independent consultant, now residing in California, who is skilled in the field in which Hunter and AGI compete. She has a superb professional reputation. In early March, 2000, Hunter decided that it wanted to hire Pike to run one of its divisions. Pike would head up western operations and would be charged with the specific task of preparing bids for jobs that Hunter and AGI compete for. Hunter was confident that Pike's knowledge and would especially be valuable in persuading customers to choose Hunter over it's leading competitor, AGI. Pike is definitely interested and has already taken an option on an opulent home in Bethesda, Maryland so that she can move to Maryland and start right in to work if an employment deal is finalized.

**Memo**

To: Associate
From: Partner
RE: Hunter/Pike Contract

House Counsel for Hunter has asked this firm for advice in drafting an employment contract between Dianne Pike and Hunter, Inc. Counsel states that she is primarily concerned about the possibility that once Pike comes on board and proves to be as valuable as Hunter expects her to be, AGI might seek to hire her away from Hunter. General Counsel is putting together a salary and benefits package that will provide incentives for Pike to stay with Hunter, but wants to use our expertise in conflict of laws to help assure that Hunter does not train Pike, showcase her talents and then lose her to AGI.

Counsel asks that we draft clauses that will help to assure that the non-compete clause Hunter will put into the Pike/Hunter contract will be valid and enforceable in the courts. The clause, which General Counsel has drafted and which we will not modify reads:

"During the time of her employment and for a period of one year after the date of its termination for any reason other than termination by Hunter for economic or budgetary reduction purposes, Pike agrees that she will not render, directly or indirectly, any services whatsoever, including but not limited to advisory or consulting services, whether as an employee or otherwise, to any business which is a competitor of Hunter Inc., including ... Application Group, Inc."

Our task is to assure that the clause is honored and enforced if there is ever litigation. House Counsel says she would like to see any litigation take place in the District Court of Maryland for the County of Bethesda, which is the home of Hunter, Inc. and which is likely to have judges and jurors who are not prejudiced against Hunter. She says that her worst nightmare is that Pike will be a success at Hunter, will be wooed away to work for AGI in California and that Pike would then file a declaratory judgment in a California court seeking a declaration that the non compete clause is invalid under California law.

Let's do our best to make sure that the nightmare does not become reality and that Hunter is able to enforce the clause in court if Pike ever does try to jump ship for AGI.

Please draft appropriate clauses for insertion in the contract, explaining concisely but fully your reasoning as to each clause selected.

Attached are relevant provisions from the law of Maryland and California

**Commercial Union Ins. Co. v. Porter Hayden Corp**, 698 A. 2d 1167 (Md. App. 1997)

Maryland law follows the lex loci contractus rule set forth in the Restatement (First) of Conflict of Laws; therefore, issues of contract construction are determined by "the local law of the place of contracting," which is defined as "the place where occurred the last act necessary under the forum's rules of offer and acceptance to give the contract binding effect...." Restatement (First) of Conflict of Laws S 332.

**American Motorists Ins. Co. v. Atra Group, Inc.**, 659 A.2d 1295 (Md. 1995)

Despite growing acceptance elsewhere, Maryland courts have never applied the "most significant relationship" test embodied by the Restatement. We have, however, cited with approval other provisions of the Restatement. In Kronovet v. Lipchin, 288 Md. 30, 415 A.2d 1096 (1980), we cited with approval Restatement S 187 in determining whether we would enforce the contracting parties' choice-of-law clause contained in a contract. See also National Glass v. J.C. Penney, 336 Md. 606, 650 A.2d 246 (1994) (applying S 187 to analyze the validity of a choice-of-law clause). Section 187 concerns whether a choice-of-law clause contained in a contract is to be enforced and provides that such a clause will be honored unless either: 1) the state whose law is chosen has no substantial relationship to the parties or the transaction; or 2) the strong fundamental public policy of the forum state precludes the application of the choice-of-law provision. See Restatement (Second) Conflict of Laws S 187.

**Ruhl v. F. A. Bartlett Tree Expert Co.**, 245 Md. 118 ( Md. App.1967)

. . .This Court has had a number of cases involving the validity of restrictive covenants in a contract of employment. Covenants of this nature are in restraint of trade; the test is whether the particular restraint is reasonable on the specific facts. The general rule in Maryland, as in most jurisdictions, that 'restrictive covenants in a contract of employment, by which an employee as a part of his agreement undertakes not to engage in a competing business or vocation with that of his employer on leaving the employment, will be sustained 'if the restraint is confined within limits which are no wider as to area and duration than are reasonably necessary for the protection of the business of the employer and do not impose undue hardship on the employee or disregard the interests of the public."

