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# Enforcement and Recognition of Foreign Judgments in United States Courts: A Practical Perspective

Cedric C. Chao\* and Christine S. Neuhoff\*\*

## I. INTRODUCTION

Lawyers have a tendency to focus on “winning” trials. Yet, enforcement of a hard-won judgment can be an equally important task. That task takes on an additional level of complexity when it must be done in a foreign country. It is also important to know the extent to which the judgment can be used defensively, if the prevailing party should be haled into the court of another country on a related matter.

Although often used interchangeably, the terms “enforcement” and “recognition” of foreign judgments<sup>1</sup> refer to two distinct concepts.<sup>2</sup> Enforcement occurs when a court compels a defendant to satisfy a judgment that has been rendered against him or her in the court of a foreign nation. While a court must recognize a judgment in order to enforce it, recognition may also occur independently of enforcement.<sup>3</sup> Recognition occurs when a court precludes litigation of a claim or issue because that claim or issue was previously litigated in the court of a foreign nation. Most of this paper

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1. Throughout this paper, the terms “foreign judgments” and “foreign courts” refer to the judgments and courts of foreign countries. In state courts of the United States the judgments of sister states are also referred to as foreign judgments. However, entirely different standards apply to sister state judgments; the United States Constitution mandates that each state accord “Full Faith and Credit” to the judgments of every other state. U.S. CONST. art. IV, § 1.

2. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 481 cmt. b (1987); *S.W. Livestock & Trucking Co. v. Ramon*, 169 F.3d 317 (5th Cir. 1999).

3. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 481 cmt. b (1987).

discusses factors relevant to both enforcement and recognition of foreign judgments.

At present, the United States is not a party to any international agreements or treaties concerning enforcement or recognition of foreign judgments.<sup>4</sup> Nor does the United States have any federal statutes governing the enforcement or recognition of judgments rendered in the courts of foreign nations. Traditionally, foreign judgments have been enforced or recognized on the basis of international comity under common law standards.<sup>5</sup> These standards are generally governed by the laws of the state in which enforcement or recognition is sought.<sup>6</sup>

## II. STATE LAW STANDARDS FOR ENFORCEMENT AND RECOGNITION OF FOREIGN JUDGMENTS

Because enforcement and recognition of judgments are governed by the laws of the fifty states, there are potentially fifty different standards that could be applicable within the United States. Fortunately, the general standards for enforcement and recognition do not vary substantially from state to state. The states can be divided into two primary groups with respect to their treatment of foreign judgments: (1) those that follow a common law standard stemming from an 1895 United States Supreme Court case; and (2) those that have adopted some form of the Uniform Foreign Money Judgments Recognition Act.

### A. Common Law Jurisdictions

In many states, enforcement and recognition of foreign judgments are governed by common law. These states follow the seminal United States Supreme Court case, *Hilton v. Guyot*.<sup>7</sup> Under *Hilton v. Guyot*, the judgments of foreign courts are recognized as a matter of international comity:

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4. The Hague Conference on Private International Law is engaged in the development of a convention on jurisdiction and the enforcement/recognition of foreign civil judgments. See Harry S. Burman, *Private International Law*, 32 INT'L L. 591 (1998); Edward C.Y. Lau, *Update on the Hague Convention on the Recognition and Enforcement of Foreign Judgments*, 6 ANN. SURV. INT'L & COMP. L. 13 (2000). The United States is among the countries engaged in this effort.

5. See, e.g., *Victrix S.S. Co., S.A. v. Salen Dry Cargo A.B.*, 825 F.2d 709, 713 (2d Cir. 1987) (noting that under federal law, the recognition of foreign judgments is governed by the principles of comity).

6. See *Seetransport Wiking Trader Schiffahrtsgesellschaft MBH & Co. v. Navimpex Centrala Navala*, 989 F.2d 572, 583 (2d Cir. 1993) (remanding the case to the District Court to determine whether judgment is enforceable in France); *In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India*, 809 F.2d 195, 204 (2d Cir. 1987) (holding that New York law "governs actions brought in New York to enforce foreign judgments"); RESTATEMENT (THIRD) FOREIGN RELATIONS LAW § 481 cmt. a (1987).

7. 159 U.S. 113 (1895).

“Comity” in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.<sup>8</sup>

Under this standard, foreign judgments are enforced where there has been: opportunity for a full and fair trial; a trial before a court of competent jurisdiction; a trial upon regular proceedings; adequate notice to or voluntary appearance of the defendant(s); proceedings under a system likely to secure an impartial administration of justice with respect to other countries; and no evidence of prejudice in the court or in the system of laws; no evidence of fraud in procuring judgment; and no other reason why comity should not be granted.<sup>9</sup>

These criteria ensure that neither the particular judgment nor the system under which it is rendered are fundamentally unfair to the foreign litigant. Under *Hilton*, where these criteria are met, “the merits of the case should not, in an action brought in this country upon the judgment, be tried afresh, as on a new trial or an appeal, upon the mere assertion of the party that the judgment was erroneous in law or in fact.”<sup>11</sup> Under a plain reading of the *Hilton* language, it appears that the party seeking to enforce the judgment has the burden of showing that the foreign court’s judgment satisfies the listed criteria. However, courts generally find foreign judgments to be presumptively enforceable.<sup>12</sup> Thus, unless the party seeking to avoid enforcement shows that the foreign court’s judgment (or the system under which it was rendered) was fundamentally unfair, the judgment should be given conclusive effect in the United States.

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8. *Id.* at 163-64.

9. *Id.* at 202-03; *see also* *Kohn v. Am. Metal Climax, Inc.*, 458 F.2d 255, 303-05 (3d Cir. 1972) (after deciding that reciprocity did not bar enforcement, stating that “the next inquiry is whether the *Hilton* [standard] has been satisfied”).

10. *Id.* at 202-03; *see also* *Kohn v. Am. Metal Climax, Inc.*, 458 F.2d 255, 303-05 (3d Cir. 1972) (after deciding that reciprocity did not bar enforcement, stating that “the next inquiry is whether the *Hilton* [standard] has been satisfied”).

