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### **Borrowing Help - Using Conflicts of Law to Aid Clients and Lawyers**

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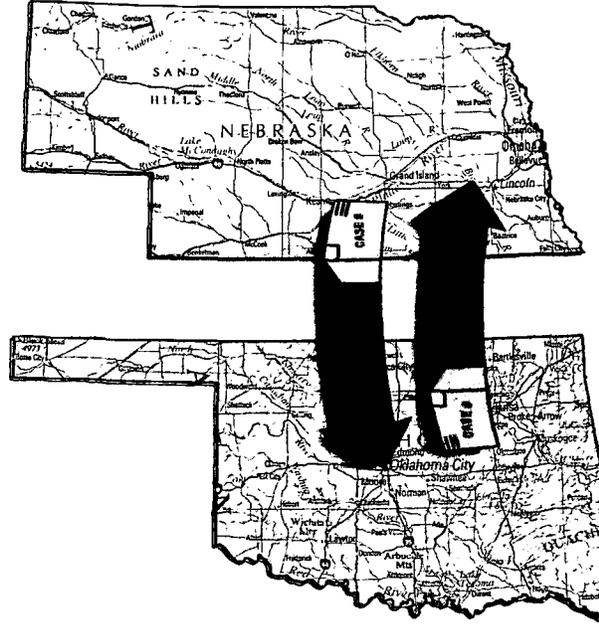
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# “Borrowing” Help?

## Using Conflicts of Law to Aid Clients and Lawyers

by Professor Susan D. Franck



A colleague from another law firm calls you on the phone. He has a client with a clear-cut personal injury case, but, as a result of his failure to mark the critical date down in his calendar, the statute of limitations has expired. It is a lawyer's worst nightmare. What can be done to salvage the case and still provide an opportunity to help the injured client?

Rex Travis,<sup>1</sup> an attorney in Oklahoma City, OK, received a phone call somewhat like this, hypothetically. Rex had an ace up his sleeve. He knew something that might remedy the damage and provide an opportunity to escape from the Oklahoma statute of limitations, gain the benefit of a longer Nebraska statute of limitations, but still permit litigation back home in Oklahoma.

How might such a miracle be accomplished?

### Susan D. Franck



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at the University of Nebraska, Professor Franck was a visiting professor at the University of Minnesota and was involved in litigating transnational disputes in the United States and the United Kingdom.

It has everything to do with Conflicts of Law, Nebraska law and the normal machinery of litigation in U.S. federal courts. Because of his work teaching Conflicts as an adjunct at the University of Oklahoma College of Law, Rex had recently read a U.S. Supreme Court decision, *Ferens v. John Deere*,<sup>2</sup> which requires federal courts to apply the Conflicts of Law rules of the U.S. District Court where the case was filed if the case is later transferred to a different federal court.<sup>3</sup> In *Ferens*, this meant that a Pennsylvania farmer maimed in a Pennsylvania combine accident could sue John Deere in a Mississippi federal court even though the Pennsylvania statute of limitations had expired. The case was later transferred back to a Pennsylvania federal court; but the Pennsylvania court was obligated to apply Mississippi's conflict of law rules and because Mississippi had an oddly interpreted borrowing statute, the longer Mississippi limitations period applied.

But for having taught Conflicts and recognizing the potential benefits of *Ferens*, Rex would not have known to do what he did next. He sat down at his computer and searched for places where there would be personal jurisdiction over the defendant, diversity of citizenship, and a forum law that permits application of a longer statute of limitations.

Rex found just what he needed in Nebraska.

The personal injury claim involved an automobile accident in Oklahoma. Although both parties involved in the accident were Oklahoma residents, the driver responsible for the accident had been driving his truck in the course of his employment for a Nebraska corporation. This meant two important things. First, it meant that there would be a basis for personal jurisdiction in Nebraska against a Nebraska



## “BORROWING” HELP?

corporation with its principal place of business in Nebraska. It also meant that suing the Nebraska employer would create diversity of citizenship. Because *Klaxon v. Stentnor*<sup>4</sup> requires a federal court sitting in diversity to apply the choice of law rules of the state in which it sits. This also meant a Nebraska federal court must use Nebraska’s choice of law rules—not Oklahoma’s—to determine which law applies to the statute of limitations.

But this good news would be all for naught unless Rex could pull another rabbit out of his hat. Filing in a Nebraska court would gain nothing unless Nebraska also had a borrowing statute or a choice of law method that would permit a longer statute of limitations to apply. Luckily for Rex and his new personal injury client, Mr. Hatchett, Nebraska law fit the bill.