There is no arbitrary yardstick as to what protection of the business of the employer is reasonably necessary, no categorical measurement of what constitutes undue hardship on the employee, no precise scales to weigh the interest of the public. The determination must be made on the particular circumstances. Even though the employer has a legitimate interest in the protection of its clientele, the restrictive covenant will not be enforced if under all the circumstances the covenant is unduly restrictive of the employee's freedom. . . .

'There are interests of public policy as well as of private rights to be balanced in the category of

cases in which this litigation falls. It is important to our economic system as well as to employers that proprietary interests of businesses be properly protected; it is important to the free competition basic to our national development as well as to the individual rights of employees who want to go into business for themselves that their spirit of enterprise be not unduly hampered. It is the facts in the particular case which weight the scales.'

**End of Maryland Law**

# California Law

**Cal Code 16600. Void contracts**
Except as provided in this chapter, every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void.

**Kolani v. Gluska**, 64 Cal.App.4th 402 (1998)

SUMMARY A broad covenant not to compete cannot be saved from illegality by narrowed construction.

FACTS AND PROCEDURAL HISTORY
Defendant Amitai Gluska was a salesperson employed by plaintiff, The Office Place (collectively, "TOP"), a wholesale supplier of office products. Co-defendant Eastman Office Products is Gluska's subsequent employer.

In May 1993 Gluska and TOP executed a "Sales Representative Agreement." The agreement included the following:

"COVENANT NOT TO COMPETE ... during the period of employment and for a period of One year following termination of employment, ... Gluska shall not for or with any other person compete with in any manner against TOP."

Gluska quit and went to work for Eastman, a competitor. This litigation to enforce the covenant not to compete resulted.

DISCUSSION
The covenant not to compete was void and unenforceable. Business & Professions Code section 16600 declares that every contract by which anyone is restrained from engaging in their lawful trade, business or profession is to that extent void. Business & Professions Code sections 16601 and 16602 permit broad covenants not to compete in two narrow situations: where a person sells the goodwill of a business, and where a partner agrees not to compete in anticipation of dissolution of a partnership. The latter sections reinforce the conclusion that covenants not to

compete in contracts other than for sale of goodwill or dissolution of partnership are void.

Narrower contractual restraints on a departing employee, which prohibit him/her from using confidential information taken from the former employer, have been held to be lawful. Gordon v. Landau (1958) 49 Cal.2d 690, 694, 321 P.2d 456.

The clause here involved is not narrowly tailored, like the one in Gordon. Instead it is an outright prohibition on competition and is void, as the trial court found

Appellants urge the court to "save" the non-compete clause by construing it as merely barring misappropriation of confidential customer lists and trade secrets. Generally, courts reform contracts only where the parties have made a mistake and not for the purpose of saving an illegal contract. Illegal contracts are void. The trial court here properly concluded that it should not rewrite the broad covenant not to compete into a narrow bar on theft of confidential information. There was no allegation of any mistake justifying reformation.

**Cation v. Hunt**, 72 Cal. Rptr. 2d 73 (Cal. App. 1998)

. . . .
California does not apply a mechanical test to choice-of-law questions. Rather, under its approach, California law will be applied unless the foreign law conflicts with California law and California and the foreign jurisdiction have significant interests in having their law applied. Where significant interests conflict, the court must assess the 'comparative impairment' of each state's policies. The law applied will be that of the state whose policies would suffer the most were a different state's law applied. A separate choice-of-law inquiry must be made with respect to each issue in a case. These rules apply regardless of whether the dispute arises out of contract or tort. An exception applies, however, in the case of contracts with choice-of-law provisions. California will apply the substantive law designated by the contract unless the transaction falls into either of two exceptions: 1) the chosen state has no substantial relationship to the parties or the transaction, or 2) application of the law of the chosen state would be contrary to a fundamental policy of the state. Under the second exception, where application of a choice-of-law provision would result in the contravention of California's public policy, the provision will be ignored to the extent necessary to preserve public policy. . . .