11. *Hilton*, 159 U.S. at 203.

12. *See* GARY B. BORN, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 941 (1996); *see also, e.g., In re Goode & Goode*, 997 P.2d 244, 248 (Or. Ct. App. 2000). *But see* *Shen v. Daly*, 222 F.3d 472, 476 (8th Cir. 2000) (“The burden of proof in establishing that the foreign judgment should be recognized and given preclusive effect is on the party asserting it should be recognized.”) (citing *Bridgeway Corp. v. Citibank*, 45 F. Supp. 2d 276, 286 (S.D.N.Y. 1999)).

In addition to the criteria listed above, the *Hilton* Court required reciprocity as a prerequisite to enforcement of a foreign judgment.<sup>13</sup> The Court found that the judgment at issue met all of the listed criteria, yet the Court declined to enforce the judgment on the grounds that a French court would not recognize a judgment from a United States court.<sup>14</sup> Most jurisdictions, however, have abandoned the reciprocity requirement, and will enforce foreign judgments without regard to whether the foreign court would likewise recognize a United States judgment.<sup>15</sup>

### B. Statutory Jurisdictions

In slightly more than half of the states (including California and New York), enforcement and recognition of foreign judgments are governed by state statute. Each of these states has adopted some form of the Uniform Foreign Money Judgments Recognition Act (“UFMJRA” or “Uniform Act”).<sup>16</sup> The National Conference of Commissioners on Uniform State Laws<sup>17</sup> approved the Uniform Act in 1962.<sup>18</sup> California adopted the Uniform Act in 1967, and New York adopted it in 1970.<sup>19</sup> Until recently, only a minority of the states had adopted the Uniform Act. Today, the Uniform Act has been adopted by twenty-nine states plus the District of Columbia and the Virgin Islands.<sup>20</sup> Since 1990, versions of the Uniform Act have become effective in Delaware (1997), the District of Columbia (1996), Florida (1994), Hawaii (1996), Idaho (1990), Maine (1999), Montana (1993), New Jersey (1997), New Mexico (1991), North Carolina (1993), Pennsylvania (1990), the Virgin Islands (1992), and Virginia (1990).<sup>21</sup>

The Uniform Act codifies the common law as applied by the majority of United States courts.<sup>22</sup> Under the Uniform Act, foreign judgments are

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13. *Hilton*, 159 U.S. at 228.

14. *Id.*

15. See, e.g., *De la Mata v. Am. Life Ins. Co.*, 771 F. Supp. 1375, 1382-83 (D. Del. 1991) (discussing rejection of reciprocity requirement by various jurisdictions); *Tahan v. Hodgson*, 662 F.2d 862, 867-68 (D.C. Cir. 1981) (discussing rejection of reciprocity requirement by various jurisdictions); *Nicol v. Tanner*, 256 N.W.2d 796 (Minn. 1976) (discussing shortcomings of reciprocity); see also RESTATEMENT (THIRD) FOREIGN RELATIONS LAW § 481 reporters note 1 (1987) (“Notwithstanding [the *Hilton*] decision, the great majority of courts in the United States have rejected the requirement of reciprocity . . .”).

16. See Appendix B to this article for a list of jurisdictions that have adopted the Uniform Act.

17. The National Conference of Commissioners on Uniform State Laws is composed of Commissioners from each of the fifty states plus the District of Columbia and Puerto Rico. 13 U.L.A. III (1986). The Commissioners are members of the bar, appointed to the Conference by the governor or the legislature of their states. *Id.*

18. UFMJRA, 13 U.L.A. 261 (1986).

19. See CAL. CIV. PROC. CODE § 1713 (2001); N.Y. C.P.L.R. 5301 (2001).

20. See UFMJRA, 13 U.L.A. Supp. 89 (West Supp. 2000). Until 1996, enforcement of foreign judgments was governed by the common law in a majority of U.S. states.

21. See *id.*

22. UFMJRA, 13 U.L.A. 261 (1986); see also BORN, *supra* note 11, at 941; DAVID EPSTEIN &

presumptively enforceable, unless a reason for non-enforcement is found.<sup>23</sup> The Uniform Act provides a list of mandatory as well as discretionary grounds for non-enforcement.<sup>24</sup> A court will not enforce or recognize a judgment if the judgment was rendered under a system which does not provide impartial tribunals or procedures compatible with due process; the rendering court lacked personal jurisdiction over the defendant; or the rendering court lacked subject matter jurisdiction.<sup>25</sup> A court need not enforce or recognize a foreign judgment if: notice to the defendant was inadequate; the judgment was obtained by fraud; the cause of action on which the judgment was based is repugnant to the public policy of the state in which enforcement is sought; the judgment conflicts with another final and conclusive judgment; the parties had entered into a forum selection clause in which they chose a forum other than the one in which the judgment was rendered; or (if jurisdiction was based solely on personal service) the rendering court was a seriously inconvenient forum.<sup>26</sup>

Although the Uniform Act specifies that courts will not enforce or recognize the judgment of a foreign court if that court lacked personal jurisdiction over the defendant, it also identifies certain circumstances in which enforcement will not be denied for lack of personal jurisdiction. These circumstances include: the defendant was personally served in a foreign country; the defendant voluntarily appeared in the proceedings for reasons other than contesting jurisdiction or protecting property seized or threatened with seizure; the defendant had previously agreed to submit to the jurisdiction of the foreign court with respect to the subject matter at issue; the defendant was domiciled in the foreign state when proceedings began; (in the case of a corporation) – the defendant had its principal place of business, was incorporated, or had otherwise acquired corporate status, in the foreign state; the defendant had a business office in the foreign state, and the cause of action arose out of business done through that office; or the defendant operated a motor vehicle or airplane in the foreign state, and the cause of action arose out of such operation.<sup>27</sup>

One purpose of the Uniform Act is to provide some uniformity among the states in the area of recognition and enforcement of foreign judgments. However, some states have enacted the Uniform Act with their own

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JEFFREY L. SNYDER, *INTERNATIONAL LITIGATION: A GUIDE TO JURISDICTION, PRACTICE, AND STRATEGY* (2d Ed. 1996 Supp.) § 11.09. For a comparison of the UFMJRA factors with those considered under *Hilton v. Guyot*, see Appendix A to this article.

