



Slaying the Trojan Horse: Arabie v. CITGO and Punitive Damages Under Louisiana's Conflict-of-Laws Provisions

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Slaying the Trojan Horse: *Arabie v. CITGO* and Punitive Damages Under Louisiana’s Conflict-of-Laws Provisions

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I. INTRODUCTION

Punitive damages are “exotic” in a civil law system,¹ and the Louisiana Civil Code articles on conflict of laws may be acting as a Trojan Horse,² sneaking punitive damages into Louisiana’s civil law.³ Although Louisiana claims to have a strong legislative policy

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1. *Dirmeyer v. O’Hern*, 3 So. 132, 134 (La. 1887).

2. The Louisiana Legislature’s debate of Senate Bill 646 proposing the codification of Louisiana’s choice-of-law provisions during the 1990 Legislative Session raised the concern that the articles could be the “[T]rojan [H]orse” introducing punitive damages into Louisiana law. Letter from Symeon Symeonides, Committee Reporter, Louisiana State Law Institute Conflicts *Projet*, to the Louisiana State Law Institute Conflicts *Projet* Committee (Dec. 19, 1990) (on file with the Louisiana State Law Institute).

3. Louisiana does allow punitive damages in limited statutory exceptions. *See infra* Part II.A.2.

against punitive damages,⁴ these articles enable courts to apply punitive damages laws from other jurisdictions in damages awards granted in Louisiana.⁵ When presented with this issue in *Arabie v. CITGO Petroleum Corp.*,⁶ the Louisiana Supreme Court reached the correct result; however, the lower courts' analyses⁷ show how Louisiana's conflict-of-laws articles can be misapplied to sneak punitive damages into Louisiana in similar claims that are still being tried.⁸ Such awards generate concerns over inconsistent codal interpretation, forum shopping, substantive and procedural clashes, and corporate exposure to damages above and beyond what Louisiana's substantive law would typically allow.⁹ This Trojan Horse creates the need for legislative clarification of the interaction among the conflict-of-laws articles governing punitive damages in order to align awards of punitive damages in Louisiana in accordance with legislative intent.¹⁰

This Comment explains why there is a need to reform Louisiana law governing multistate tort conflicts. The Louisiana Legislature needs to amend the conflict-of-laws articles to limit situations in which courts may award punitive damages outside of Louisiana's statutory exceptions.¹¹ Accordingly, Part II of this Comment summarizes Louisiana's punitive damages and conflict-of-laws provisions and compares Louisiana's provisions to that of other jurisdictions.¹² Part III then traces the path established by *Arabie v. CITGO Petroleum Corp.*, highlighting the flawed analysis at all three levels of litigation.¹³ Finally, Part IV analyzes the Louisiana courts' decision-making processes and underlying motives for awarding punitive damages and then offers a legislative solution to

4. See *Commercial Union Ins. Co. v. Upjohn*, 409 F. Supp. 453 (E.D. La. 1976); *Karavokiros v. Ind. Motor Bus Co.*, 524 F. Supp. 385 (E.D. La. 1981); see also *Arabie v. CITGO Petroleum Corp.*, 89 So. 3d 307 (La. 2012).

5. See *infra* Parts II.B.2, IV.A–B.

6. *Arabie*, 89 So. 3d 307; *Arabie v. Citgo Petroleum Corp.*, 49 So. 3d 529 (La. Ct. App. 2010).

7. See *Arabie*, 89 So. 3d 307; *Arabie*, 49 So. 3d 529.

8. See *Evans v. TIN, Inc.*, Nos. 11–2067, 11–2068, 11–2069, 11–2182, 11–2348, 11–2351, 11–2417, 11–2949, 11–2985, 11–2987, 11–3018, 11–3021, 11–3048, 11–3049, 12–18, 11–3050, 2012 WL 1499225 (E.D. La. Apr. 27, 2012); *infra* Part V.A.

9. See *infra* Part IV.

10. See *infra* Part IV.B.

11. See *infra* Parts IV.A.2, V.B.

12. See *infra* Part II.

13. *Arabie v. CITGO Petroleum Corp.*, 89 So. 3d 307 (La. 2012); *Arabie v. CITGO Petroleum Corp.*, 49 So. 3d 529 (La. Ct. App. 2010). See *infra* Part IV.

the flawed articles on the conflict of laws to definitively close the door to punitive damages.¹⁴

II. OPENING THE DOOR TO PUNITIVE DAMAGES: A COMPARATIVE OVERVIEW OF LOUISIANA LAW

Louisiana purports to have a strong legislative policy against awarding punitive damages, except in limited statutorily excepted situations.¹⁵ The history of Louisiana's policy on punitive damages is instructive because the courts and the Louisiana Legislature have disagreed on the legislative intent behind punitive damages over the past century.¹⁶ This overview details the codification of Louisiana's conflict-of-laws provisions and compares Louisiana's approach to those of other jurisdictions, paying particular attention to the treatment of punitive damages.¹⁷ Louisiana's legislative policy restricting punitive damages is unique, and it should be preserved from erosion through codal loopholes that open the door to the inappropriate award of punitive damages under the law of foreign jurisdictions.

A. Louisiana Law on Punitive Damages

Louisiana traditionally disfavors the award of punitive damages.¹⁸ This is a minority position on punitive damages among American states,¹⁹ as this policy is rooted in the civil law rather than the common law.²⁰ In the civil law, an award of damages is meant to "repair the harm sustained by the victim of a wrong, and not to punish the wrongdoer."²¹ Accordingly, as a civilian jurisdiction, Louisiana has "been reluctant to open its doors" to allow the recovery of punitive damages.²²

14. See *infra* Part V.

15. See generally John W. deGravelles & J. Neale deGravelles, *Louisiana Punitive Damages—A Conflict of Traditions*, 70 LA. L. REV. 579 (2010).

16. See generally *id.* See *infra* Part II.A.

17. See *infra* Part II.B.

18. See generally deGravelles & deGravelles, *supra* note 15.

19. See *infra* note 28.

20. See deGravelles & deGravelles, *supra* note 15, at 579.

21. See *id.* at 580 (citing SAUL LITVINOFF, OBLIGATIONS § 7.6, in 6 LOUISIANA CIVIL LAW TREATISE 205 (2d ed. 1999)); see also 2 LINDA L. SCHLUETER, PUNITIVE DAMAGES § 22.2 (5th ed. 2005); John Y. Gotanda, *Punitive Damages: A Comparative Analysis*, 42 COLUM. J. TRANSNAT'L L. 391, 396–98 (2004).

22. See deGravelles & deGravelles, *supra* note 15, at 580 (citing LITVINOFF, *supra* note 21, at 198); see also Helmut Koziol, *Punitive Damages—A European Perspective*, 68 LA. L. REV. 741 (2008).

1. The Louisiana Supreme Court: Closing the Door to Punitive Damages

The Louisiana Civil Code of 1808 was silent on punitive damages.²³ The courts awarded punitive damages without a statutory basis in ten reported decisions from 1836 to 1917.²⁴ These unsupported awards spurred the desire for a statutory basis to justify awards of punitive damages, and Louisiana courts argued the issue of punitive damages for many years.²⁵ In 1917, the Louisiana Supreme Court finally laid the issue to rest in *Vincent v. Morgan's Louisiana*²⁶ by holding that “pecuniary penalties imposed as exemplary, punitive, or vindictive damages” were not recoverable under Louisiana law.²⁷

2. The Louisiana Civil Code: Cracking the Door to Punitive Damages

After *Vincent*, the Legislature enacted three narrow statutory exceptions permitting awards of punitive damages, and this is the current state of Louisiana law on the subject.²⁸ Still, Louisiana’s policy is far more restrictive than the majority of states that allow

23. See deGravelles & deGravelles, *supra* note 15, at 583; see also Patrick J. Borchers, *Punitive Damages, Forum Shopping, and the Conflict of Laws*, 70 LA. L. REV. 529 (2010).

24. See deGravelles & deGravelles, *supra* note 15, at 583 n.30 (citing and discussing some of those cases (Casper v. Prosdame, 14 So. 317 (La. 1894); McFee v. Vicksburg, Shreveport & Pac. R.R. Co., 7 So. 720, 722–23 (La. 1890); Rutherford v. Shreveport & Houston R.R. Co., 6 So. 644, 644 (La. 1889); Dirmeyer v. O’Hern, 3 So. 132, 134 (La. 1887); Hill v. New Orleans, Opelousas & Great W. R.R. Co., 11 La. Ann. 292, 294 (La. 1855); Varillat v. New Orleans & Carrollton R.R. Co., 10 La. Ann. 88 (La. 1855); Black v. Carrollton R.R. Co., 10 La. Ann. 33, 38 (La. 1855); Grant v. McDonogh, 7 La. Ann. 447, 448 (La. 1852); McGary v. City of Lafayette, 4 La. Ann. 440, 440 (La. 1849); Summers v. Baumgard, 9 La. 161, 162 (1836.)); see also Adams v. J.E. Merit Constr., Inc., 712 So. 2d 88, 90–91 (La. 1998).

25. See deGravelles & deGravelles, *supra* note 15, at 583. The courts began citing article 2324.1 as a justification for punitive damages to allow the judge or the jury to have discretion over the award of punitive damages in the absence of a statutory basis, but there was no specific basis for punitive damages in this article. *Id.* Current article 2324.1 appeared as article 1928 in the Louisiana Civil Code of 1825. *Id.* at n.31. Those decisions, which allowed the award of punitive damages, admitted that punitive damages have common law roots and described punitive damages as “exotic” in a civil law system. *Id.* at 581 n.12. The dissents in those decisions refuted punitive damages because they are against civil law tradition. *Id.*

26. *Vincent v. Morgan's La.*, 74 So. 541 (La. 1917).

27. See deGravelles & deGravelles, *supra* note 15, at 585 (citing *Vincent*, 74 So. at 549).

28. See *id.*; LA. CIV. CODE arts. 2315.3, 2315.4, 2315.7 (2013).

punitive damages.²⁹ This strict limitation is rooted “in the protection of [Louisiana’s] judicial system . . . from what it might consider inherently speculative awards.”³⁰

Unless specific statutory authority to award punitive damages exists, Louisiana only allows the award of compensatory damages in tort cases.³¹ Article 2315 of the Louisiana Civil Code sets forth general delictual liability for “[e]very act whatever of man that causes damage to another.”³² Damages awarded for delictual conduct under article 2315 are strictly limited to general damages and special damages, which include “loss of consortium, service, and society” and costs “directly related to a manifest physical or mental injury or disease.”³³ These narrow bases for damages reflect the civilian goal of remedying wrongs, without punishing the wrongdoer.³⁴

However, three articles allow additional exemplary damages for statutorily excepted tortious conduct.³⁵ Specifically, these articles only allow exemplary damages for exceptionally egregious torts, which are limited to child pornography, operation of a motor vehicle while intoxicated, and criminal sexual activity with a child.³⁶ Exemplary damages are synonymous with punitive damages, as they are meant to make an example out of the defendant for delictual conduct³⁷ and may only be awarded upon proof of a heightened

29. ROBERT W. HAMMESFAHR & LORI S. NUGENT, PUNITIVE DAMAGES: A STATE-BY-STATE GUIDE TO LAW AND PRACTICE § 7.3, at 266–68 (2011). From a national perspective, states have three major variations on punitive damages, which in turn affect the choice-of-law analysis for multistate tort conflicts. First, four states generally disallow punitive damages. Borchers, *supra* note 23, at 531. Second, Louisiana and Massachusetts disallow punitive damages but provide exceptions for specific, statutorily excepted conduct. *Id.* Third, the remaining states, including Louisiana’s neighbors, allow punitive damages. *Id.* These states allow punitive damages as a matter of common law. See HAMMESFAHR & NUGENT, *supra*, at 266–68.

30. Pitmann v. Kaiser Alum. & Chem. Corp., 559 So. 2d 879 (La. Ct. App. 1990). Accord Lee v. Ford Motor Co., 457 So. 2d 193, 194–95 (La. Ct. App. 1984). The Louisiana Civil Code provisions that make exceptions to allow the award of punitive damages mirror common law analytical techniques that import the framework for these awards. See deGravelles & deGravelles, *supra* note 15, at 579.