**End of California Law**

**End of Question One**

**Question Two**
**Suggested Time: Ninety Minutes**

Sam Stanley and Gerald Green were each seventeen years old in 1997. Both were domiciled in New Mexico with their respective parents. On November 10, 1997, Green borrowed his father's 1997 Honda Accord (registered in New Mexico and purchased from Harry's Honda, Inc., an Albuquerque dealership) for a trip to Fort Collins, Colorado to visit a friend who attends Colorado State University. Stanley went with him.

While Green was cautiously and prudently driving on a rain-slicked road just outside of Pueblo, Colorado, the car swerved on a wet spot and overturned. As a result of the rollover, Stanley was killed.

The Stanley family was convinced that Green was driving with care and so decided not to file a lawsuit for wrongful death against Green. On April 12, 2000, Sam Stanley's mother, Susan Stanley, watched a "60 Minutes" story about a newly-discovered design flaw in the 1997 Honda which caused the vehicle to turn over too easily when the driver made sudden steering corrections.

The next day Mrs. Stanley consulted your law firm and asked you to look into the possibility of filing a lawsuit against the manufacturer, Honda Japan Corp. and/or Harry's Honda, Inc. for defective design.

You quickly hired an expert who, after thorough investigation, reported back to you on May 10, 2000 that: 1) The 1997 Honda automobile has a defect causing it to overturn too easily when the driver makes a steering correction; 2) Analysis of the accident report now makes clear that the Honda would not have turned over when Green sought to turn the steering wheel to get the Honda out of the skid except for the defect in the Honda; 3) Sam Stanley would not have been injured, much less killed, if the Honda did not have the defective design; 4) The 1997 Honda was designed in Tokyo, Japan by Honda Japan, Inc.; 5) Japan has no strict liability in tort and awards only out of pocket expenses for wrongful death; 6) Honda Japan Corp. also distributes Honda automobiles and is registered to do business in both New Mexico and Colorado.

You have agreed to file a wrongful death action asserting that the defective design of the 1997 Honda caused the crash of the Honda and the death of Sam Stanley.

In order to determine where to sue the lawsuit, you hired a third-year law student to research New Mexico and Colorado law concerning products liability, the statute limitations and wrongful death law. The student's research follows and you are to assume that it correctly states the law of New Mexico and Colorado (Liberties may have been taken with the actual law in order to make the problem interesting).

Decide where to file the lawsuit to gain the maximum benefits for the Stanley family. Consider: 1) Statute of Limitations; 2) Law of Products Liability, and; 3) Wrongful Death Recovery. Write a memo to the file explaining fully why you chose the forum that you decided upon and how you expect the court in which the lawsuit is tried to rule with regard to the issues of products liability, statute of limitations and the amount of wrongful death recovery.

# New Mexico Law

**Choice of Law**

New Mexico is a "traditional" jurisdiction following the Restatement (First) of Conflict of Laws.

First National Bank of Albuquerque v. Benson, 89 N.M. 481 (1975)

**Statute of Limitations**

NMSA Sec. 41-2-2 (1907) Limitations of Actions

Every action instituted by virtue of the provisions of the (New Mexico Wrongful Death Act) must be brought within three years after the cause of action accrues. The cause of action accrues as of the date of the death.

**Wrongful Death Recovery**

There is no financial cap on the amount of recovery in a wrongful death action under New Mexico law.

NMSA Sec. 41-2-3 (1907) ....Damages

...and the jury in every such action may give such damages, compensatory and exemplary as they shall deem fair and just, taking into account pecuniary injury or injuries resulting from the death ....

Two years ago, the Supreme Court held that under the New Mexico wrongful death act, the personal representative may recover for the non-pecuniary "value of a human life" [hedonic damages].

Romeo v. Byers, 117 N.M. 422 (1998)

**Products Liability**

Duran v. General Motors Corp., 101 N.M. 742 (1983)

Defective design cases can only be based on negligence despite the fact that strict product liability applies to manufacturing defects.

Brooks v. Beech Aircraft Corp., 120 N.M. 372 (1995)

This was an appeal in which plaintiff sought to reverse a trial court ruling based on Duran, dismissing a design defect claim based on strict product liability.

Held: Overruling Duran—Case remanded for trial; Defective design cases may be brought in strict product liability just as manufacturing cases can be.

NMSA Sec. 41-8B-1 (1999) Products Liability; Design Defects

No action shall be brought against a manufacturer of any product for strict products liability or breach of implied warranty because of a design defect; bur rather such actions shall be based solely on negligence, breach of express warranty or fraud.