23. UFMJRA § 3, 13 U.L.A. 261, 265-68 (1986).

24. *Id.* at § 4.

25. *Id.* at § 4(a).

26. *Id.* at § 4(b).

27. *Id.* at § 5.

variations. For example, the Uniform Act does not include a reciprocity requirement, but several states have included a reciprocity requirement in their versions of the Uniform Act. These states include Florida, Georgia, Idaho, Massachusetts, Ohio, and Texas. In the courts of Florida, Idaho, Ohio, and Texas, the court *has discretion* to deny enforcement of a foreign judgment if the foreign country's courts would not enforce or recognize a judgment of the particular state's courts.<sup>28</sup> In the courts of Georgia and Massachusetts, reciprocity is *mandatory* to enforcement.<sup>29</sup> Thus a particular foreign judgment might be enforceable in one UFMJRA state, such as California, and unenforceable in another UFMJRA state, such as Massachusetts, if the party seeking enforcement is unable to show that the foreign court would enforce a similar judgment rendered in Massachusetts.

### C. Particular Issues

#### 1. Finality

Foreign judgments are presumptively enforceable in United States courts if they are final and enforceable in the rendering jurisdiction.<sup>30</sup> In determining whether a judgment is "final" for purposes of recognition and enforcement, a United States court will generally look to the law of the rendering country.<sup>31</sup> Indeed, under the Uniform Act courts recognize and enforce judgments that are "final and conclusive and enforceable *where rendered*."<sup>32</sup> Further, a judgment will be considered final even though it is subject to appeal or an appeal is pending.<sup>33</sup> At least one United States court has refused to reconsider recognition of a foreign judgment even though that judgment was later vacated in the foreign court.<sup>34</sup> Thus, if one is opposing enforcement of a foreign judgment that is on appeal, or for which the time to appeal has not passed, it would be prudent to seek a stay of the United States

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28. See FLA. STAT. ANN. § 55.605 (West 2000); IDAHO CODE § 10-1404(2)(g) (Michie 2000); OHIO REV. CODE ANN. § 2329.92 (2001); TEX. CIV. PRAC. & REM. CODE ANN. § 36.005(b)(7) (1999).

29. See GA. CODE ANN. § 9-12-114(10) (2001); MASS. ANN. LAWS ch. 235, § 23A (2001).

30. See UFMJRA § 2 13 U.L.A. 261, 264-65 (1986); *Seetransport Wiking Trader Schiffahrtsgesellschaft MBH & Co. v. Navimpex Centrala Navala*, 29 F.3d 79 (2d Cir. 1994).

31. See *id.*; RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 481 cmt. e (1987); see also *Hunt v. BP Exploration Co. (Libya) Ltd.*, 492 F. Supp. 885, 903 (N.D. Tex. 1985).

32. UFMJRA § 2, 13 U.L.A. 261, 264-65 (1986) (emphasis added).

33. See *id.*

34. *DSQ Prop. Co. v. DeLorean*, 745 F. Supp. 1234 (E.D. Mich. 1990) (English court vacated judgment after it had been recognized in the United States; U.S. court refused to reconsider its recognition).

action pending appeal in the foreign court. “[T]he court may stay the proceedings until the appeal has been determined or until the expiration of a period of time sufficient to enable the defendant to prosecute the appeal.”<sup>35</sup>

## 2. Enforcement or Recognition of Default Judgments

Courts in the United States will recognize default judgments as well as judgments on the merits.<sup>36</sup> Indeed, foreign default judgments are “as conclusive an adjudication as a contested judgment,”<sup>37</sup> and are also subject to the same objections as judgments on the merits.<sup>38</sup> So long as the requirements of basic fairness are met, the default status of a foreign judgment does not affect its enforceability.<sup>39</sup> A party may not simply argue that he or she should have won on the merits of the action.<sup>40</sup> As with judgments on the merits, if the criteria for recognition or enforcement are met, “the merits of the case should not . . . be tried afresh, as on a new trial or an appeal, upon the mere assertion of the party that the judgment was erroneous in law or in fact.”<sup>41</sup> A court may decline to address even the merits of the entry of default. Indeed, in one recent case, a New York court enforced a foreign default judgment even though it was conceded that the default judgment was entered one day before defendant’s response was due in the foreign court.<sup>42</sup> In that case, the party seeking to avoid enforcement

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35. UFMJRA § 6, 13 U.L.A. 261, 274 (1986); *see also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 485 cmt. a (1987).

36. *See, e.g.*, *Bank of Montreal v. Kough*, 612 F.2d 467, 473 (9th Cir. 1980) (enforcing a default judgment rendered by a British Columbia court and precluding counterclaims on the grounds of res judicata); *John Sanderson & Co. v. Ludlow Jute Co.*, 569 F.2d 696 (1st Cir. 1978) (upholding enforcement of a default judgment rendered by an Australian court); *Belle Island Inv. Co. v. Feingold*, 453 So. 2d 1143 (Fla. App. 1984) (enforcing default judgment rendered by the court of an independent state within the British Commonwealth); *see also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 481 cmt. i (1987).

37. *Ackermann v. Levine*, 788 F.2d 830, 842 (2d Cir. 1986) (emphasis added) (quotations omitted); *see also* *Somportex v. Phila. Chewing Gum Corp.*, 453 F.2d 435, 442-43 (3d Cir. 1971), (stating, in reference to an English default judgment, “[i]n the absence of fraud or collusion, a default judgment is as conclusive an adjudication between the parties as when rendered after answer and complete contest in the open courtroom.”).

38. *See* *Tahan v. Hodgson*, 662 F.2d 862, 864-68 (D.C. Cir. 1981) (examining defenses to enforcement, including adequacy of service, public policy, and reciprocity); *Citadel Mgmt. Inc. v. Hertzog*, 703 N.Y.S.2d 670, 672 (N.Y. Sup. Ct. 1999) (denying enforcement as to one defendant entity where foreign court did not obtain personal jurisdiction over that entity).