31. Compare LA. CIV. CODE art. 2315 with *id.* arts. 2315.3, 2315.4, 2315.7.

32. Art. 2315.

33. *Id.*

34. See deGravelles & deGravelles, *supra* note 15, at 580 (citing LITVINOFF, *supra* note 21); see also SCHLUETER, *supra* note 21; Gotanda, *supra* note 21, at 396–98.

35. See arts. 2315.3, 2315.4, 2315.7.

36. See arts. 2315.3, 2315.4, 2315.7.

37. See deGravelles & deGravelles, *supra* note 15, at 588.

standard of liability.³⁸ The limited circumstances in which punitive damages may be recovered and the heightened standard of liability required for recovery further illustrate the Legislature's intent to limit such awards.³⁹

Louisiana reaffirmed its policy against punitive damages in 1996 when the Legislature repealed article 2315.3, a fourth statutory exception, which allowed "punitive damages in matters involving transportation of hazardous or toxic substances."⁴⁰ The repeal of article 2315.3 is also important to the treatment of cases asserting claims for punitive damages for delictual conduct involving hazardous or toxic substances, such as cases involving refinery spills like in *Arabie*.⁴¹ There is no longer a statutory exception for the award of punitive damages in this situation, leading plaintiffs to seek other authority for such awards.⁴² Consequently, some plaintiffs have turned to the codal provisions on conflict of laws as a substitute.

B. Louisiana Law on Conflict of Laws

In addition to lacking authorization for punitive damages, the Louisiana Civil Code of 1808 was also silent on choice-of-law in multistate tort cases.⁴³ Initially, Louisiana courts adjudged multistate

38. Articles 2315.3, 2315.4, and 2315.7 set the heightened standard of liability at "a wanton and reckless disregard for the rights and safety" of the person or others. See arts. 2315.3, 2315.4, 2315.7.

39. See arts. 2315.3, 2315.4, 2315.7.

40. Philip Ackerman, *Some Don't Like it Hot: Louisiana Eliminates Punitive Damages for Environmental Torts*, 72 TUL. L. REV. 327, 327 (1997); HAMMESFAHR & NUGENT, *supra* note 29, at 395-96. The Legislature repealed article 2315.3 to counteract the Louisiana Supreme Court's judicial expansion of article 2315.3 in the *Billiot v. B.P. Oil Co.* case. See *id.* at 383 (citing *Billiot v. B.P. Oil Co.*, 645 So.2d 604 (La. 1994) (overruled by *Adams v. Merit Constr., Inc.*, 712 So. 2d 88 (La. 1998) and Act No. 432, 1995 La. Acts 1622)). The *Billiot* Court held that "an employee could seek punitive damages against an employer even though the Louisiana Workers' Compensation Statute provided employers with tort immunity." See HAMMESFAHR & NUGENT, *supra* note 29, at 395-96 (citing *Billiot*, 645 So. 2d 604). This created a loophole for employees to sue their employers, who were immune from compensatory damages, for punitive damages instead. *Id.* While article 2315.3 was also repealed for reasons such as preserving the Louisiana Workers' Compensation Statute and other political pressures, it nonetheless further restricted punitive damages recovery in Louisiana.

41. See *Arabie v. CITGO Petroleum Corp.*, 89 So. 3d 307 (La. 2012); *infra* Part III.

42. This is particularly important for the purposes of this Comment because article 2315.3 formerly applied to refinery spills like the one in *Arabie*. *Id.*

43. Symeon Symeonides, *Introductory Note: The State of Present Louisiana Jurisprudence* 59 (July 2, 1989) (unpublished comment) (on file with the Louisiana State Law Institute).

torts by following the approach of other states under the rule of *lex loci delicti*, which dictates that the law of the place where the tort occurred should govern a rule of decision in a tort case.⁴⁴ The rule of *lex loci delicti* fell under attack during the American conflicts revolution of the 1960s, and many jurisdictions denounced the rule.⁴⁵ Louisiana followed suit in 1973 when the Louisiana Supreme Court judicially abandoned the rule in *Jagers v. Royal Indemnity Co.*⁴⁶ After *Jagers*, the place where the tort occurred no longer necessarily controlled which law applied.⁴⁷ The *Jagers* Court clearly denounced the *lex loci delicti* rule but failed to provide a suitable replacement.⁴⁸ Without a clear rule to follow, Louisiana lower courts applied a variety of inconsistent methods.⁴⁹ The Louisiana State Law Institute undertook the task of creating a uniform body of law to streamline the various approaches.

44. *Id.*

45. *Id.*

46. See generally *Jagers v. Royal Indem. Co.*, 276 So. 2d 309 (La. 1973).

47. See Symeonides, *supra* note 43, at 59. In *Jagers v. Royal Indemnity Co.*, the Louisiana Supreme Court chose not to apply the rule of *lex loci delicti*. *Id.* (citing *Jagers*, 276 So. 2d 309); see also Symeon C. Symeonides, *Louisiana's New Law of Choice of Law for Tort Conflicts: An Exegesis*, 66 TUL. L. REV. 677, 681 n.17 (1992). See generally Harvey Couch, *Choice-of-Law, Guest Statutes, and the Louisiana Supreme Court: Six Judges in Search of a Rulebook*, 45 TUL. L. REV. 100 (1970) (offering insight into how the Court chose to abandon the *lex loci delicti* rule). *Jagers* arose from a car accident in Mississippi between two Louisiana family members. See Symeonides, *supra* note 43, at 59 (citing *Jagers*, 276 So. 2d 309). Because Mississippi "had no interest" in applying its law to the particular issue of whether Louisiana family members could sue one another in tort, the Court refused to apply Mississippi law under the rule of *lex loci delicti*. *Id.* Mississippi law would have disallowed the suit through intra-family immunity. *Id.* The Court instead applied Louisiana law because Louisiana's policy of compensation would have been affected if the court did not apply it to protect the Louisiana domiciliary, although the injury occurred in Mississippi. *Id.* Because the case did not involve a Mississippi family, Mississippi's policy of protecting families from discourse would not be affected. *Id.* The *Jagers* Court considered the case to be a "false conflict" because only one of the states involved, Louisiana, truly "had an interest" in applying its own law. *Id.* A "true conflict" would be a case in which both states are interested in applying their law. *Id.*

48. See Symeonides, *supra* note 43, at 59 (citing *Jagers*, 276 So. 2d 309).

49. See *id.* at 59–60. Louisiana lower courts applied three methods of reasoning to reconcile multistate torts conflicts: (1) the government interest analysis, (2) the Restatement Second of Conflict of Laws approach, and (3) a combination of the two methods. *Id.* See also James J. Hautot, *Choice of Law in Louisiana: Torts*, 47 LA. L. REV. 1109 (1987). Compare *Sutton v. Langley*, 330 So. 2d 321 (La. Ct. App. 1976) (government interest analysis), with *Cooper v. American Express Co.*, 593 F.2d 612 (5th Cir. 1979) (the Restatement Second of Conflict of Laws analysis), *Brinkley & West Inc., v. Foremost Ins. Co.*, 499 F.2d 928 (5th Cir. 1974), and *Ardoyno v. Kyzar*, 426 F. Supp. 78 (E.D. La. 1976) (a combination of the two methods).

1. Building the Trojan Horse: The Louisiana State Law Institute's Projet

Louisiana's conflict-of-laws codification was "the first comprehensive attempt at conflicts codification in the United States."⁵⁰ When the Louisiana State Law Institute prepared the *Projet* for the Codification of Louisiana Law of Conflict of Laws,⁵¹ it submitted its proposal of 36 new Louisiana Civil Code articles to the 1990 Regular Legislative Session.⁵² During the course of debate in the Louisiana House of Representatives, the tort articles were the most controversial.⁵³ Concern arose that the *Projet* "might open the doors to obnoxious foreign laws . . . [and] be the '[T]rojan [H]orse' for the introduction of punitive damages to Louisiana."⁵⁴ Due to its concerns, the House deferred the conflicts *Projet* and recommended the addition of an article that would allow Louisiana courts to refuse foreign law if it "would produce a result that is repugnant to Louisiana's public policy."⁵⁵ The Institute's Advisory Committee

50. See Symeonides, *supra* note 47, at 678. Prior to Louisiana's codification, conflicts rules were found in Louisiana Civil Code of 1870 articles 9 and 10, revised statutes, and jurisprudence. *Id.* There was no specific rule for tort conflicts in the code articles. *Id.* Article 9 was meant to govern tort conflicts, but Louisiana courts followed *lex loci delicti* under the influence of its common law neighbors. *Id.* at 678–80.

51. Letter from Symeon C. Symeonides, Committee Reporter, Louisiana State Law Institute Conflicts *Projet*, to the Louisiana State Law Institute Conflicts *Projet* Committee (Feb. 5, 1990) (on file with the Louisiana State Law Institute). The following members comprised the Institute's Advisory Committee for the Codification of Louisiana Conflict of Laws: David Conroy, Harvey Couch, James L. Dennis, Cordell H. Haymon, Harry T. Lemmon, Howard W. L'Enfant, Andrew Rinker, Jr., Raphael J. Rabalais, Katherine S. Spaht, A.N. Yiannopoulos, staff attorney James J. Carter, Jr., and Committee Reporter Symeon C. Symeonides. See Symeonides, *supra* note 47, at 683 n.35.

52. Letter from Symeon C. Symeonides to the Louisiana State Law Institute Conflicts *Projet* Committee, *supra* note 51. The Institute's Advisory Committee for the Codification of Louisiana Conflict of Laws approved the proposed code articles, then submitted the proposal to the Council of the Institute. *Id.* The Council of the Institute approved the proposal as a whole on March 17, 1989. *Id.* Senators McLeod and Nelson introduced the proposal to the Louisiana Legislature as Senate Bill 646 during the 1990 Regular Legislative Session. Letter from Symeon C. Symeonides to the Louisiana State Law Institute Conflicts *Projet* Committee, *supra* note 2. The Senate Committee on the Judiciary, the Senate, and the House Civil Law and Procedure Committee approved the Bill, but the House deferred the Bill for further study. *Id.*

53. Letter from Symeon C. Symeonides to the Louisiana State Law Institute Conflicts *Projet* Committee, *supra* note 2.

54. *Id.*

55. The proposed additional article read as follows:

Article 'X'. Ordre public. When the law of another state is designated as applicable to an issue under the provisions of this Chapter, the

had considered such an article prior to its first legislative proposal and decided to omit it because the committee believed that “the flexibility . . . built into [the *Projet*] permit[ted] and require[d] the judge to take account of Louisiana’s public policy in *every*, not just the last, step of the choice-of-law analysis.”⁵⁶

The Committee also faced the question of “what effect punitive damages [would] have on the tort law in Louisiana.”⁵⁷ Professor Symeon Symeonides, the Committee Reporter, promptly assuaged this concern and responded that “the intent of the *Projet*’s drafters was precisely *not* to affect at all Louisiana’s substantive law on the issue.”⁵⁸ He further explained that “[t]he *Projet* simply delineate[d], and [did] so in a very conservative manner, the circumstances under which punitive damages may be awarded, if and when such damages are imposed by a—usually foreign—law that is otherwise applicable to the dispute.”⁵⁹

The Committee resubmitted the original *Projet* for the 1991 Regular Legislative Session but failed to adopt the recommended article that would ensure that Louisiana’s longstanding public policy against punitive damages was explicitly protected in multistate tort conflicts.⁶⁰ The Legislature adopted the *Projet*, and the articles were then added to the Louisiana Civil Code as Book IV Conflict of

application of such law may be refused [only] if it would lead to a result that is manifestly incompatible with the public policy (*ordre public*) of this State as understood in interstate or international relations.

Id.

56. *Id.* In response, the Institute’s Advisory Committee for the Codification of Louisiana Conflict of Laws insisted that:

the *Projet*: (a) [did] not change an iota in Louisiana’s policy against punitive damages; (b) . . . delineate[d] more narrowly than any other state, and more narrowly than present Louisiana jurisprudence, the cases in which punitive damages *may* be awarded under a *foreign* law that is otherwise applicable to the case (Art. 46); and (c) even in those cases, it allows the court to *not* award punitive damages if it determines that “the policies of another state [*e.g.* Louisiana] would be more seriously impaired if its law were not applied to the particular issue [*e.g.* punitive damages]” (Art. 47).

Id. These were the original intended numbers for the enactment, but they were later renumbered. *Id.* Articles 46 and 47 were renumbered to be articles 3546 and 3547. *Id.* See *infra* Part II.B.2 for a discussion of their content.