# Colorado Law

**Choice of Law**

Scheer v. Scheer
881 P.2d 479 (Colo. 1994)

. . . .While father and son were in Colorado on their way home to California after a trip to New York, they were involved in an automobile accident with another vehicle driven by a third party. Son brought this negligence claim against father. Father contended that his son's action against him was barred by parental immunity, a doctrine recognized in Colorado. Son asserted that California law controlled the immunity issue. California has abolished the doctrine of parental immunity.

The trial court granted father's motion for summary judgment, applying Colorado law. This appeal followed. Son contends that the trial court erred and that the law of California barring immunity should apply. We agree.. . . .

In multistate tort controversies, the law of the state with the most "significant relationship" with the occurrence and the parties is applied. First National Bank v. Rostek, 182 Colo. 437, 514 P.2d 314 (1973) (adopting the analysis of Restatement (Second) of Conflict of Laws § 145 (1969)).

Here, the trial court gave little weight to the domicile of the father and son and, instead, focused on the place of the accident and injury. However, the place of the accident was merely a "fortuitous occurrence." Focusing on the place of injury in an intra-family immunity dispute subjects the rights, duties, liabilities, and immunities conferred or imposed by the family relationship to constant change as family members cross state lines during temporary absences from home. California has the dominant interest in the parties' family relationship, and its law should be applied to that issue.

**Statute of Limitations**

**Colo. St. Ann. Sec. 13-21-204 Limitation of action.**
All actions provided for by [the Colorado Wrongful Death Act] shall be brought within two years from the death for which suit is brought.

**Davis v. National Gypsum Co..**
743 F.2d 1132 (5th Cir. 1984)

Maymon Lloyd Garner was killed on December 20, 1979, when a mortar shell prematurely exploded during Army training exercises at Fort Carson, Colorado. Garner was a Mississippi resident, but had been stationed at Fort Carson for approximately nine months prior to his death. On August 27, 1982, Laura Garner Davis filed this diversity action alleging that National Gypsum Company manufactured the defective mortar shell which caused her son's death. The district court determined that under Mississippi choice of law rules, Colorado substantive law should apply. The court then granted National Gypsum's motion for summary judgment on the ground that the action was barred by Colorado's two-year statute of limitation for wrongful death actions. In this appeal, Ms.

Davis contends that under Mississippi choice of law principles Mississippi substantive law should apply. We affirm the district court's decision to apply Colorado's substantive law. However, in deference to Colorado's position that its two-year time limitation to bring a death action is procedural, we conclude that Mississippi's six-year statute of limitation should be applied. . . .

National Gypsum contends the district court correctly determined that the two-year statute in the Colorado wrongful death act, Col.Rev.Stat. § 13-21-204, bars this action. We find that the six-year Mississippi statute of limitations is applicable. National Gypsum's argument is premised on the widely-accepted wisdom that limitation periods contained in wrongful death statutes extinguish the right to bring the action itself, not merely the right to pursue a remedy. Such limitation periods are thus treated as substantive law rather than procedural law. . . . However, the Colorado Court of Appeals has specifically held "the purpose and the effect of § 13-21- 204 ... and the emphasis of the statute is on the remedy and not the cause of action ...." Barnhill v. Public Service Co., 649 P.2d 716 (Col.Ct.App.1982). We . . .conclude that Barnhill teaches us that the time limitation in § 13-21-204 is a matter of procedural law rather than substantive law. In this case, then, Mississippi courts would accept Barnhill's characterization of § 13-21-204 as procedural rather than substantive, and thus would apply Mississippi's six-year general statute of limitations.

**Wrongful Death Act**

Colo. St. Ann. Sec.13-21-102.5. Limitations on damages for noneconomic loss

(1) The general assembly declares that awards in civil actions for noneconomic losses or injuries often unduly burden the economic, commercial, and personal welfare of persons in this state; therefore, for the protection of the public welfare the general assembly places monetary limitations on such damages for noneconomic losses or injuries in all actions, including those for wrongful death.

(2) "Noneconomic loss or injury" means nonpecuniary harm for which damages are recoverable by the person suffering the direct or primary loss or injury, including pain and suffering, inconvenience, emotional stress, and impairment of the quality of life.

(3) In any civil action in which damages for noneconomic loss or injury may be awarded, the total of such damages shall not exceed the sum of two hundred fifty thousand dollars. . . .