39. *Nicol v. Tanner*, 256 N.W.2d 796, 802 (Minn. 1976).

40. *See, e.g.*, *Fairchild, Arabatzis & Smith, Inc. v. Prometco Co.*, 470 F. Supp. 610, 614-17 (S.D.N.Y. 1979) (rejecting party’s argument that it would have won on common law fraud claim had the judgment been rendered on the merits).

41. *Hilton*, 159 U.S. at 203.

42. *Citadel Mgmt. Inc.*, 703 N.Y.S.2d at 671. The same court declined to enforce the default



made no attempt to vacate the judgment in the foreign court. Under these circumstances, the court declined to exercise its discretion to refuse enforcement.<sup>43</sup>

### 3. Adequacy of Notice

If the defendant did not voluntarily appear before the foreign court, a United States court may examine whether the method of service of process provided the defendant with adequate notice of the action. Inadequate notice may constitute grounds for non-recognition of a foreign judgment.<sup>44</sup> This issue often arises when a party seeks enforcement or recognition of a default judgment rendered by a foreign court.

If the rendering court sits in a country that has ratified the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters,<sup>45</sup> the United States court will consider whether the method of service complied with that Convention. If the method of service was consistent with the Hague Convention, the court will find it to have provided adequate notice to the defendant.<sup>46</sup> Where the Convention is silent as to a particular method of service, the method need comply only with the Federal Rules of Civil Procedure, and not state procedural laws, whether enforcement is sought in federal or state court.<sup>47</sup> In *Aspinall's Club Ltd. v. Aryeh*, the plaintiff sought to enforce an English default judgment in a New York court.<sup>48</sup> In the English action, process was served at the defendant's residence upon an adult other than the defendant. Under New York law, where service is upon a person other than the defendant, a copy of the papers must also be sent by mail to the defendant's residence.<sup>49</sup> The Federal Rules contain no such requirement. The court held that service under the Convention need only meet the requirements of federal law, and not the more stringent requirements of state law.<sup>50</sup>

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judgment entered against a co-defendant because the foreign court had not obtained personal jurisdiction over that party. *Id.* at 672.

43. *Id.* at 671.

44. *Hilton*, 159 U.S. at 202; UFMJRA § 4(b), 13 U.L.A. 262 (1986).

45. Signatories to the Hague Convention on Service Abroad include: Antigua and Barbuda, Bahamas, Barbados, Belarus, Botswana, Belgium, Bulgaria, Canada, China, Cyprus, Czech Republic, Denmark, Egypt, Estonia, Finland, France, Germany, Greece, Hong Kong, Ireland, Israel, Italy, Japan, Republic of Korea, Latvia, Luxembourg, Macau, Malawi, Mexico, Netherlands, Norway, Pakistan, Poland, Portugal, Seychelles, Slovakia, Spain, Sweden, Switzerland, Turkey, United Kingdom, United States, and Venezuela. Further information concerning signatories to the Convention can be found on the internet site of the Hague Conference on Private International Law, at <http://www.hcch.net/e/conventions/menu14e.html> (last visited Dec. 14, 2001).

46. *See Ackermann v. Levine*, 788 F.2d 830, 838 (2d Cir. 1986).

47. *Id.* at 840; *Aspinall's Club Ltd. v. Aryeh*, 450 N.Y.S.2d 199, 202 (N.Y. App. Div. 1982).

48. *Id.* at 199.

49. *Id.* at 202 (citing N.Y. C.P.L.R. § 308(2) (Consul. 2001)).

50. *Id.*

If the foreign judgment was rendered in a country that is not a party to the Hague Convention (or service was not by a method authorized under the Convention), some United States courts consider whether service of process complied with the rules of the foreign jurisdiction.<sup>51</sup> However, if the foreign forum's law is not reasonably calculated to provide actual notice to the defendant, compliance with foreign law will not be sufficient to support enforcement of the judgment in the United States.<sup>52</sup> Other United States courts consider only whether the method actually employed was reasonably calculated to produce actual notice.<sup>53</sup>

#### 4. Personal Jurisdiction

Where a party seeks enforcement or recognition of a foreign judgment in the United States, the United States court may examine whether the foreign court had personal jurisdiction over the defendant. A defendant may resist enforcement or recognition on the basis of lack of personal jurisdiction if that defendant neither appeared in the foreign court to contest jurisdiction, nor waived jurisdiction. For example, a defendant against whom a foreign court has entered a default judgment may argue that he or she was not subject to personal jurisdiction in the foreign court.

Personal jurisdiction may not be subject to dispute in the United States court if the issue was litigated and decided before the foreign court. If after losing on a jurisdictional argument, the defendant defended on the merits, the defendant generally will be precluded from asserting in the United States court that the foreign court lacked personal jurisdiction.<sup>54</sup> A United States

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51. See, e.g., *De la Mata v. Am. Life Ins. Co.*, 771 F. Supp. 1375, 1385 (D. Del. 1991) ("Analysis begins by examining the law governing service in Bolivia and determining whether the Bolivian court adhered to Bolivian laws."); *Royal Bank of Can. v. Trentham Corp.*, 491 F. Supp. 404, 409 (S.D. Tex. 1980) ("[I]nquiry requires an examination of [Alberta, Canada's] law regarding service of process.").

52. See *Koster v. Automark Indus. Inc.*, 640 F.2d 77, 81 n.3 (7th Cir. 1981) (stating in dicta that a Dutch default judgment could not be enforced where the Dutch law was not reasonably calculated to provide notice: "statutory provision is not reasonably calculated to provide notice unless its terms relating to the sending of notice are mandatory."); *Boivin v. Talcott*, 102 F. Supp. 979, 981 (N.D. Ohio 1951) (holding foreign default judgment unenforceable where defendant received actual notice but foreign law contained no mandatory form of serving process).