57. Letter from Symeon C. Symeonides, Committee Reporter, Louisiana State Law Institute Conflicts *Projet*, to Oliver P. Stockwell, attorney (Feb. 12, 1990) (on file with the Louisiana State Law Institute).

58. *Id.*

59. *Id.*

60. Act No. 923, 1991 La. Acts 251.

Laws.⁶¹ These articles remain the governing law regarding punitive damages in choice-of-law situations.⁶²

2. Hidden in the Trojan Horse: Allowing Punitive Damages Under the Current Conflict-of-Laws Articles

Although the *Projet* drafters insisted that the conflicts codification insulated Louisiana law from punitive damages,⁶³ the conflict-of-laws provisions nonetheless provide ample opportunity to recover punitive damages,⁶⁴ in addition to the statutorily excepted provisions,⁶⁵ because the choice-of-law articles governing an award of punitive damages in a Louisiana forum permit the application of another state's law in limited circumstances.⁶⁶

Louisiana Civil Code Book IV “is based on the premise that the choice-of-law process should strive for ways to minimize the impairment of the involved states’ interests, rather than to maximize one state’s interests at the expense of those of the other states” through an analysis of policy and pertinent contacts.⁶⁷ Book IV

61. *Id.* Although the 36 articles adopted in Act Number 923 were numbered as articles 14 to 49, all but article 14 were adopted as articles 3515 to 3549 in a newly created Book IV Conflict of Laws to avoid renumbering Book I of the Civil Code. *See* Symeonides, *supra* note 47, at 685–86 n.43. The Louisiana State Law Institute renumbered these articles through its statutory authority after Act Number 923 was passed. *Id.* Articles 3542 through 3548 are the most important to the scope of this Comment. *See* LA. CIV. CODE arts. 3542–3548 (2013); *infra* Part II.B.2.

62. *See* LA. CIV. CODE arts. 3515–3549 (2013).

63. *See supra* Part II.B.1.

64. *See* *Arabie v. CITGO Petroleum Corp.*, 89 So. 3d 307 (La. 2012); *Arabie v. CITGO Petroleum Corp.*, 49 So. 3d 529 (La. Ct. App. 2010); *Evans v. TIN, Inc.*, Nos. 11–2067, 11–2068, 11–2069, 11–2182, 11–2348, 11–2351, 11–2417, 11–2949, 11–2985, 11–2987, 11–3018, 11–3021, 11–3048, 11–3049, 12–18, 11–3050, 2012 WL 1499225 (E.D. La. Apr. 27, 2012).

65. *See supra* Part II.A.2.

66. *See* arts. 3542–3548. Article 14 on multistate cases provides that “[u]nless otherwise expressly provided by the law of this state, cases having contacts with other states are governed by the law selected in accordance with the provisions of Book IV of this Code.” LA. CIV. CODE art. 14 (2013). This article lays the foundation to apply the articles in Book IV to multistate tort cases, “whether these contacts pertain to the domicile of the parties, the transaction or the occurrence giving rise to the dispute, or the location of its object or subject matter.” *See* Symeonides, *supra* note 47, at 687. Article 14 is the only conflict-of-laws article that retains its original location in Book I of the Civil Code. *Id.* at 686. *See infra* note 62.

67. *See* Symeonides, *supra* note 47, at 690. This analysis “is accomplished by identifying the state that, in light of its relationship to the parties and to the dispute, and the policies rendered pertinent by that relationship, would suffer the most serious legal, social, economic, and other consequences if the court did not apply its law to the issue.” *Id.* Louisiana Civil Code Book IV establishes the framework

begins with a general, residual rule on how to determine the applicable law. Article 3515 specifically provides that “an issue in a case having contacts with other states is governed by the law of the state whose policies would be most seriously impaired if its law were not applied to that issue.”⁶⁸ To make that determination, article 3515 requires the court to consider “the strength and pertinence of the relevant policies of all involved states,”⁶⁹ with special consideration for the relationship between the parties, the state policies involved, and the expectations of the parties.⁷⁰

Professor Symeonides warned that some policies “are more susceptible to being overlooked if they are not brought to the attention of the decisionmaker.”⁷¹ Another important consideration is that “the parties should not be subjected to a law whose application they had no reason to anticipate.”⁷²

In addition to the general, residual rule of article 3515, Book IV specifically addresses delictual obligations involving several

for the application of its Title 7, which specifically governs conflict of laws for delictual and quasi-delictual obligations. *See* arts. 3542–3548.

68. LA. CIV. CODE art. 3515 (2013).

69. *Id.* The policies referenced in article 3515 “should include not only those embodied in the rules of law claimed to be applicable, but also the more general policies, domestic as well as multistate, that might be pertinent to the particular issue.” Symeonides, *supra* note 47, at 692. In fact, the original draft of article 3515 included the language “the policies embodied in the particular rules of law claimed to be applicable as well as any other pertinent policies of the involved states,” but the Louisiana State Law Institute’s Semantics Committee replaced the phrase with “relevant policies” because it thought the lengthier version was redundant. *Id.* at 693 n.86 (quoting LOUISIANA STATE LAW INST., ADVISORY COMMITTEE, REVISION OF PRELIMINARY TITLE OF THE CIVIL CODE OF 1870: LAW OF CONFLICTS OF LAWS: A PROJET 1 (Comm. Print 1989) (Symeon C. Symeonides, Committee Reporter, adopted Mar. 17, 1989) (on file with the *Tulane Law Review*); *cf.* ARTHUR T. VON MEHREN & DONALD T. TRATUMAN, THE LAW OF MULTISTATE PROBLEMS 76–79, 376–78, 392, 394–95, 406–08 (1965)). The Institute’s Coordinating Committee made further non-substantive, semantical revisions after the passage of the proposal. Symeonides, *supra* note 43.

70. Art. 3515. Symeonides further described the policy consideration embodied in article 3515 as “[a] legislative policy that is strongly espoused by the enacting state for intrastate cases may in fact be attenuated in a particular multistate case that has only minimal contacts with that state.” Symeonides, *supra* note 47, at 693. Similarly, “the same policy may prove to be far less pertinent if the case has sufficient contacts with that state, but not contacts of the type that would actually implicate that policy.” *Id.*

71. *See* Symeonides, *supra* note 47, at 694 n.35 (citing art. 3515). This is why the second paragraph of article 3515 expressly mentions “the policies of upholding the justified expectations of parties and of minimizing the adverse consequences that might follow from subjecting a party to the law of more than one state.” *Id.*

72. *Id.* at 695.

states.⁷³ In particular, article 3546 addresses the treatment of punitive damages in a choice-of-law analysis for multistate torts.⁷⁴ Article 3546 reads:

Punitive damages may not be awarded by a court of this state unless authorized:

- (1) By the law of the state where the injurious conduct occurred and by either the law of the state where the resulting injury occurred or the law of the place where the person whose conduct caused the injury was domiciled; or
- (2) By the law of the state in which the injury occurred and by the law of the state where the person whose conduct caused the injury was domiciled.⁷⁵

Thus, article 3546 specifically prohibits the award of punitive damages by a Louisiana court, unless the substantive law of a minimum of two of the three listed locations allows the award of punitive damages: (1) the place of the alleged injurious conduct, (2) the place of the alleged injury, or (3) the place of the defendant's domicile.⁷⁶ The language in article 3546 stating: "may not be awarded . . . unless" reaffirms Louisiana's restrictive view on the authorization of punitive damages in multistate tort conflicts.⁷⁷ However, from the very text of article 3546, there is an oddity in the statutory exception allowing punitive damages in multistate torts because there are three clauses and two provisions.⁷⁸ This allows parties to prepare alternative arguments within the three provisions in the text of the article, while only needing to satisfy two of the provisions, which allows wide latitude for an award of punitive damages in contrast with Louisiana's limited statutory exceptions.⁷⁹

73. See LA. CIV. CODE arts. 3542–3548 (2013). Article 3542 parallels article 3515 and sets forth the general rule on multistate tort conflicts. Art. 3542. Article 3542 explains that to determine which state's policies would be the "most seriously impaired" if not applied, the analysis should first consider "the pertinent contacts of each state to the parties and the events giving rise to the dispute, including the place of conduct and injury, the domicile, habitual residence, or place of business of the parties, and the state in which the relationship, if any, between the parties was centered." *Id.* Next, the analysis should look to "the policies referred to in article 3515, as well as the policies of deterring wrongful conduct and of repairing the consequences of injurious acts." *Id.*

74. Art. 3546.

75. *Id.*

76. *Id.*

77. *Id.* (emphasis added).

78. *Id.*

79. See *infra* Part III.

One of the most important determinations that must be made in any choice-of-law analysis, including claims for punitive damages, is the domicile of the parties. The general rule is that “[a] juridical person *may* be treated as a domiciliary of *either* the state of its formation *or* the state of its principal place of business, whichever is most pertinent to the particular issue.”⁸⁰ However, in an effort to subject out-of-state tortfeasors to jurisdiction in Louisiana, “a juridical person that is domiciled outside this state, but which transacts business in this state and incurs a delictual . . . obligation arising from activity within this state, *shall* be treated as a domiciliary of this state,” as long as it is consistent with policy considerations enumerated under article 3542.⁸¹ The duality of these two domicile rules allows manipulation of their application based on which domicile is preferential to the particular plaintiff.⁸²

The defendant’s domicile is crucial to the analysis in a claim for punitive damages in a multistate tort conflict because it is a requirement for such awards under the law of another state.⁸³ Although an out-of-state tortfeasor “*shall* be domiciled” in Louisiana for delictual liability arising from activity within this state, plaintiffs may argue that policy concerns favor domiciling the corporation in a forum that allows punitive damages.⁸⁴ If the court agrees that policy considerations indicate that the defendant should be domiciled in a state that allows an award of punitive damages and the plaintiff proves that either the injurious conduct or the resulting injury occurred in a state that allows punitive damages as well, the plaintiff may secure an award of punitive damages under another state’s law. Such an award circumvents the codal attempt to subject out-of-state actors to Louisiana law governing delictual liability in multistate torts.⁸⁵

Moreover, article 3547 on exceptional cases creates an “escape hatch” and allows the court to consider whether, under the totality of

80. LA. CIV. CODE art. 3518 (2013) (emphasis added).

81. *Id.* art. 3548. *See also id.* art. 3542 (promulgating the general rule governing delictual obligations). *See supra* note 73 for the article 3542 policy considerations.

82. It is important to note that article 3548 dictates that a juridical person “shall” be domiciled in Louisiana if consistent with article 3542. Art. 3548. Professor Symeonides stressed that article 3548 may protect out-of-state corporations from punitive damages liability but only if the court agrees this is appropriate under article 3542. Arts. 3542, 3548. *See Symeonides, supra* note 47, at 762. *See infra* Part III for a discussion of the application of these articles in *Arabie. Arabie v. CITGO Petroleum Corp.*, 89 So. 3d 307 (La. 2012); *Arabie v. CITGO Petroleum Corp.*, 49 So. 3d 529 (La. Ct. App. 2010).

83. Arts. 3518, 3548.

84. Art. 3548.

85. *Id.* arts. 3546, 3548.

the circumstances, to apply the law of another involved state, irrespective of any other Civil Code provisions, if “it is clearly evident . . . that the policies of another state would be more seriously impaired if its law were not applied to the particular issue.”⁸⁶ This “escape hatch” conflicts with Louisiana’s legislative policy to strictly limit the award of punitive damages because it enables plaintiffs to recoup punitive damages not allowed through Louisiana’s statutory exceptions and narrow choice-of-law provisions.⁸⁷

Although the conflict-of-laws articles provide courts with the tools to evaluate a multistate tort conflict through a step-by-step analysis, there are flaws hidden within the articles. These flaws became evident in the *Arabie* litigation.⁸⁸ Plaintiffs and defendants need to know how to proceed with reasonable certainty when a Louisiana court may award punitive damages under the law of another state. Louisiana has a mainstream approach to choice-of-law in general,⁸⁹ yet Louisiana takes the minority approach by expressly prohibiting punitive damages, creating policy concerns in a choice-of-law analysis.⁹⁰ The outcome of future multistate tort cases is currently unclear, which opens the door to years of litigation on the meaning of the choice-of-law articles in relation to punitive damages. This lack of clarity may further suggest the need for legislative clarification.⁹¹

III. THE TROJAN HORSE ENTERS: *ARABIE V. CITGO PETROLEUM CORP.*

Arabie was the first case involving the Louisiana choice-of-law provisions on punitive damages to reach the Louisiana Supreme Court.⁹² *Arabie* traveled from the Fourteenth Judicial District

86. *Id.* art. 3547. The principles of article 3542 are used to consider “whether the policy of another state would be more seriously impaired if its law were not applied to the particular issue.” *Id.* See *supra* note 73 for the article 3542 policy considerations.