**Products Liability**

**Union Supply Co. v. Pust**
583 P.2d 276 (Colo. 1978)

. . . .Pust argues that this conveyor was defective in design....This court has heretofore never had the occasion to decide whether a defect in the design of a product can form the basis of a claim in strict liability. The Colorado Court of Appeals declared, in Bradford v. Bendix Co., 517 P.2d 406, that s 402A is available in Colorado as a theory of recovery for manufacturing defects. We agree and now also hold that if a product has a defect in

its design strict liability may lie. We perceive no valid reason not to extend strict liability to design defects. A defective product may be equally hazardous to the ultimate user or consumer whether its defect arises from a flaw in manufacture or from a flaw in design.

**End of Colorado Law**

**End of Question Two**

## Question Three
## Suggested Time: Ninety Minutes

You are the legislative assistant to Senator Domenici. A constituent has written him, complaining that the present Full Faith and Credit Statute (28 U.S.C. Sec. 1738) is in need of revision for three reasons: 1) It does not list and explain all of the existing exceptions which have been engrafted onto the statute by the courts; 2) It does not contain a public policy exception, but should contain such an exception, thus overturning, in effect, the decision in Baker v. General Motors Corp, and; 3) It does not currently apply to Indian Tribal Court judgments by its plain language but should do so.

Senator Domenici would like to accommodate the constituent if appropriate. He has asked you to do the following: In a memo:

1. Identify the existing exceptions to the Full Faith and Credit statute (28 U.S.C. Sec. 1738) as construed by the courts, determine which of them are sound and which should be discarded and explain why; and
2. Describe the current law concerning the "public policy exception" for full faith and credit to judgments, explain whether and why you think it should be changed (or not changed) and explain why; and
3. Describe the current law concerning the applicability of the Full Faith and Credit statute to Indian Tribal Courts, determine whether (or not) Tribal Courts should be explicitly included in the statute and explain your reasoning fully; and
4. Assuming that the Senator will submit a bill to Congress making at least some changes in the Full Faith and Credit statute: Determine, in light of current law and sound policy, whether the new statute would and should apply to judgments entered into before the effective date of the proposed statute which judgments are sought to be enforced after the effective date of the statute. Explain your reasoning.

Do so.

**28 U.S.C. Sec. 1738**
**State and Territorial statutes and judicial proceedings; full faith and credit**

The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

## End of Question Three

## Question Four
## Suggested Time: Ninety Minutes

Memo

**To: Chris Clerk**
**From: Judge Judd**

**Re: Third Party Claims by Vermont Log against DAP Inc.**

**I need help on two issues in this case in order to resolve motions to dismiss third party claims for contribution and indemnity. The issues are: 1) Federal preemption, and; 2) Constitutional requirements in choice of law, focusing on a statute of limitations defense.**

**Basically, G sued VL for personal injury when VL's finished product caused G to become sick.**

**In turn, VL sued DAP for contribution and indemnity claiming that DAP manufactured a component product used in VL's finished product and that component was the cause of G's injury.**

**DAP seeks dismissal of the third party claims, arguing: 1) that they should be dismissed because of federal preemption, and; 2) they should also be dismissed because the Vermont statute of limitations has run and that statute, rather than the forum (Massachusetts) limitations statute, must apply or else the U.S. Constitution would be violated.**

**VL responds that the state-law claims are not preempted by federal law and it is neither unconstitutional nor inappropriate to apply the forum's statute of limitations to VL's claims.**

**Please write a memo: 1) telling me your view on how I should rule on the two grounds for dismissal, and; 2) providing a full explanation of the arguments on each side and the reasons why you came to the conclusions you reached.**

**What follows is a statement of relevant facts and law.**

Joan Grenier suffered from chronic gastritis for several years, allegedly in reaction to the wood preservative applied to the walls of her parents' Massachusetts log cabin. She sued Vermont Log Buildings, Inc. (incorporated in Vermont), the supplier of logs for the cabin, in Massachusetts Federal District Court, claiming negligence and breaches of implied and express warranty. Vermont Log in turn filed a third- party complaint against DAP, Inc. the manufacturer of the preservative used by Vermont Log to treat the logs used to construct the cabin.