53. See *Ma v. Cont'l Bank*, 905 F.2d 1073, 1076 (7th Cir. 1990) (party could not collaterally attack Hong Kong judgment where method of service was reasonably calculated to produce actual notice and the party, in fact, received actual notice). Cf. *Knothe v. Rose*, 392 S.E.2d 570, 573 (Ga. Ct. App. 1990) (in enforcing a divorce judgment, finding no merit in defendant's contention that notice was inadequate where he had received actual notice of the action).

54. Cf. *Mercandino v. Devoe & Reynolds, Inc.*, 436 A.2d 942, 943 (N.J. Super. Ct. App. Div. 1981) ("It is well established that the issue of jurisdiction underlying [a foreign] judgment is always open to inquiry, provided that it has not been actually and fully litigated."). But see *Hunt v. BP Exploration Co. (Libya)*, 492 F. Supp. 885, 895-96 (N.D. Tex. 1980) ("[T]rying the merits of the

court may find that such a defendant waived any challenge to personal jurisdiction if, after losing the initial challenge, he or she participated in the action on the merits, taking no further action to reassert its challenge to personal jurisdiction.<sup>55</sup> At least one court has suggested that a defendant may have preserved the right to challenge personal jurisdiction on a later enforcement action if he had brought an interlocutory appeal in the foreign court or reasserted the objection during the trial on the merits and any subsequent appeals.<sup>56</sup>

When a defendant asserts that the foreign court lacked personal jurisdiction, United States courts generally inquire whether the foreign court's exercise of personal jurisdiction conformed to standards of due process as recognized in the United States.<sup>57</sup> This means that United States courts will apply the "minimum contacts" test, under which a defendant is subject to personal jurisdiction if he or she availed him or herself of the benefits of the forum state by acting in a way that would have some impact within the forum state.<sup>58</sup>

Few U.S. courts consider whether the foreign court had jurisdiction over the defendant under the laws of the foreign country.<sup>59</sup> Exceptions to enforcement based on "jurisdictional defects or procedural unfairness [are] construed especially narrowly 'when the alien jurisdiction is . . . a sister common law jurisdiction with procedures akin to our own.'"<sup>60</sup>

As noted above in section B, the Uniform Act provides a list of circumstances under which enforcement or recognition may not be denied on the basis of lack of personal jurisdiction.<sup>61</sup> In a statutory jurisdiction, if

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British suit after losing the jurisdictional argument is not a consent to the jurisdiction of the English court and a waiver of his due process rights to an appropriate forum. . . . The litigation of counterclaims . . . does not constitute a waiver of jurisdictional objections either, at least in the absence of proof or allegation that any of them were permissive counterclaims.").

55. See *S. Carolina Nat'l Bank v. Westpac Banking Corp.*, 678 F. Supp. 596, 599 (D.S.C. 1987) ("[A] party who objects to a court's jurisdiction, but takes action inconsistent with that objection, waives the objection and becomes subject to the court's jurisdiction.").

56. *Id.* at 599.

57. See, e.g., *Ackermann v. Levine*, 788 F.2d 830, 838 (2d Cir. 1986).

58. See *Mercandino*, 436 A.2d at 943-44 (enforcing Italian default judgment where defendant sent a representative to Italy to discuss with plaintiff marketing of defendant's products in Italy). For more information on the minimum contacts test, see *Int'l Shoe Co. v. Wash.*, 326 U.S. 310 (1945), and the cases interpreting it.

59. See *Canadian Imperial Bank of Commerce v. Saxony Carpet Co.*, 899 F. Supp. 1248, 1253 (S.D.N.Y. 1995) (noting that personal jurisdiction was proper under both Quebec and New York law).

60. *Id.* 1252 (quoting *Clarkson Co. v. Shaheen*, 544 F.2d 624, 630 (2d Cir. 1976)); see also *Hunt v. BP Exploration Co. (Libya)*, 492 F. Supp. 885, 894 (N.D. Tex. 1980) ("Where, as here, the rendering forum's [England's] system of jurisprudence has been a model for other countries in the free world, and whose judges are of unquestioned integrity independent of the political winds of the moment, the judgment rendered is entitled to a more ministerial, less technocratic, recognition decisional process.").

61. UFMJRA § 5, 13 U.L.A. 261 (1986)..

any of the conditions in § 5 of the Uniform Act are met, a defendant cannot contest the personal jurisdiction of the foreign court.

#### 5. Subject Matter Jurisdiction

United States courts – regardless of whether they follow *Hilton v. Guyot* or the Uniform Act – will decline to recognize or enforce a foreign judgment if the foreign court lacked jurisdiction over the subject matter of the action.<sup>62</sup> The foreign court must have had jurisdiction under the laws of the foreign country.<sup>63</sup>

United States courts normally presume that the foreign court had jurisdiction over the subject matter of the action.<sup>64</sup> However, United States courts do not employ such a presumption with respect to a foreign judgment affecting rights in land in the United States or rights in a United States patent, trademark, or copyright.<sup>65</sup> Thus in most civil and commercial matters, the foreign court will be presumed to have had jurisdiction over the subject matter, so that this exception will rarely lead to denial of enforcement of a foreign judgment.

#### 6. Public Policy Exception

United States courts will not enforce or recognize a foreign judgment based on claims that are contrary to “fundamental notions of decency and justice.”<sup>66</sup> This exception is very narrowly construed. Enforcement will not be denied merely because the foreign cause of action is not recognized in the jurisdiction in which enforcement is sought.<sup>67</sup> Enforcement should be denied on public policy grounds only if it would

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62. *Hilton v. Guyot*, 159 U.S. 113, 202 (1895); UFMJRA § 4(a)(3), 13 U.L.A. 261, 265-68 (1986).

63. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 482(1)(b); RESTATEMENT (SECOND) CONFLICT OF LAWS § 92 cmt. i (1971) (“A judgment is valid only if it is rendered by a court which has been granted power to entertain the action.”); *Hunt*, 492 F. Supp. at 898 (holding that, because the English High Court of Justice is the English court of general jurisdiction, it had subject matter jurisdiction even though only Texas law applied to the contract action at issue).

64. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 482 cmt. d (1987).

65. *Id.*

66. *Id.*

67. See, e.g., *Somportex Ltd. v. Phila. Chewing Gum Corp.*, 453 F.2d 435, 443 (3d Cir. 1971) (enforcing an English judgment despite fact that certain items were not recoverable under Pennsylvania law); *Gutierrez v. Collins*, 583 S.W.2d 312, 322 (Tex. 1979) (holding that enforcement of Mexican judgment did not violate public policy despite dissimilarities between the laws of Mexico and those of Texas).

tend[] clearly to injure the public health, the public morals, the public confidence in the purity of the administration of the law, or to undermine that sense of security for individual rights, whether of personal liberty or of private property, which any citizen ought to feel, is against public policy.<sup>68</sup>

Although the public policy exception rarely provides a basis to deny enforcement of a foreign judgment, United States courts have found the enforcement of some foreign laws to be repugnant to public policy.<sup>69</sup> In 1997, the Supreme Court of Maryland held that the enforcement of an English libel judgment would contravene Maryland public policy.<sup>70</sup> The court found that the differences between English and Maryland standards governing defamation were striking.<sup>71</sup> In particular, Maryland recognizes special protection for speech involving criticism of public officials, public figures, and for speech relating to matters of public concern, while under English law no such special protection exists.<sup>72</sup> Given the “stark contrast between English and Maryland [defamation] law,” the Maryland court held that the English judgment should not be enforced.<sup>73</sup>

In one recent case, an English court had found the wife and children of a man accused of embezzling from the Arab Monetary Fund jointly and severally liable for attorney’s fees and costs estimated at ten million dollars. The Bankruptcy Court for the District of Arizona found that “‘saddling innocent transferees of property with \$10 million in personal liability for costs’ was ‘shocking to the Court’ ‘repugnant to the principals of American jurisprudence,’ and ‘contrary to the public policy of the United States.’”<sup>74</sup> The Ninth Circuit reversed, holding that the public policy exception should be interpreted narrowly.<sup>75</sup> A party seeking to avoid enforcement of a foreign

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68. *Somportex*, 453 F.2d at 443 (quoting *Goodyear v. Brown*, 26 A. 665, 666 (Pa. 1893)).

69. See, e.g., *Ackermann v. Levine*, 788 F.2d 830 (2d Cir. 1986) (refusing in part to enforce foreign judgment for attorneys’ fees); *Telnikoff v. Matusevitch*, 702 A.2d 230, 251 (Md. 1997) (holding that enforcement of English libel judgment would be repugnant to public policy); *Robinson v. Jardine Ins. Brokers*, 856 F. Supp. 554, 560 (N.D. Cal. 1994) (enjoining the enforcement of an English injunction anywhere in the United States where the English injunction, enforcing a non-compete clause, would undermine California public policy).

70. *Telnikoff*, 702 A.2d at 251.

71. *Id.* at 247.

72. *Id.* at 248.

73. *Id.* at 249-50.

74. *In re Hashim*, 213 F.3d 1169, 1171 (9th Cir. 2000).

75. *Id.* at 1172. The Ninth Circuit further stated that “absent grave procedural irregularities or allegations of fraud,” it must decline “to impugn the lawfulness of judgments of that judicial system from which our own descended.” *Id.* During the pendency of the appeal, the English court taxed costs and fees in an amount less than \$1 million. *Id.* at 1171. The Ninth Circuit nonetheless noted that “Arizona law would not support the bankruptcy court’s order denying comity . . . even if the award were to amount to \$10 million.” *Id.* at 1172.

judgment on the grounds that the judgment contravenes the public policy of the enforcing forum, must show that the level of contravention is high.<sup>76</sup>

#### D. Preclusive Effect of Foreign Judgments

As noted above, although enforcement of a foreign judgment entails recognition of that judgment, recognition may occur independently of enforcement.<sup>77</sup> Recognition occurs when a court precludes litigation of a claim or issue because that claim or issue was previously litigated in the court of a foreign nation. All United States jurisdictions follow the doctrine of collateral estoppel – precluding the parties from relitigating facts that were previously litigated and decided.<sup>78</sup> Preclusion serves the purposes of ending litigation and promoting judicial economy.<sup>79</sup> United States courts apply the doctrine of preclusion to foreign, as well as domestic, judgments.<sup>80</sup>

The issues discussed in section C above pertain to recognition as well as to enforcement of foreign judgments. Thus, in determining whether a judgment is entitled to recognition, the courts look to the law of the state in which recognition is sought. Once the court determines that a judgment is entitled to recognition, it must then determine whose law governs the preclusive effect that should be accorded to the judgment. Many United States courts apply either federal or state law in determining the preclusive effect.<sup>81</sup> Other courts apply the law of the rendering country to determine the preclusive effect.<sup>82</sup> “It is unsettled whether an American court will apply the foreign court’s rules of res judicata and collateral estoppel when called upon to recognize a foreign court’s judgment.”<sup>83</sup>

76. See *Hunt v. BP Exploration Co. (Libya)*, 492 F. Supp. 855, 900 (N.D. Tex. 1980).

77. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 481 cmt. b (1987).

78. Robert C. Casad, *Issue Preclusion and Foreign Country Judgments: Whose Law?*, 70 IOWA L. REV. 53, 55 (1984).

79. See *id.*

80. See *Omega Imp. Corp. v. Petri-Kine Camera Co.*, 451 F.2d 1190, 1196 (2d Cir. 1971) (precluding relitigation of status determined in previous action before West German court); *Alesayi Beverage Corp. v. Canada Dry Corp.*, 947 F. Supp. 658, 666 (S.D.N.Y. 1996) (denying preclusion based on Saudi Arabian judgment where standards of proof differed).

81. See, e.g., *Success Motivation Inst. of Japan Ltd. v. Success Motivation Inst. Inc.*, 966 F.2d 1007, 1010 (5th Cir. 1992) (“[Texas] law should be considered to determine what preclusive effect the Japanese judgment should be given.”); see also *Alfadda v. Fenn*, 966 F. Supp. 1317, 1329 (S.D.N.Y. 1997) (holding that “a federal court should normally apply either federal or state law . . . to determine the preclusive effect of a foreign [] judgment.”).