87. See, e.g., *Cain v. Altec Industries, Inc.*, 236 F. App’x. 965 (5th Cir. 2007) (awarding damages under another state’s law using article 3547 to circumvent the application of Louisiana’s choice-of-law principles). Compare art. 3546, with art. 3547 (allowing parties to circumvent codal requirements).

88. See *supra* Part II.B for a discussion of Book IV. See *infra* Part III for a discussion of the *Arabie* litigation. *Arabie v. CITGO Petroleum Corp.*, 89 So. 3d 307 (La. 2012); *Arabie v. CITGO Petroleum Corp.*, 49 So. 3d 529 (La. Ct. App. 2010). See *infra* Part IV.B for a discussion of the flaws in the code articles.

89. See *supra* Part II.B.

90. See *supra* Part II.A; *infra* Part IV.C.

91. See *infra* Part IV.B.

92. *Arabie*, 89 So. 3d 307.

Court,⁹³ to the Third Circuit Court of Appeal,⁹⁴ and ultimately to the Louisiana Supreme Court, which reversed the lower courts' awards of punitive damages.⁹⁵ However, despite the High Court's seemingly definitive holding, the Court's analysis and subsequent cases⁹⁶ demonstrate the flaws in the conflict-of-laws provisions governing conduct and domicile that need legislative attention.⁹⁷

A. Sneaking in the Trojan Horse: The Trial Court's Award of Punitive Damages

The dispute in *Arabie* arose after CITGO Petroleum Corp. unintentionally released 4 million gallons of hazardous slop oil and 17 million gallons of wastewater into the Calcasieu River in Lake Charles, Louisiana, in a refinery spill on June 19, 2006.⁹⁸ The spill originated from the storm surge storage tanks in the refinery's wastewater treatment unit (WWTU) built in 1994.⁹⁹ The dike around the tanks failed to contain the spillage, and the 21 million gallons of oil and wastewater migrated downriver to the Ron Williams Construction site at the Calcasieu Refining Company where the plaintiffs were working.¹⁰⁰

Fourteen plaintiffs filed suit in Louisiana state court against CITGO and R & R Construction.¹⁰¹ Some who were directly

93. *Arabie v. CITGO Petroleum Corp.*, No. 2007-2738, 2009 WL 7170890 (La. Dist. Ct. Oct. 22, 2009).

94. *Arabie v. CITGO Petroleum Corp.*, 49 So. 3d 529 (La. Ct. App. 2010).

95. *Arabie*, 89 So. 3d 307.

96. See *infra* Part IV.A for a discussion of *Evans v. TIN, Inc.* *Evans v. TIN, Inc.*, Nos. 11-2067, 11-2068, 11-2069, 11-2182, 11-2348, 11-2351, 11-2417, 11-2949, 11-2985, 11-2987, 11-3018, 11-3021, 11-3048, 11-3049, 12-18, 11-3050, 2012 WL 1499225 (E.D. La. Apr. 27, 2012).

97. *Arabie*, 89 So. 3d 307. See *infra* Part IV.B for a discussion of legislative proposals.

98. *Arabie*, 49 So. 3d at 533.

99. *Id.* The function of the WWTU was to treat wastewater then discharge it into the Calcasieu River. *Id.* Two 10 million gallon storm tanks stored the untreated wastewater, but the skimmers designed to remove the oil from the wastewater had been inoperable since shortly after the WWTU was built. *Id.* Over time, eight feet of slop oil accumulated under the wastewater stored in the tanks. *Id.* This accumulation resulted in a capacity overload because the two tanks experienced heavy rainfall in a very short period of time. *Id.*

100. *Id.* In response to the accident, CITGO implemented a two-month cleanup project in proximity to Calcasieu Refining Company. *Id.* Booms absorbed the oil and were deposited into a dumpster called a roll-off box 30 feet from the plaintiffs' break tent, where there were daily construction meetings. *Id.*

101. *Id.* The plaintiffs alleged negligence against R & R Construction, who had contracted to build a new levee system around a third storm water tank at CITGO's WWTU. *Id.* CITGO entered a plea agreement in federal court for "Negligently Discharging a Pollutant from a Point Source into the Navigable

exposed to the slop oil claimed physical injuries such as vomiting, rashes, headaches, nausea, and eye, nose, and throat problems.¹⁰² CITGO and R & R filed a joint admission of fault for the release of the slop oil.¹⁰³ The defendants agreed to pay the plaintiffs for their compensatory damages if the plaintiffs were able to prove that the dike failure at the CITGO refinery in Louisiana proximately caused those damages.¹⁰⁴

Then, only after CITGO's admission of fault, the plaintiffs amended their suit to include CITGO's liability for punitive damages, in addition to compensatory damages.¹⁰⁵ Plaintiffs asserted that CITGO was headquartered in Oklahoma, prior to 2004, when the corporation moved its headquarters to Texas.¹⁰⁶ The plaintiffs alleged that CITGO intentionally underbuilt the Louisiana refinery's WWTU based on corporate headquarters' decisions.¹⁰⁷ Through this line of reasoning, plaintiffs attempted to use Louisiana's conflict-of-laws rules to claim that the corporate-funding decisions made over the years in Oklahoma and Texas constituted the injurious conduct, therefore allowing an award of punitive damages under the law of either state.¹⁰⁸

Waters of the United States in violation of Title 33 of the United States Code" on September 17, 2008. *Id.* at 533–54. CITGO agreed to a criminal fine of \$13 million in exchange for the government agreeing not to prosecute additional criminal offenses related to the refinery spill. *Id.* at 534. Specific offenses known to the government included discharges of pollutants, Clean Air Act violations, record-keeping violations, and disposal and treatment violations. *Id.* The state trial court entered summary judgment for the plaintiffs on the issue of comparative fault of the plaintiffs, their employer, and the premise owner. *Id.*

102. *Id.* at 534.

103. *Id.*

104. *Id.* The defendants specifically agreed to "pay (upon final judgment after all appeals) plaintiffs for all their compensatory damages assessed to CITGO and R & R, if any, that plaintiffs [were] able to prove to the Court were proximately caused by such release from the CITGO refinery in Calcasieu Parish, Louisiana, on or about June 19, 2006." *Id.*

105. *Id.*

106. *Id.*

107. *Id.* The plaintiffs cited corporate headquarters' decision to delete a third storage tank in the original unit design in order to save millions of dollars in expenses made in the early 1990s as the injurious conduct. *Id.* CITGO had actually approved engineering for the addition of the WWTU's originally deleted third tank in 2004 and approved funding for the third tank in 2005. *Id.* The plaintiffs argued that fund diversion to profit-centered projects was the reason the third tank was not functional at the time of the spill in 2006. *Id.*

108. *Id.* See *supra* Part II.B.2 for a discussion of the conflict-of-laws provisions on punitive damages. The trial was a bench trial because Louisiana law only provides for a jury trial in civil cases with damages claims above \$50,000. See *infra* Part IV.C. Both Oklahoma law and Texas law permit punitive damages

The trial court awarded punitive damages in the amount of \$30,000 to each of the plaintiffs.¹⁰⁹ The court determined that two of the requisite three requirements under article 3546 were satisfied, namely (1) that the injurious conduct occurred in a state that allowed punitive damages and (2) that CITGO was also domiciled in that state.¹¹⁰ First, the trial court agreed with the plaintiffs that the injurious conduct occurred through corporate decision-making at headquarters in Oklahoma and Texas.¹¹¹ Second, the trial court determined that CITGO was domiciled at its corporate headquarters in Oklahoma at the time the WWTU was constructed and when the decision to delete the third tank was made.¹¹² Relatedly, the court determined that after moving headquarters in 2004, CITGO was domiciled in Texas until the time of the refinery spill in 2006.¹¹³ Thus, even though Louisiana law did not allow for punitive damages under the facts of the case, the trial court judge was able to award them under the conflict-of-laws provisions all the same.¹¹⁴ CITGO then appealed the award of punitive damages.¹¹⁵

B. Grooming the Trojan Horse: The Appellate Court's Affirmation of Punitive Damages

The Louisiana Third Circuit Court of Appeal affirmed the punitive damages award despite CITGO's argument that Louisiana law, rather than the law of Oklahoma or Texas, should have governed the award of punitive damages.¹¹⁶ The appellate court analyzed the issue under Louisiana's conflict-of-laws articles and agreed that article 3546 authorized punitive damages because the plaintiffs established (1) that the law of the state of the injurious

for the plaintiffs' injuries resulting from the tortious conduct. *See* OKLA. STAT. tit. 23, § 9.1 (Westlaw 2013); TEX. CIV. PRAC. & REM. CODE ANN. § 41.003 (West 2008); *Arabie*, 49 So. 3d at 551–52.

109. *Arabie*, 49 So. 3d at 534, 554. *See supra* Part II.B.2 for a discussion of article 3546.

110. *Arabie*, 49 So. 3d at 551. The plaintiffs specifically argued for punitive damages under the law of Texas or Oklahoma. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. *See supra* Part II.B.2.

115. *Arabie*, 49 So. 3d at 534.

116. *Id.* at 533, 551. The Third Circuit Court of Appeal only admonished the trial court on one issue: its failure to clarify whether it applied Texas or Oklahoma law for the award of punitive damages. *Id.* at 558. Otherwise, the appellate court affirmed the judgment of the trial court. *Id.*

conduct and (2) that the law of the state of the defendant's domicile would permit an award of punitive damages.¹¹⁷

First, in its analysis of injurious conduct, the appellate court agreed that CITGO's refinery spill caused the plaintiffs' injuries.¹¹⁸ However, instead of finding that the injurious conduct that caused the refinery spill leading to the plaintiffs' injuries occurred in Louisiana at the time of CITGO's refinery spill, the appellate court deferred to the factual findings of the trial court, which determined that the injurious conduct occurred in Oklahoma and Texas at the time of corporate headquarters' decisions.¹¹⁹

Second, in its analysis of CITGO's domicile, the court considered whether CITGO should be an out-of-state corporation domiciled in Louisiana or whether CITGO should be domiciled at its principle place of business in Oklahoma or Texas.¹²⁰ CITGO argued that it should be a Louisiana domiciliary because, although its headquarters are in Texas, CITGO is a juridical person that transacts business in Louisiana and incurred delictual liability arising from activity in Louisiana.¹²¹

The court rejected CITGO's argument and concluded that CITGO was domiciled in Texas under an interest analysis¹²² that determined which state's policies "would be most seriously impaired if its law were not applied to that issue" by weighing the "pertinent contacts of each state" to the parties and the events giving rise to the dispute against policy concerns,¹²³ including the policies deterring wrongful conduct.¹²⁴

117. *Id.* at 552.

118. *Id.* at 547. The court said that it found "no abuse of discretion in the trial court's determination that CITGO's spill of slop oil caused the plaintiffs' injuries." *Id.*

119. The court cited article 3546, comment (d), which leads to article 3543, comment (h) to evaluate conduct that occurred in more than one state. *Id.* at 552. The court relied on comment (h) to article 3543, which explains that where the injurious conduct occurred in more than one state, the case should be "approached under the principles of causation of the law of the forum" to legally "determine which particular conduct was . . . the principal cause of the injury." *Id.* (citing LA. CIV. CODE art. 3543 cmt. h (2013)).

120. *Id.* at 552. Article 3546, comment (d) led the court to articles 3518 and 3548 governing domicile. *Id.* See *supra* Part II.B.2 for a discussion of articles 3518 and 3548.

121. *Arabie*, 49 So. 3d at 552. See *supra* Part II.B.2 for a discussion of articles 3518 and 3548.

122. Article 3542 sets forth the interest analysis. See *supra* note 73 for a discussion of the policy considerations underlying article 3542.

123. Article 3515 sets forth important policy considerations for the article 3542 interest analysis. See LA. CIV. CODE art. 3515 (2013).