In April, 0000, Joan Grenier's parents purchased the components of a log house from Vermont Log's retail store in Arlington, Vermont. Vermont Log only sells from its store in Vermont and neither solicits business in other states nor ships its products to other states. The Greiners used their own truck to ship the logs from Vermont to their lot in Massachusetts where they assembled the cabin. The Greniers moved into the house in June 0000.

Vermont Log had treated the logs with Woodlife, a wood preservative (containing the active

ingredient pentachlorophenol), manufactured by DAP. Vermont Log had bought the Woodlife in January, 0000 from an authorized DAP distributor in Brattleboro, Vermont.

In early 0007, Joan Grenier began to suffer intermittent pain that lasted for several years. A doctor who examined her in April, 0012, suspected that her condition was caused by the wood preservative in the logs of the Greniers' cabin. Tests revealed an elevated level of pentachlorophenol in her body. When she moved out of the house, her level of pentachlorophenol dropped and her symptoms abated.

At the time the Greniers bought the logs, Woodlife was registered as a pesticide as required by the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. " 136-136y. FIFRA is a federal regulatory statute that is concerned with health, safety and the environment. Two of its main components are a requirement of prior approval of the product by the Environment Protection Agency, and of EPA approval of the labeling supplied with the product, Sec. 136a(a) and (c)(1)(C).

In 0000, the Woodlife labeling, which EPA had approved, warned that the product was toxic and was not "for use or storage in or around the home," but the labeling also included a section describing the uses of the product: "PRODUCT USES: Millwork, shingles, siding, structural lumber, fences, trellises, outside furniture, vacation homes, all lumber and wood products." On January 2, 0001, the EPA directed and approved a modified label for Woodlife. On these labels, the section listing product uses no longer included "vacation homes" as a use and added a further warning: "Do not use on interior surfaces which are not to be finished." DAP changed the labels as required by the 0001 directive, but, because the directive did not so require, DAP did not notify prior purchasers of the product that Woodlife was no longer approved for use in vacation homes.

Joan Grenier filed suit in 0015 against Vermont Log in Federal District Court in Massachusetts, alleging that the pentachlorophenol contained in the Woodlife used in the log home caused her illness. In early 0016, Vermont Log filed this third-party complaint against DAP. The claims for contribution and indemnity comprised several counts, including claims based on 1) express warranty, 2) implied warranty, 3) negligence in design 4) negligence in manufacture, 5) negligent failure to warn, and; 6) strict liability for design defect.

DAP Inc. is incorporated in Vermont and does almost all of its business with companies in Vermont, Maine, New Hampshire and Rhode Island. DAP has never sold or advertised its products in Massachusetts but it has registered to do business there, appointing Service, Inc. of Boston as agent for service of process. Vermont Log properly served Service, Inc with the third party complaint against DAP.

In August 0016, DAP moved for dismissal of the third party complaint on the grounds that Vermont Log's third party complaint against DAP was preempted by FIFRA and that the statute of limitations had run on Vermont Log's claim against DAP for contribution and indemnity. Vermont Log argues that Vermont Log's third party complaint against DAP is not preempted and that the applicable statute of limitations has not run.

Preemption

The preemption argument turns upon a correct construction of the FIFRA preemption clause. FIFRA's preemption clause, 7 U.S.C. Sec. 136v, reads as follows:

(a) In general

A State may regulate the sale or use of any federally registered pesticide or device in the State, but only if and to the extent the regulation does not permit any sale or use prohibited by this subchapter.

(b) Uniformity

Such State shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter.

Statute of Limitations

DAP's affirmative defense of the statute of limitations is premised on the Vermont statute of limitations which provides that "No action shall be brought in any court for any claim for contribution or indemnity arising from, out of or because of personal injury unless such claim is brought within ten years of the date of the sale of the product alleged to cause the injury." DAP pointed out that the sale of Woodlife took place in Vermont in 0000, more than ten years before Greiner's lawsuit was filed.

Vermont Log responded by noting that the Massachusetts statute of limitations provides that "No action shall be brought in this state for contribution or indemnity unless such claim is filed within five years of the date that the person seeking contribution was sued by the injured person for the injuries for which contribution or indemnity is sought." Vermont Log notes that its suit was filed well within five years from the date Grenier sued Vermont Log.

DAP then argued that application of a longer forum statute of limitations to a claim for contribution arising out of sales occurring outside of the forum to and by companies not doing business in the forum would violate the United States Constitution and therefore the Massachusetts statute of limitations is inapplicable.

**End of Question Four**
**End of Examination**