Rather than having to rely upon common law choice of law analysis, Nebraska has a choice of law statute to address conflicts in the law applicable to the limitations period. Specifically, it has a borrowing statute.<sup>5</sup> Although a forum will generally apply its own statutes of limitation, borrowing statutes direct the forum to apply the statute of limitations of a different jurisdiction—typically the limitations period of the jurisdiction where the cause of action arose.<sup>6</sup> But Nebraska’s current borrowing statute is a bit odd. The Nebraska Supreme Court has called the statute “bizarre” and even suggested that saying the borrowing statute “makes any particular sense would be a gross overstatement;”<sup>7</sup> and a noted Conflicts scholar has called it “one of the strangest borrowing statutes in the nation.”<sup>8</sup>

The Nebraska statute does not borrow the limitations period from where the action arose. It is essentially a “non-borrowing” statute that operates to make statutes of limitations procedural.<sup>9</sup> It generally requires Nebraska courts to apply the law of the forum irrespective of the limitations period of the place where the cause of action arose.<sup>10</sup> Ultimately, this would mean that filing in a Nebraska state or federal court would permit the application of the four-year Nebraska statute of limitations<sup>11</sup>—instead of a shorter limitations period, such as the two-year limitations period of Oklahoma.<sup>12</sup>

But, filing a claim based upon diversity in federal courts provides an added benefit. Namely, if transfer to another jurisdiction is requested and granted, it means that—because of cases like *Klaxon* and *Ferens*—the new statute of limitations can be brought home to a convenient forum where the limitations period has already expired.

Aware of these implications, Rex hired William E. Gast, an Omaha attorney, to file the complaint against the Nebraska employer in federal court. Gast quickly requested an inter-

district transfer. Acknowledging that the accident occurred in Oklahoma, the key witnesses were in Oklahoma and all medical treatment related to the accident occurred in Oklahoma, U.S. District Judge Thomas M. Shanahan granted plaintiff’s request to transfer the matter to the Western District of Oklahoma.

Judge Shanahan was well aware of the broader impact of his order. Judge Shanahan explained that, “[u]pon transfer to Oklahoma, the Plaintiff gets his choice of law (Nebraska) and his preferred choice of forum (Oklahoma)” and, although the rule seemed generous by giving the plaintiff the best of both worlds, *Ferens* tied the court’s hands.<sup>13</sup>

It was against this backdrop that an Oklahoma district court decided *Hatchett v. K&S Transportation, Inc.*<sup>14</sup> The court expressed a strong concern for plaintiff’s forum shopping and dissatisfaction with Nebraska law. Nevertheless, acknowledging “lack of comfort with the result,” *Hatchett* held that Rex’s skillful navigation through the procedural maze of Conflicts of Law and borrowing statutes required the Oklahoma court to apply the Nebraska statute of limitations to the Oklahoma claim.<sup>15</sup>

But this decision does not end the story. *Hatchett* came down the day before the parties had been previously scheduled to mediate the dispute. The mediation resulted in a very favorable settlement for Mr. Hatchett. Rex believes that, but for the district court’s decision in *Hatchett*, they would have been unable to mediate a settlement that day—let alone a favorable one.

This story has a variety of implications for lawyers practicing in Nebraska. First, *Hatchett* underscores that lawyers should be aware of Conflicts of Law and the different results a lawyer can achieve by obtaining the benefit of another state’s law. These different results can facilitate settlement or ultimately lead to more favorable litigation outcomes. Second, it means that Nebraska lawyers can gain business by acting as local counsel for those *Hatchett*-like cases that are filed in Nebraska; and lawyers might use such representation as an opportunity to develop and sustain a multi-jurisdictional practice. Third, for those lawyers who are faced with an adverse situation on a statute of limitations, Nebraska lawyers might usefully seek out states with longer statutes of jurisdiction where personal jurisdiction is available over the defendant and consider whether there are opportunities to bring home a longer limitations period.

Ultimately, the story of *Hatchett* provides a multi-faceted lesson about the potential implications of forum shopping and underscores the practical importance of Conflicts of Law. 

*If you would like the Endnotes to the article, please contact Anne Nau at the NSBA Office at (402) 475-7091, ext. 138 or email [ananau@nebar.com](mailto:ananau@nebar.com).*