124. *Arabie*, 49 So. 3d at 552 (citing LA. CIV. CODE art. 3542 (2013)). To consider the pertinent contacts component of article 3542, the court should

Under the first prong of the interest analysis, the appellate court considered the pertinent contacts and the events leading up to the dispute.¹²⁵ The court conceded that CITGO had pertinent contacts with Louisiana, but it discounted the strength of these contacts by failing to identify any contacts supporting CITGO being a Louisiana domiciliary.¹²⁶ Therefore, according to the appellate court, CITGO should be domiciled in Texas.¹²⁷ The court next analyzed the events giving rise to the dispute.¹²⁸ The appellate court agreed that CITGO's corporate management intentionally underbuilt the WWTU because of corporate headquarters' decisions in Oklahoma and Texas; then later corporate decisions caused construction delays resulting in a third tank not being complete by the time of the spill in 2006.¹²⁹ The court rejected CITGO's counterarguments that the WWTU was not intentionally underbuilt and that the decisions to add a third tank occurred at the Louisiana refinery.¹³⁰

evaluate "the events giving rise to the dispute, including the place of conduct and injury, the domicile, habitual resident, or place of business of the parties, and the state in which the relationship, if any, between the parties was centered." *Id.*

125. *Id.* at 552.

126. *Id.* The court relied upon the fact that CITGO is an international corporation with headquarters in Texas. *Id.* The court determined corporate headquarters in Texas to be the most pertinent contact by citing CITGO's "Safety, Health, and Environmental Management Policy 80-100," which dictates that "Executive Management of the Corporation establishes policies, approves standards and goals for performance, and reviews HS&E compliance for all facilities," as well as being responsible for comprehensive reviews and assessment of its facilities. *Id.* at 552-53.

127. *Id.* at 553.

128. *Id.*

129. *Id.* Plaintiffs argued the following points in support of their argument that the events giving rise to the dispute occurred at corporate headquarters. *Id.* First, a memo dated August 15, 1992, indicated that employees from Tulsa headquarters visited Lake Charles with the intent to reduce the scope and cost of the WWTU. *Id.* Second, the 1994 deadline for the WWTU was extended to conduct cost reduction studies. *Id.* Third, seven items labeled "Wastewater Equipment Eliminated for Cost Reduction" were deleted from the original WWTU proposal. *Id.* This saved \$35.3 million including \$12 million for "One Stormwater Tank." *Id.* Fourth, several near overflows and diversions of wastewater occurred when the WWTU opened. *Id.* Fifth, Lake Charles first suggested reassessing the WWTU capacity in 1996, with the first recommendation for a third tank in 2002. *Id.* Sixth, it took nearly a year between initial approval in May of 2004 until final approval in March of 2005 for funding to be approved for a third tank. *Id.* Seventh, construction on the third tank did not commence until spring of 2006 and was incomplete at the time of the spill on June 19, 2006. *Id.*

130. *Id.*

Under the second prong of the interest analysis,¹³¹ the court must weigh policy considerations,¹³² including the interests in deterring wrongful conduct and repairing the consequences of injurious acts.¹³³ The appellate court denied Louisiana's policy against punitive damages and chastised CITGO, claiming that they were "paint[ing] with too broad a brush and too heavy a hand."¹³⁴ The court said that "Louisiana does not have a policy of protecting *all* out of state defendants from their own state's law."¹³⁵ Further, "Louisiana [does not] have an unswerving interest in rejecting *all* punitive damages," which the court supported by citing the few

131. See *supra* note 73 for the article 3542 policy considerations.

132. Article 3515 sets forth important policy considerations for the article 3542 interest analysis. See LA. CIV. CODE art. 3515 (2013).

133. *Arabie*, 49 So. 3d at 554. See LA. CIV. CODE arts. 3515, 3542 (2013). The guidelines for the choice-of-law analysis balance

the relevant policies of *all involved states* in light of: (1) the relationships of each state to the parties and the dispute; and (2) the policies and needs of the interstate . . . systems, including the policies of upholding the justified expectations of parties and of minimizing the adverse consequences that might follow from subjecting a party to the law of more than one state.

Arabie, 49 So. 3d at 555 (emphasis added) (citing art. 3515). The appellate court determined that the state with the "higher standard of conduct" should be the law considered in issues of conduct and safety. *Id.* See also LA. CIV. CODE art. 3543 (2013). The court interpreted the "higher standard of conduct" to be the state law allowing punitive damages for *negligent* conduct, which would be Texas or Oklahoma. *Arabie*, 49 So. 3d at 555. The court deferred to article 3543, comment (f) for an explanation as to why the law of Texas or Oklahoma should apply and outweigh Louisiana's interest. *Id.* See art. 3543 cmt. f; *Arabie*, 49 So. 3d at 555–56. The court moved to article 3543, comment (h), which suggests that the law should be determined "under the principles of causation of the law of the forum" in cases in which injurious conduct occurs in more than one state. *Id.* at 556. See art. 3543 cmt. h. The comment stresses the determination of "the principal cause of injury" to decide upon application of the law or the state of injury or the state of conduct. *Id.* The comment provides two alternatives: deferral to article 3542 if the determination of causation is unclear or application of article 3547 if the injurious conduct was not localized in any single state. *Id.* See *id.* arts. 3542, 3547.

134. *Arabie*, 49 So. 3d at 554. CITGO cited *Commercial Union Insurance Co. v. Upjohn Co.*, 409 F. Supp. 453 (E.D. La. 1976), and *Karavokiros v. Indiana Motor Bus Co.*, 524 F. Supp. 385 (E.D. La. 1981), to support its argument perpetuating Louisiana's purported policy against punitive damages. *Arabie*, 49 So. 3d at 554 (citing *Commercial Union Ins. Co.*, 409 F. Supp. 453; *Karavokiros*, 524 F. Supp. 385). The court dismissed CITGO's argument regarding the Louisiana Legislature's intent to restrict punitive damages in repealing article 2315.3. *Arabie*, 49 So. 3d at 554. See *infra* Part II.A.2 for a discussion of former article 2315.3. The court cited article 3546 as the governing framework within the conflict-of-laws statutes to refute CITGO's reliance on legislative policy. *Id.* at 554.

135. *Arabie*, 49 So. 3d at 554 (emphasis added).

statutory exceptions in the Louisiana Civil Code: child pornography, operation of a motor vehicle while intoxicated, and criminal sexual activity with a child.¹³⁶ Therefore, both prongs of the interest analysis weighed in favor of CITGO being an out-of-state domiciliary.¹³⁷

The appellate court ultimately affirmed the trial court's award of punitive damages.¹³⁸ However, the appellate court failed to thoroughly analyze all of the relevant choice-of-law considerations that would determine that the injurious conduct occurred in Louisiana and favor CITGO as a Louisiana domiciliary, which would have resulted in a reversal of the trial court's award of punitive damages.¹³⁹ CITGO then successfully sought a writ of certiorari to the Louisiana Supreme Court.¹⁴⁰

C. Closing the Door to the Trojan Horse: The Louisiana Supreme Court's Denial of Punitive Damages

The Louisiana Supreme Court overturned the lower courts' award of punitive damages in a splintered decision.¹⁴¹ The Court performed a detailed analysis of the punitive damages awarded under Louisiana's conflict-of-laws provisions.¹⁴² The Court identified legislative intent, beginning with the language of the statute, as the fundamental question because the core issue in the punitive damages

136. *Id.* (emphasis added). The Third Circuit reasoned that punitive damages were permissible not only under article 3546 but under four articles in the Louisiana Civil Code as well. *Id.* at 551. See LA. CIV. CODE arts. 2315.3, 2315.4, 2315.7 (2013). See *supra* Part II.A.2 for a discussion of the statutory exceptions to punitive damages in Louisiana.

137. *Arabie*, 49 So. 3d at 554. See arts. 2315.3, 2315.4, 2315.7. See *supra* Part II.A.2 for a discussion of the statutory exceptions to punitive damages in Louisiana.

138. *Arabie*, 49 So. 3d at 557. The court relied on articles 3515, 3518, 3542, 3543, and 3546. *Id.* at 556. Both the trial court and the appellate court reserved application of article 3547 as a fallback provision to award punitive damages in addition to the other conflict-of-laws articles. *Id.* The court decided that there was no conflict of laws between Texas and Oklahoma; the court ultimately chose to apply Texas law because it had the greater interest in enforcing its own law as the current domicile of CITGO. *Id.* The court cited article 3543 on the point of no true conflict between Texas and Oklahoma. *Id.* The court cited article 3542 and 3546 for further support on applying Texas law under an interest analysis. *Id.*

139. *Id.* at 529.

140. *Arabie v. CITGO Petroleum Corp.*, 89 So. 3d 307 (La. 2012).

141. *Id.* Justice Clark wrote the majority opinion and was joined by Justices Guidry, Weimer, Victory, and Chief Justice Kimball. *Id.* Justice Guidry concurred in the result but assigned reasons. Justices Knoll and Johnson concurred in part and dissented in part. *Id.*

142. *Id.*

award is based on the statutory interpretation of the conflict-of-laws articles, especially in light of Louisiana's general policy against punitive damages.¹⁴³ The Court began its legislative interpretation with article 3546 on punitive damages and analyzed each of the three requisite factors: (1) the place of the injurious conduct, (2) the place of the resulting injury, and (3) the place of the defendant's domicile.¹⁴⁴

First, the Court affirmed that the resulting injuries occurred in Louisiana.¹⁴⁵ Second, the Court analyzed CITGO's domicile to determine whether CITGO should be domiciled in Louisiana for choice-of-law purposes or at its principle place of business in Texas or Oklahoma.¹⁴⁶ Under the rules of statutory interpretation, "when two statutes apply to the same subject matter and their language cannot be harmonized, the language of the more specific statute applies . . . which . . . would be article 3548," mandating that CITGO be domiciled in Louisiana in this case.¹⁴⁷

Instead of circumventing the application of article 3548 as the appellate court did,¹⁴⁸ the Supreme Court harmonized the general choice-of-law provisions on domicile and the choice-of-law provisions on out-of-state domiciliaries incurring delictual liability in Louisiana.¹⁴⁹ The Court found that while CITGO is a juridical person domiciled in Texas at its corporate headquarters under the general choice-of-law provisions, article 3548 requires that CITGO be considered a Louisiana domiciliary for the purpose of this delictual obligation, if appropriate under an interest analysis.¹⁵⁰ The Court recognized that article 3548 on the domicile of out-of-state corporations includes the word "shall," so the application of this article is mandatory when a juridical person incurs delictual liability in Louisiana.¹⁵¹

143. *Id.* at 312 (citing *City of DeQuincy v. Henry*, 62 So. 3d 43, 46 (La. 2011); *In re Succession of Faget*, 53 So. 3d 414, 420 (La. 2010)). The court recognized that "the Official Revision Comments are not the law," unlike the appellate court, which heavily relied on the Official Revision Comments to affirm the damages award. *Arabie*, 89 So. 3d at 312. *See, e.g., State v. Jones*, 351 So. 2d 1194, 1195 (La. 1977).

144. *Arabie*, 89 So. 3d at 313.

145. *Id.* at 313–14.

146. *Id.* *See* LA. CIV. CODE arts. 3518, 3548 (2013); *supra* Part II.B.2.

147. *Arabie*, 89 So. 3d at 313–14.

148. *See supra* Part III.B for a discussion of the appellate court's analysis of domicile.

149. *Arabie*, 89 So. 3d at 313–14.

150. *See* LA. CIV. CODE art. 3542 (2013). *See supra* note 73 for the article 3542 policy considerations.

151. *Arabie*, 89 So. 3d at 312, 314.

The Court also recognized that the appellate court failed to mention any factors to support CITGO being a domiciliary of Louisiana in its interest analysis¹⁵² and that the trial court failed to discuss each state's contacts in its interest analysis.¹⁵³ The Supreme Court then properly performed an interest analysis in consideration of the specific facts of *Arabie*, including those contacts that favor CITGO as a Louisiana domiciliary.¹⁵⁴

In a case less than a year earlier than *Arabie*, the Supreme Court analyzed the domicile of a corporate defendant in a multistate tort conflict.¹⁵⁵ To identify which of the involved state's policies would be most seriously impaired if its law were not applied, the Court extracted a multifactor balancing test from the conflict-of-laws interest analysis.¹⁵⁶ In its application to the facts of *Arabie*, the

152. *Id.* at 314. See *supra* note 73 for the article 3542 policy considerations. The appellate court referenced the considerations in article 3542 as controlling domicile, in addition to the considerations under article 3548. See *supra* Part III.B.