82. Cf. *Fairchild, Arabatzis & Smith, Inc. v. Prometco Co.*, 470 F. Supp. 610, 616 (S.D.N.Y. 1979) (“This court need not address the issue [of whose law applies] for it appears that British law and New York law are not in conflict on this point.”).

83. *Id.* (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS 2d § 98 cmt. f (1971)).

Preclusion may apply to prevent a party from raising an argument that was necessarily decided in favor of the other party upon the entry of a foreign default judgment.<sup>84</sup> A default judgment necessarily decides dispositive defenses in favor of the prevailing party.<sup>85</sup> For example, a default judgment entered on a contract claim necessarily determines that the contract was binding and valid, thus precluding the party seeking to avoid enforcement from arguing that the contract was invalid on the basis of fraud.<sup>86</sup> Recognition of a default judgment may not, however, bar the defaulting party from raising a claim based on the facts that were before the foreign court, if that claim could not have been brought as a counterclaim in the foreign proceeding.<sup>87</sup> For example, if the foreign judgment was based on an insurance agreement and the foreign court does not recognize bad faith as a cause of action, the defaulting party may be able to pursue the bad faith claim in the United States court, even if other issues relating to the insurance agreement are precluded by recognition of the foreign default judgment.<sup>88</sup>

#### E. Enforcement of Injunctions

Very few decisions address the subject of whether United States courts will enforce temporary restraining orders or preliminary injunctions issued by foreign courts. It appears that United States courts are not inclined to duplicate preliminary injunctive relief granted abroad.<sup>89</sup> In *Pilkington Brothers v. AFG Industries*, a United States District Court in Delaware declined to issue a preliminary injunction duplicative of an interim injunction issued by a court in England.<sup>90</sup> Plaintiff sought the duplicative order out of fear that the English order afforded inadequate protection from potential violations occurring in the United States.<sup>91</sup> The parties stipulated that the defendant would violate the English injunction and cause irreparable harm to the plaintiff.<sup>92</sup> The court determined that the duplicative injunction would offend the principles of international comity – unnecessarily interfering in the ongoing foreign proceedings and potentially leading to inconsistent interpretation and enforcement of the injunction’s terms.<sup>93</sup>

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84. See, e.g., *id.* at 614-17; *Bank of Montreal v. Kough*, 612 F.2d 467, 473 (9th Cir. 1980).

85. See *Fairchild, Arabatzis & Smith*, 470 F. Supp. at 617.

86. See *id.*

87. See *Guardian Ins. Co. v. Bain Hogg Int'l Ltd.*, 52 F. Supp. 2d 536, 545 (D.V.I. 1999) (stating “since Guardian’s bad faith claim could not be brought in the English Court, Guardian is not barred from proceeding with this claim in this Court”; and holding that remaining claims are “barred by principles of *res judicata*.”).

88. See *id.*

89. See *Pilkington Bros. P.L.C. v. AFG Indus. Inc.*, 581 F. Supp. 1039 (D. Del. 1984).

90. *Id.*

91. *Id.* at 1042.

92. *Id.*

93. *Id.* at 1046.

In *Robinson v. Jardine Ins. Brokers*, a United States District Court issued an order enjoining the enforcement of a temporary restraining order issued by an English court.<sup>94</sup> There, the plaintiff's former employer had obtained a temporary restraining order prohibiting the plaintiff from doing business with any of the former employer's clients and prohibiting the plaintiff from soliciting former co-workers to leave their employer. The English court issued this order despite the fact that the plaintiff had never signed the non-compete agreement and the former employer's Chief Executive Officer had testified that the non-compete provision was not a condition of employment.<sup>95</sup> Public policy in California disfavors restraining any person from engaging in a lawful profession.<sup>96</sup> Although the court held that enforcing the English order in the United States would undermine California's public policy, enforcing it in England would not.<sup>97</sup> Therefore the court issued an order enjoining the defendant from enforcing the English order anywhere in the United States, but permitting the defendant to serve English court documents on the plaintiff in the United States for the purpose of enforcing the English order in England.<sup>98</sup>

Although enforcement of preliminary injunctions appears to be disfavored, permanent injunctions issued by foreign courts may be enforceable in the United States. Nothing in the Uniform Act prevents recognition or enforcement of judgments other than money judgments.<sup>99</sup> United States courts will issue, for example, orders to permit foreign bankruptcy trustees to obtain records located in the United States.<sup>100</sup> In addition, at least one U.S. court has noted, in finding that a foreign court provided an adequate alternative forum for purposes of a forum non conveniens motion, that an injunction issued in a foreign court would be enforceable in the United States if fair and consistent with United States policy.<sup>101</sup>

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94. 856 F. Supp. 554 (N.D. Cal. 1994).

95. *Id.* at 558.

96. *Id.* (citing CAL. BUS. & PROF. CODE § 16600 (stating that any contract "by which anyone is restrained from engaging in a lawful profession, trade or business of any kind is to that extent void"))).

97. *Id.* at 560.

98. *Id.* at 561.

99. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 481 reporters note 2 (1987).

100. *See Clarkson Co. v. Shaheen*, 544 F.2d 624 (2d Cir. 1976) (holding that district court properly issued preliminary injunction ordering defendant to preserve records and to give Canadian bankruptcy trustee immediate and continuing access to those records).

101. *See Murray v. British Broad. Corp.*, 906 F. Supp. 858, 865 (S.D.N.Y. 1995), *aff'd*, 81 F.3d 287 (2d Cir. 1996).