153. *Arabie*, 89 So. 3d at 313, 316. See *supra* note 73 for the article 3542 policy considerations.

154. See *supra* note 73 for the article 3542 policy considerations.

155. *Arabie*, 89 So. 3d at 315 (citing *Wooley v. Lucksinger*, 61 So. 3d 507, 567 (La. 2011)). In *Wooley*, the Court chose to apply Texas law to award punitive damages in a delictual obligation arising between two Texas domiciliaries, one Louisiana domiciliary, and one Oklahoma domiciliary because the majority of the tortious conduct and the most severe harm occurred in Texas, although harm occurred in all three states. *Wooley*, 61 So. 3d at 567.

156. *Arabie*, 89 So. 3d at 313, 315–16. Article 3542, comment (a) instructs that this listing is merely illustrative and should be quantitatively evaluated. *Id.* at 316. The factors are extracted from article 3542 and include factors from article 3515 as well:

- (1) the pertinent contacts of each state to the parties; (2) their contacts to the events giving rise to the dispute, including the place and conduct and injury; (3) the domicile, habitual residence, or place of business of the parties; (4) the state in which the relationship between the parties was centered; (5) deterring wrongful conduct; and (6) repairing the consequences of injurious acts . . . (7) the relationship of each state to the parties and the dispute; and (8) the policies and needs of the interstate system, including the policies of upholding the justified expectations of the parties and of minimizing the adverse consequences that might follow from subjecting a party to the law of more than one state.

Id. Under the first factor—pertinent contacts—the Supreme Court found that the plaintiffs only had contact with Louisiana, which favored application of Louisiana law. *Id.* at 317. In evaluating the second factor—the state's contacts giving rise to the dispute—the Court held that corporate decisions must outweigh local tortious conduct to be the place of injurious conduct in light of Louisiana's legislative policy against punitive damages. *Id.* The Court pointed out that even if the third 10 million gallon tank at the WWTU had been complete at the time of the refinery spill, the third tank could not have contained 21 million gallons of waste, along with eight additional perfunctory deficiencies at the Lake Charles refinery, which contributed to the spill. *Id.* at 317–18. For these reasons, the construction delay of the third tank did not cause the spill nor outweigh the allegedly tortious conduct at

Supreme Court explicitly noted that the plaintiffs only had contact with Louisiana and that CITGO anticipated defending a claim for injury that occurred in Louisiana under Louisiana law.¹⁵⁷ From a policy standpoint, the court reasoned that an award of punitive damages under Texas or Oklahoma law was overshadowed by Louisiana's legislative policy disfavoring punitive damages, unlike the appellate court's denial of Louisiana's policy against punitive damages.¹⁵⁸ The compensatory damages awarded under Louisiana law repaired the consequences of injurious acts without the need for an award of punitive damages.¹⁵⁹ For these reasons and others found through performing the multifactor interest analysis,¹⁶⁰ the Supreme Court concluded that it was "appropriate" for CITGO to be domiciled in Louisiana as a juridical person.¹⁶¹ Therefore, CITGO could not be liable for punitive damages under article 3546 because its domicile was deemed to be in Louisiana and Louisiana was the place where the resulting injury occurred, meaning that at most, only one of the requisite three factors for an award of punitive damages—the place of the injurious conduct—could be satisfied.¹⁶² Thus, the Court affirmed

the Lake Charles refinery. *Id.* at 318. The third factor—domicile—also favored Louisiana law because CITGO's large Louisiana operation constitutes a place of business and all plaintiffs are habitual residents and domiciliaries of Louisiana. *Id.* The fourth factor—relationship between the parties—again supports Louisiana law because the spill in Louisiana is the only contact between the plaintiffs and the defendants. *Id.* The Court discounted the fifth factor—detering wrongful conduct—by reasoning that the award of punitive damages is overshadowed by Louisiana's legislative policy disfavoring punitive damages. *Id.* The compensatory damages awarded under Louisiana law satisfied the sixth factor—repairing the consequences of injurious acts—without the need for an award of punitive damages. *Id.* The seventh factor—the relationship between the states and parties—favors Louisiana law because of the extent of conduct in Louisiana because plaintiffs reside in and are employed in Louisiana and because plaintiffs filed suit in Louisiana. *Id.* at 319. The eighth factor—policy interests—again favors Louisiana law because CITGO anticipated defending a claim for injury that occurred in Louisiana under Louisiana law; neither decisions made in Texas nor in Oklahoma were the primary cause of plaintiffs' injury in Louisiana. *Id.*

157. *Id.* at 319.

158. *Id.* at 318.

159. *Id.*

160. See *supra* note 73 for the article 3542 policy considerations.

161. *Arabie*, 89 So. 3d at 319.

162. *Id.* The Court then analyzed article 3543 on conduct and safety. *Id.* at 320. It found that article 3543 should not apply to allow another state's punitive damages law, contrary to what the lower courts decided. *Id.* The Court again applied the principles of statutory interpretation to determine that article 3546 on punitive damages should apply, rather than article 3543 on conduct and safety, because the more specific statute should apply when two statutes apply to the same subject matter and their language cannot be harmonized. *Id.* at 320 (citing

the place of injurious conduct to be Louisiana, negating any possible award of punitive damages under Louisiana's conflict-of-laws provisions allowing such awards under the law of another state.¹⁶³

The Supreme Court also denied application of the choice-of-law allowance for exceptional cases as an "escape hatch" through which to award punitive damages in the alternative and to circumvent the application of the more specific conflict-of-laws provisions on punitive damages.¹⁶⁴ Under the interest and policy analysis, it is not "clearly evident" that either Texas or Oklahoma would be more seriously impaired if its law were not applied.¹⁶⁵

In the end, the Louisiana Supreme Court did not permit an award of punitive damages because it found that the conflict-of-laws provisions did not allow for the application of the law of a foreign jurisdiction under the facts of *Arabie*.¹⁶⁶ Although the Supreme

McGlothlin v. Christus St. Patrick Hosp., 65 So. 2d 1218, 1229 (La. 2011)). In the alternative, the Court reasoned that article 3543 would dictate the application of Louisiana law if it were to apply. *Id.* The first paragraph states that issues pertaining to standards of conduct are governed by the law of the state in which the injurious conduct occurred. *Id.* Louisiana law should apply because the most significant conduct—the refinery spill—occurred in Lake Charles, Louisiana. *Id.*

163. *Id.*

164. *Id.*

165. *Id.* See *supra* note 73 for the article 3542 policy considerations.

166. *Arabie*, 89 So. 3d at 319, 324. The Court mainly relied upon article 3546, but it noted that articles 3543 and 3547 are also inapplicable in the alternative. *Id.* Justice Guidry concurred with the majority on the denial of punitive damages. *Id.* at 336 (Guidry, J., concurring). He recognized that punitive damages are not generally allowed under Louisiana law nor are they allowed under any of Louisiana's statutory exceptions based on the facts of *Arabie*. *Id.* (citing *Bellard v. American Cent. Ins. Co.*, 980 So. 2d 654, 667 (La. 2008); *Gagnard v. Baldrige*, 612 So. 2d 732, 736 (La. 1993)). See *supra* Part II.A.2. However, he disagreed on the standard of review for an issue regarding choice-of-law. *Id.* Rather than applying a standard of manifest error, as the majority opinion did, Justice Guidry urged a standard of de novo review for choice-of-law determinations. *Id.* See *Wooley v. Lucksinger*, 61 So. 3d 507, 562–63 (La. 2011); *Mihalopoulos v. Westwind Africa Ltd.*, 511 So. 2d 771, 775–76 (La. Ct. App. 1987) ("The law is well settled that a determination of choice of law by the trial court is reviewed by the appellate courts 'de novo[.]'" (citing *Diaz v. Humboldt*, 722 F. 2d 1216 (5th Cir. 1984)). Nevertheless, Justice Guidry found the award of punitive damages under article 3546 improper due to legislative policy against punitive damages and jurisprudential concerns. *Arabie*, 89 So. 3d at 336 (Guidry, J., concurring). He first recognized the refusal to award punitive damages as "a fundamental tenet of Louisiana law." *Id.* at 337. Justice Guidry relied upon *Ricard v. State*, 390 So.2d 882, 884 (La. 1980), for this proposition. *Id.* This policy was reinforced by the repeal of article 2315.3, specifically applicable to toxic tort cases. *Arabie*, 89 So. 3d at 337–38 (Guidry, J., concurring). He then argued that "allow[ing] recovery under [the] facts [of *Arabie*], would infer a jurisprudential rule that corporations headquartered out-of-state can be held vicariously liable through the application of

Court reached the correct result in *Arabie*, it left a convoluted, multifactor interest analysis intact, which leaves room for legislative action to provide a more predictable choice-of-law analysis for multistate tort cases involving punitive damages.

Further, three courts analyzed the facts of *Arabie* before reaching the correct conclusion on punitive damages. Although the Louisiana Supreme Court provided an interpretation of the articles governing choice-of-law in multistate tort conflicts—consistent with Louisiana’s legislative intent disfavoring the award of punitive damages—the analysis for future cases is uncertain. The inconsistency in the interpretation of the conflict-of-laws articles among Louisiana courts shows the need for legislative clarification in this area of law to ensure that the code articles are properly applied in future cases.

Arabie supports the implementation of a specific statutory basis for the Louisiana Supreme Court’s decision to provide certainty in future litigation involving corporations conducting business across multiple jurisdictions so that courts reach consistent results in multistate tort conflicts and litigation does not require multiple, time-consuming appeals.

IV. THE DOOR AJAR: BEWARE OF GREEKS BEARING GIFTS

The Louisiana Supreme Court closed the door to punitive damages in *Arabie*, but the door has been left ajar for future plaintiffs to push the limits of the conflict-of-laws articles provided in the Louisiana Civil Code. The Court reached the correct result in one case but only increased a plaintiff’s burden of using article 3546 for an award of punitive damages in future cases. *Arabie* did not, however, completely close the door to punitive damages by any means. Through conflicting codal interpretation and clashes in the

another forum’s laws for its Louisiana employees’ tortious acts absent evidence of management’s participation, consent or control.” *Id.* Justices Knoll and Johnson concurred with the majority in part but dissented from the majority opinion on the reversal of punitive damages. *Id.* at 324. (Knoll, J., dissenting). Justice Knoll concurred with the majority’s affirmation of compensatory damages. *Id.* In Justice Knoll’s dissent, she agreed with the lower courts and reasoned that CITGO was domiciled outside of Louisiana and the injurious conduct occurred outside of Louisiana, therefore satisfying an award of punitive damages by meeting two of article 3546’s requirements. *Id.* Interestingly, she pointed out that the choice-of-law provisions in the Code do not create a presumption that Louisiana law should apply to suits filed in Louisiana. *Id.* Regardless of whether there is a presumption or not, article 3548 and the interpretation of the majority clearly state that CITGO should be domiciled in Louisiana as a juridical person, which undercuts Justice Knoll’s conclusion on domicile and the award of punitive damages.

choice-of-law provisions, there is still an opportunity for courts to reach different results in future litigation, and courts have already begun to reach inconsistent results less than a year after the *Arabie* decision.

A. The Continuing Challenge: Evans v. TIN, Inc.

Within a month of the Louisiana Supreme Court's decision in *Arabie*, claimants showed that there may still be room to use the Louisiana Civil Code articles on conflict of laws to permit awards of punitive damages, contrary to legislative intent. In *Evans v. TIN, Inc.*,¹⁶⁷ plaintiffs brought suit in federal court under an eerily similar fact pattern to that in *Arabie*. The dispute arose after TIN's paper mill and waste treatment facility in Bogalusa, Louisiana, discharged contaminants into the Pearl River, which allegedly caused injury to property owners, businesses, and individuals.¹⁶⁸ Plaintiffs sought punitive damages under Texas law against TIN for the resulting injury that occurred in Louisiana under the Louisiana conflict-of-laws articles.¹⁶⁹ The plaintiffs argued that two of the requisite three article 3546 factors authorizing an award for punitive damages under the law of another state were satisfied: (1) that decisions at corporate headquarters in Texas constituted the injurious conduct, rather than conduct at the Louisiana paper mill; and (2) that the defendant should be domiciled at its principal place of business in Texas, rather than in Louisiana where the out-of-state corporation conducted business and incurred the delictual liability.¹⁷⁰

In evaluating the defendant's motion to dismiss the punitive damages claims, the *Evans* court extensively analyzed the punitive damages claims under article 3546 and the corresponding choice-of-law articles, citing *Arabie* throughout its analysis.¹⁷¹ The parties did not dispute that the place of the resulting injury was Louisiana.¹⁷² As for the injurious conduct, the plaintiffs "sufficiently alleged that corporate-level decisions occurring in Texas outweighed any tortious activity that occurred locally."¹⁷³ The court then applied the

167. *Evans v. TIN, Inc.*, Nos. 11-2067, 11-2068, 11-2069, 11-2182, 11-2348, 11-2351, 11-2417, 11-2949, 11-2985, 11-2987, 11-3018, 11-3021, 11-3048, 11-3049, 12-18, 11-3050, 2012 WL 1499225 (E.D. La. Apr. 27, 2012).

168. *Id.* at *1.

169. *Id.*

170. *Id.* The plaintiffs attempted to employ federal admiralty law as well, which failed and resulted in dismissal of their punitive damages claims under that cause of action. *Id.* at *3-4.

171. *Id.* at *5-12.

172. *Id.*

173. *Id.* at *7.

multifactor interest test, as the Louisiana Supreme Court had done in *Arabie*,¹⁷⁴ to conclude that Texas law may be more seriously impaired in the matter, which supported treating TIN as a Texas domiciliary.¹⁷⁵ Therefore, the district court concluded that it was too soon to dismiss the plaintiffs' claims for punitive damages because (1) the place of the injurious conduct and (2) the place of the defendant's domicile should be in Texas, which allows an award of punitive damages.¹⁷⁶

Evans proves not only that parties are already trying to circumvent the Louisiana Supreme Court's decision in *Arabie* but also that parties may use trial and error to file the identical claim in federal court that *Arabie* found to be unsuccessful in state court.¹⁷⁷ This sets a dangerous precedent and reopens the door to the Trojan Horse of punitive damages under Louisiana's choice-of-law provisions, which the Legislature needs to close.

B. Slaying the Trojan Horse: A Legislative Solution to the Inconsistency in Codal Interpretation

The Legislature needs to amend the conflict-of-laws articles to clarify the analysis for multistate torts involving punitive damages. In order to close the codal loopholes exposed in the *Arabie* litigation and left open in the *Evans* litigation, the Legislature should focus on the choice-of-law provisions governing the place of the injurious conduct and the place of the defendant's domicile, giving attention to how plaintiffs can circumvent the current provisions.

1. Striking the "Injurious Conduct" from Article 3546

All three courts in *Arabie* agreed that the resulting injury occurred in Louisiana but disagreed as to where the injurious conduct occurred.¹⁷⁸ There is an odd disconnect in the appellate

174. *Id.*

175. *Id.* at *12.

176. *Id.*

177. "The lead case in this consolidated proceeding was the first of 33 cases filed in various federal and state courts." *Evans v. TIN, Inc.*, Nos. 11-2067, 11-2068; 11-2069; 11-2182; 11-2348; 11-2351; 11-2417; 11-2949; 11-2985; 11-2987; 11-3018; 11-3021; 11-3048; 11-3049; 12-18; 11-3050; 12-2042; 12-2424; 12-2815; 12-2819; 12-2824; 12-2825; 12-236, 2013 WL 4501061 (E.D. La. Aug. 21, 2013). The parties engaged in settlement negotiations under the supervision of a mediator, "and TIN's insurance carriers reached an agreement to resolve plaintiff's claims against" them. *Id.* "The class action settlement resolved all claims related to the incident, except for certain 'later-manifested bodily injury' claims." *Id.*

178. *See supra* Part III.

court's conclusory paragraph where the court said that "but for the release in 2006, the damages to the plaintiffs would not have occurred."¹⁷⁹ The court is admitting to "but for" causation of the plaintiffs' injuries and contradicting its entire conflict-of-laws analysis, which argued that the injurious conduct occurred out of state at headquarters, rather than at the refinery in Louisiana or at both locations.¹⁸⁰ This concession undermines the court's own argument and is evidence of judicial unrest in the interpretation of article 3546's consideration of injurious conduct when analyzing a claim for punitive damages in a choice-of-law situation.

The appellate court also contradicted itself by reaffirming that the resulting injury occurred in Louisiana but stating that the resulting injury was caused by injurious conduct at the Louisiana refinery.¹⁸¹ If the appellate court's determination that malfunctions at the Louisiana refinery were the only cause of the refinery spill is taken as true, the appellate court's finding on this issue is incongruent with the plaintiffs' argument and the appellate court's ultimate determination that the injurious conduct occurred through decision-making at CITGO's corporate headquarters in Oklahoma and Texas. The court's finding on the injurious conduct should also pretermit the punitive damages discussion altogether. If the site of the injurious conduct is in fact at the refinery in Louisiana, then there would be no opportunity for punitive damages through Louisiana's conflict-of-laws provisions because it would be impossible to meet two of article 3546's three requirements for the award of punitive damages, i.e., (1) the place of the resulting injury, (2) the place of the injurious conduct, or (3) the place of the defendant's domicile.¹⁸²

The *Evans* court repeated the same contradiction as the lower courts in *Arabie* by reasoning that corporate headquarters decisions in Texas may be the site of the injurious conduct under article 3546, although the resulting injuries occurred in Louisiana, even after the Louisiana Supreme Court corrected the same reasoning under the facts in *Arabie*.¹⁸³ There is clear confusion, which requires a legislative remedy, when three courts have made the same mistake in the article 3546 analysis of injurious conduct.

179. *Arabie v. CITGO Petroleum Corp.*, 49 So. 3d 529, 556–57 (La. Ct. App. 2010). This statement was in the context of stating causation occurred in "both states," presumably referring to Texas and Oklahoma. *Id.*

180. *Id.* See *supra* Part III.B.

181. See *supra* Part III.B.

182. The Louisiana Supreme Court properly reached this determination and corrected the flaw in the lower courts' reasoning in the article 3546 analyses. See *supra* Part III.C.

183. See *supra* Part IV.A.

The most logical solution would be to limit article 3546 by excluding the consideration of injurious conduct because it can be such a tenuous concept along an indefinite chain of causation. A delictual action resulting from years of allegedly injurious conduct lends itself to manipulation of this requirement.¹⁸⁴ The injurious conduct consideration must be stricken from article 3546 to provide a more predictable basis for awarding punitive damages based on where the resulting injury occurred and the place of the defendant's domicile. Article 3546 should be amended to read as follows:

Punitive damages may not be awarded by a court of this state unless authorized:

- (1) ~~By the law of the state where the injurious conduct occurred and by either the law of the state where the resulting injury occurred or the law of the place where the person whose conduct caused the injury was domiciled; or~~
- (2) By the law of the state in which the injury occurred and by the law of the state where the person whose conduct caused the injury was domiciled.¹⁸⁵

This revision would remedy the attenuation in the injurious conduct analysis and prevent the uncertainty in the article 3546 analysis. The analysis currently involves three factors yet only requires two to be met for an award of punitive damages. Instead of arguing the weight of corporate headquarters' decisions made out of state against the weight of delictual conduct occurring in Louisiana, the court would only consider two factors: the place of the resulting injury and the place of the defendant's domicile, both of which are subject to less ambiguity. Both factors would be required for an award of punitive damages under another state's law, instead of the three alternative factors that, as the article is currently written, are subject to manipulation. By striking consideration of the injurious

184. *See supra* Part III.B.

185. LA. CIV. CODE art. 3546 (2013) (alteration to original). An example of a defendant's domicile in a jurisdiction allowing punitive damages that would meet the revised requirement would be a company transacting unrelated business in Louisiana but headquartered outside of Louisiana, which would evade jurisdiction under the proposed version of article 3548. *See infra* Part IV.B.2. Additionally, a company transacting business in Louisiana and incurring delictual liability in Louisiana but headquartered elsewhere, thus evading jurisdiction under the current version of article 3548, might meet this revised domicile requirement. LA. CIV. CODE art. 3548 (2013). An example of a the resulting injury in a jurisdiction allowing punitive damages that would meet the revised requirement would be a long term disease, such as asbestos, or perhaps a legacy lawsuit for environmental damages in another jurisdiction, which were caused by a company transacting business in multiple jurisdictions.

conduct from article 3546, the analysis of future multistate tort cases would be more predictable on the basis of two clear factors.

2. Striking the “Interest Analysis” from Article 3548

The *Arabie* courts also had various interpretations of the articles governing the domicile of parties to multistate tort litigation and ultimately decided that the two codal provisions could be harmonized to declare CITGO a Louisiana domiciliary.¹⁸⁶ CITGO’s admission of fault recognized the situs of the injurious conduct to be at the location of the refinery spill in Louisiana, which proved that CITGO intended to be domiciled in Louisiana as a juridical person doing business in Louisiana.¹⁸⁷ Furthermore, CITGO’s admission of fault specified responsibility for “compensatory damages,” with no mention of punitive damages.¹⁸⁸ This also shows that CITGO understood that it was subject to the law of Louisiana, which did not permit the award of punitive damages in such a case. As dictated by the current codal provisions and the Louisiana Supreme Court in *Arabie*, CITGO’s expectation to be domiciled in Louisiana as a corporation conducting business in Louisiana and incurring delictual liability in Louisiana seems to be the correct result.

Even after *Arabie*, the *Evans* court recognized that the choice-of-law domicile provisions could be harmonized. However, the *Evans* court still domiciled the defendant–corporation at its principal place of business in Texas under the *Arabie* multifactor interest analysis, rather than in Louisiana where it conducted business and incurred delictual liability.¹⁸⁹ The appellate court in the *Arabie* litigation also relied heavily on the multifactor interest analysis to avoid domiciling CITGO in Louisiana where it conducted business and incurred delictual liability, which shows there is a recurring problem involving the domicile provisions in a multistate tort conflict.¹⁹⁰

186. See *supra* Part III.C.

187. See *supra* Part III.A.

188. *Arabie v. CITGO Petroleum Corp.*, 49 So. 3d 529, 534 (La. Ct. App. 2010).

189. See *supra* Part IV.A.

190. The appellate court became so preoccupied with analyzing comments to the code articles that it never came to a true conclusion on the second prong of the article 3542 interest analysis, much less the application of article 3542 itself. The appellate court bypassed the remaining factors to be considered under the pertinent contacts prong of article 3542: “the events giving rise to the dispute, including the place of conduct and injury, the domicile, habitual residence, or place of business of the parties, and the state in which the relationship, if any, between the parties was centered.” Art. 3546. The court exhausted the events giving rise to the dispute but did not address how many of those events actually occurred in Lake Charles,

Under the current choice-of-law provisions on delictual liability, article 3548 requires that a corporation conducting business in Louisiana be domiciled in state with the word “shall.”¹⁹¹ This does not allow the court to circumvent this requirement, but nonetheless, courts are relying upon an interest analysis,¹⁹² from which the Louisiana Supreme Court created a multifactor test, to circumvent the application of article 3548. As article 3548 currently reads, a court may avoid declaring an out-of-state tortfeasor as a Louisiana domiciliary if it finds that another state’s interests would be more seriously impaired by considering the corporation a Louisiana domiciliary.