## F. Pre-Enforcement Attachment

Pre-enforcement attachment may be permitted in those jurisdictions that normally allow such attachment. One practice guide suggests that “[a]s a practical matter, a plaintiff will have to seek a prejudgment attachment, particularly if he is expecting to levy on movable property such as bank accounts.”<sup>102</sup>

In New York, the Civil Practice Law and Rules specifically authorize attachment if the cause of action is based “on a judgment which qualifies for recognition under the provisions of article 53 [governing recognition of foreign country money judgments].”<sup>103</sup> In California, attachment is governed by Code of Civil Procedure section 481.010 *et seq.*<sup>104</sup> The California statute neither expressly authorizes nor expressly prohibits attachment when an action is based on a judgment entitled to recognition under the California Foreign Money Judgments Act (California Code of Civil Procedure § 1713 *et seq.*).<sup>105</sup>

## III. FINAL THOUGHTS

The Hague Conference on Private International Law is engaged in the development of a convention on jurisdiction and the enforcement/recognition of foreign civil judgments.<sup>106</sup> The United States is among the countries engaged in this effort. If the Conference is successful in producing a Convention, and if the United States signs it, the United States would likely enact implementing legislation (as it did upon signing the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards).<sup>107</sup> As a result, the enforcement and recognition of foreign judgments would then become a matter of federal, rather than state law.<sup>108</sup> If this occurs, the area of enforcement of foreign judgments in United States courts could change dramatically.

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102. See LAWRENCE W. NEWMAN & MICHAEL BURROWS, *THE PRACTICE OF INTERNATIONAL LITIGATION*, IV-25 (1999).

103. N.Y.C.P.L.R. § 6201(5); see also *Overseas Dev. Bank in Liquidation v. Nothman*, 103 A.D.2d 534 (N.Y. App. Div. 1984) (plaintiff had obtained ex parte order of attachment against defendant's property on the grounds that the cause of action was based upon judgment subject to enforcement in New York).

104. CAL. CIV. PRAC. CODE § 487.070 *et seq.* (West 2001).

105. CAL. CIV. PRAC. CODE § 1713 *et seq.* (West 2001).

106. See Harry S. Burman, *Private International Law*, 32 INT'L LAW 591 (1998); Edward C.Y. Lau, *Update on the Hague Convention on the Recognition and Enforcement of Foreign Judgments*, 6 ANN. SURV. INT'L & COMP. L. 13 (2000).

107. See American Law Institute, *International Jurisdictions and Judgments, Memorandums Submitted for Discussion on May 20, 1999 at the Seventy-Sixth Annual Meeting* (1999), at [http://www.ali.org/ali/1999\\_Pfund1.htm](http://www.ali.org/ali/1999_Pfund1.htm) (last visited Dec. 14, 2001).

108. See *id.*

## APPENDIX A

COMPARISON OF FACTORS CONSIDERED UNDER  
*HILTON v. GUYOT AND THE UNIFORM ACT**Hilton v. Guyot*  
159 U.S. 113 (1895)Uniform Foreign Money  
Judgments Recognition Act

A foreign judgment <i>will be</i> enforced where there has been:	A foreign judgment is <i>presumptively enforceable</i> , but <i>will not be enforced</i> if:
<ul style="list-style-type: none"> <li>• Opportunity for a full and fair trial</li> <li>• A trial upon regular proceedings</li> <li>• Proceedings under a system likely to secure an impartial administration of justice with respect to citizens of other countries</li> </ul>	<ul style="list-style-type: none"> <li>• The judgment was rendered under a system which does not provide impartial tribunals or procedures compatible with due process</li> </ul>
<ul style="list-style-type: none"> <li>• Adequate notice to or voluntary appearance of defendant(s)</li> </ul>	<ul style="list-style-type: none"> <li>• The rendering court lacked personal jurisdiction over the defendant</li> </ul>
<ul style="list-style-type: none"> <li>• A trial before a court of competent jurisdiction</li> </ul>	<ul style="list-style-type: none"> <li>• The rendering court lacked subject matter jurisdiction</li> </ul>

***Hilton v. Guyot***  
**159 U.S. 113 (1895)**

**Uniform Foreign Money  
Judgments Recognition Act**

<b>A foreign judgment <i>will not</i> be enforced if there is a showing of:</b>	<b>A foreign judgment may not be enforced if:</b>
<ul style="list-style-type: none"> <li>• Prejudice in the court or in the system of laws</li> </ul>	<ul style="list-style-type: none"> <li>• Notice to the defendant was inadequate</li> </ul>
<ul style="list-style-type: none"> <li>• Fraud in the procuring court</li> </ul>	<ul style="list-style-type: none"> <li>• The judgment was obtained by fraud</li> </ul>
<ul style="list-style-type: none"> <li>• Any other reason why comity should not be granted</li> </ul>	<ul style="list-style-type: none"> <li>• A cause of action on which the judgment is based is repugnant to the public policy of the state in which enforcement is sought</li> </ul>
	<ul style="list-style-type: none"> <li>• The judgment conflicts with another final and conclusive judgment</li> </ul>
	<ul style="list-style-type: none"> <li>• The parties had entered into a forum selection clause in which they chose a forum other than the one in which the judgment was rendered</li> </ul>
	<ul style="list-style-type: none"> <li>• If jurisdiction was based solely on personal service, the rendering court was a seriously inconvenient forum</li> </ul>

**APPENDIX B****JURISDICTIONS THAT HAVE ADOPTED THE UNIFORM  
FOREIGN MONEY JUDGMENTS RECOGNITION ACT<sup>109</sup>**

<b>Jurisdiction</b>	<b>Year of Adoption</b>	<b>Jurisdiction</b>	<b>Year of Adoption</b>
Alaska	1972	Minnesota	1985
California	1967	Missouri	1984
Colorado	1977	Montana	1993
Connecticut	1988	New Jersey	1997
Delaware	1997	New Mexico	1991
District of Columbia	1996	New York	1970
Florida	1994	North Carolina	1993
Georgia	1975	Ohio	1985
Hawaii	1996	Oklahoma	1965
Idaho	1990	Oregon	1977
Illinois	1963	Pennsylvania	1990
Iowa	1989	Texas	1981
Maine	1999	Virgin Islands	1992
Maryland	1963	Virginia	1990
Massachusetts	1966	Washington	1975
Michigan	1967		

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109. 13 Uniform Laws Annotated, 2000 Supplement at 89.

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