The Legislature must prevent judicial reliance on the multifactor interest analysis to circumvent the codal provisions governing domicile. To preclude courts from meeting the domicile requirement of article 3546 on punitive damages and from awarding punitive damages by domiciling defendants outside of Louisiana, article 3548 should be redacted to strike the interest analysis as a codal circumvention and mandate that all tortfeasors be domiciled in Louisiana when a tortfeasor conducted business in Louisiana and

which could also influence the pertinent contacts analysis. The court analyzed the place of conduct as headquarters but explicitly conceded that the place of injury was Lake Charles. The Third Circuit determined that CITGO was domiciled at its headquarters, but this is debatable under a pertinent contacts analysis. The court failed to note that CITGO was a habitual resident of Louisiana at the situs of its place of business—the Lake Charles refinery. Most importantly, the appellate court never discussed the relationships of each state to the parties and the dispute, as required by the first prong of article 3515. This weighs most heavily in CITGO’s favor because the plaintiffs only had a relationship with CITGO in Lake Charles, Louisiana. They were employed in Louisiana, worked in Louisiana, and were injured by CITGO in Louisiana. CITGO headquarters in Texas never had any contact with these plaintiffs prior to this litigation. The court never discussed the adverse consequences of subjecting CITGO to the law of more than one state under the second prong of article 3515. Article 3543, comment (f), which was referenced in the opinion but is not even the relevant article, mentioned that “there is nothing unfair about subjecting a tortfeasor to the law of the state in which he acted. Having violated the standards of conduct of that state, he should bear the consequences of such violation and should not be allowed to invoke the lower standards of another state.” *Arabie*, 49 So. 3d at 555 (quoting LA. CIV. CODE art. 3543 cmt. f. (2013)). Again, this comment can be viewed in CITGO’s favor. First, they acted in both Texas and Louisiana. Second, an award of greater damages should not be characterized as a “higher standard of conduct.” To make a final interpretation under the article 3542 interest analysis, as the appellate court neither clarified its reasoning nor made a final conclusion until it simply stated that it applied, it would be very reasonable to believe both the pertinent contacts and policy considerations would favor the application of Louisiana law. *Id.* at 556.

191. LA. CIV. CODE art. 3548 (2013).

192. See *supra* note 73 for the article 3542 policy considerations.

incurred delictual liability in Louisiana. Article 3548 should be amended to read as follows:

For the purposes of this Title, ~~and provided it is appropriate under the principles of Article 3542,~~ a juridical person that is domiciled outside of this state, but which transacts business in this state and incurs a delictual or quasi-delictual obligation arising from activity within this state, shall be treated as a domiciliary of this state.¹⁹³

If the Legislature makes this amendment, two goals would be met: reinforcement of legislative intent and predictability. First, courts would be bound to domicile out-of-state corporations in Louisiana if they meet the two codal requirements: (1) conducting business in Louisiana and (2) incurring a delictual liability in Louisiana. Article 3548 is weak as it currently reads. Presently, courts may easily circumvent article 3548 through an unpredictable multifactor interest analysis. The Legislature promulgated article 3548 as a domicile provision exclusive to multistate torts, in addition to the general conflict-of-laws domicile provision; if the Legislature's true intent was to subject out-of-state tortfeasors to Louisiana domicile as a means to limit the award of punitive damages, the consideration of "the principles of Article 3542" should be stricken from this article to remove this loophole. Second, amending article 3548 would make a defendant in a multistate tort suit arising from activity in Louisiana almost certainly a Louisiana domiciliary, aiding predictability. Legislative intent against punitive damages and predictability are core tenets of Louisiana's choice-of-law codification, and the Legislature should amend article 3548 to reflect this.

3. Repealing the "Escape Hatch" Under Article 3547

The codal allowance for exceptional cases is inconsistent with the balance of the conflict-of-laws provisions on multistate torts. The Civil Code provides seven articles specific to choice-of-law for delictual obligations.¹⁹⁴ Yet, article 3547 allows the court to circumvent all of these articles to apply the law of another state if it is "clearly evident . . . that the policies of another state would be more seriously impaired if its law were not applied to the particular issue."¹⁹⁵ This can occur if "from the totality of the circumstances of

193. Art. 3548 (alteration to original).

194. *See id.* arts. 3542–3548.

195. Art. 3547. *See supra* note 73 for the article 3542 policy considerations. Article 3547 has its critics. *See* Russel J. Weintraub, *The Contribution of*

an exceptional case,”¹⁹⁶ the court reaches that conclusion. Both the trial court and the appellate court in *Arabie* refrained from applying article 3547 to circumvent the more explicit conflict-of-laws articles governing multistate torts but recognized it as a fallback provision permitting the award of punitive damages.¹⁹⁷ Only the Supreme Court denied the application of the “escape hatch” as an alternative method to allow an award of punitive damages under Texas law.¹⁹⁸

If the policy analysis dictated by the conflicts codification and Louisiana’s policy against punitive damages are to be taken seriously, the Legislature should consider repealing the article 3547 “escape hatch” to provide greater clarity in the conflict-of-laws articles. As noted by the original opponents of the conflicts codification, specific policies espoused by the Louisiana Legislature, like the legislative policy against punitive damages, need to be safeguarded against circumvention. Article 3547 may be an aid to the interjection of the perfect Trojan Horse for importing punitive damages into Louisiana against Louisiana’s legislative policy. Therefore, article 3547 should be repealed if Louisiana is serious about restricting awards of punitive damages. Alternatively, the article could be amended to exclude article 3546 on punitive damages and read as follows:

The law applicable under Articles 3543–3545~~6~~ shall not apply if, from the totality of the circumstances of an exceptional case, it is clearly evident under the principles of Article 3542, that the policies of another state would be more seriously impaired if its law were not applied to the particular issue. In such event, the law of the other state shall apply.¹⁹⁹

The legislative proposal to either repeal article 3547 or to amend article 3547 would provide a sufficient solution to prevent courts from using this “escape hatch” as a loophole to award punitive damages under another state’s law, even if such an award would not be permissible under the codal provisions.

Symeonides and Kozyris to Making Choice of Law Predictable and Just: An Appreciation and Critique, 38 AM. J. COMP. LAW 431, 473 (1990).

196. Art. 3547.

197. *Arabie v. CITGO Petroleum Corp.*, 49 So. 3d 529, 556 (La. Ct. App. 2010).

198. The *Evans* court did not rely upon the article 3547 escape hatch as a primary authorization for punitive damages or as an alternative. See *supra* Part IV.A.

199. Art. 3547.

If the Legislature makes these proposed amendments to the conflict-of-laws provisions on delictual liability to remedy the current uncertainty in the punitive damages analysis, future litigants would benefit from the clarity and predictability provided by the amendments, and the judiciary would be insulated from unnecessary litigation regarding the meaning of the choice-of-law articles and the unpredictable multifactor interest analysis.

C. Lingerin Inside the Gates: Policy Concerns from Punitive Damages

In addition to showing the need for legislative remedies to correct improper statutory interpretation, *Arabie* also exposed overarching policy concerns in the conflicts codification, specifically forum selection and corporate exposure in relation to punitive damages claims in multistate torts. Legislative proposals could effectively rectify these concerns.

1. Jurisdiction Jumping: Federal Versus State Court

An oddity from the very beginning of the *Arabie* litigation is that the plaintiffs chose to file suit in Louisiana state court, even though the plaintiffs continually insisted that the situs of the injurious conduct was at the defendant's headquarters and that CITGO should be domiciled at its headquarters in Texas or Oklahoma. Even though they had filed suit in state court, the plaintiffs fervently fought for an award of punitive damages, which is disfavored under Louisiana law. The plaintiffs could have easily filed suit in federal court under diversity jurisdiction, a forum in which their path to punitive damages might have been easier.²⁰⁰ Alternatively, the application of Texas law in a federal suit would have allowed the award of punitive damages.²⁰¹

The reasons that the plaintiffs chose to file suit in Louisiana state court are clear: the traditional plaintiff preference for state courts and the avoidance of a jury trial. This jurisdictional jump set the stage for the entire debate on the place of the defendant's domicile and the place of injurious conduct, and it supports the need for

200. It is important to note that a federal court is bound to apply the substantive law of the state in which the federal action was brought. *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938). But, filing suit in federal court would arguably yield an easier policy argument for the award of punitive damages. A federal judge might have a broader approach to the Louisiana state policy on punitive damages, rather than a Louisiana state judge who is more in tune with the policy of the state.

201. See TEX. CIV. PRAC. & REM. CODE ANN. § 41.003 (West 2008).

amendments to the conflict-of-laws provisions governing punitive damages.

a. The Traditional Plaintiff Preference for State Courts

Certain factors sometimes steer plaintiffs away from federal courts, “such as greater federal judicial supervision, a greater geographical reach of federal jury pools leading to perhaps more pro-defense panels, and a perceived greater federal enthusiasm for dismissing cases on summary judgment.”²⁰² The *Arabie* plaintiffs’ manipulation of these preconceived notions about federal courts ultimately backfired. The plaintiffs filed suit in state court, although there was complete diversity between the Louisiana plaintiffs and CITGO under the plaintiffs’ argument that CITGO should be domiciled at its headquarters in Texas or Oklahoma. The plaintiffs prevented removal by declaring damages for each plaintiff under the requisite amount for a federal diversity action.²⁰³ Ironically, the plaintiffs lost their claim for punitive damages by failing to file in federal court under Texas law in order to take advantage of Texas’s punitive damages provisions.²⁰⁴ If the codal provisions governing domicile in multistate tort cases are amended to strictly treat out-of-state corporations doing business in Louisiana and incurring delictual liability in Louisiana as Louisiana domiciliaries, the defendant–corporation’s domicile would clearly be Louisiana, which would effectively minimize the opportunity for forum shopping in claims subject to diversity jurisdiction.

202. Borchers, *supra* note 23, at 531 (internal citations omitted).

203. 28 U.S.C. § 1441 generally allows defendants to remove a case originally filed in state court to federal court. *See* Borchers, *supra* note 23, at 531 n.29.

204. “[E]ven a state with a constitutional prohibition on punitive damages must recognize without question a judgment for punitive damages from another state” under the Full Faith and Credit Clause of the Constitution. Borchers, *supra* note 23, at 530–31. Texas substantive law applies a “most significant relationship approach” to conflict of laws, which balances the relative interest of each state in having its own law applied based on the factors in the Restatement (Second) of Conflict of Laws, which include: the needs of the interstate and international systems; the relevant policies of the forum; the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue; the protection of justified expectations; the basic policies underlying the particular field of law; certainty, predictability, and uniformity of result; and the ease in the determination and application of the law to be applied. *Am. Home Assur. Co. v. Safway Steel Products Co., Inc., A Div. of Figgie Intern., Inc.*, 743 S.W.2d 693, 696–97 n.2 (Tex. Ct. App. 1987); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188 (1971). This is an inherently fact sensitive analysis, however, the policies of the forum may favor the application of Texas law to the facts of *Arabie* in either a Texas forum or if Texas substantive law were applied in a federal court.

b. The Avoidance of a Jury Trial

Another irony is the *Arabie* plaintiffs' strategy of filing suit in Louisiana state court to avoid a jury trial. Under Louisiana law, the threshold for a jury trial in a civil suit is an individual cause of action worth a minimum of \$50,000.²⁰⁵ The appellate court's opinion in *Arabie* specifically stated that "no plaintiff received a total award exceeding \$50,000.00 due to the jurisdictional limits for a bench trial."²⁰⁶ A sum in excess of \$75,000 is the minimum amount in controversy required to file a federal diversity action,²⁰⁷ which also happens to be greater than the amount claimed by the *Arabie* plaintiffs. This gave the plaintiffs two reasons to keep their claims under these requisite amounts: (1) to avoid a jury trial and (2) to avoid removal to federal court.²⁰⁸

Punitive damages were key to the *Arabie* plaintiffs' case. It was a calculated risk to exercise Louisiana's conflict-of-laws provisions on punitive damages, but it was arguably less risky than yielding to Texas law on the issue.

205. See LA. CODE CIV. PROC. art. 1732 (2013). This threshold amount cannot be met in the aggregate and is exclusive of interest and costs. *Id.* A bench trial is held in claims for any lesser amount. *See id.* In the 2012 legislative session, House Bill 343 was proposed to lower the cap for civil jury trials from \$50,000 to \$15,000 in tort cases tried in Louisiana state courts, with a focus on personal injury cases. Bill Barrow, *House Committee Rejects Lowering Threshold for Jury Trials in Lawsuits*, THE TIMES-PICAYUNE, Apr. 2, 2012, http://www.nola.com/politics/index.ssf/2012/04/house_committee_rejects_loweri.html.

206. *Arabie v. CITGO Petroleum Corp.*, 49 So. 3d 529, 557 (La. Ct. App. 2010). Despite failed efforts of legislative adjustment, Louisiana has the highest national threshold for a civil jury trial. Louisiana Lawsuit Abuse Watch published a report asserting that Louisiana's threshold for civil jury trials is in fact twenty-eight times the national average of \$1,742.40. Press Release, Louisiana Lawsuit Abuse Watch, Study Finds LA Jury Trial Threshold More Than 28 Times National Average (Mar. 9, 2012), *available at* http://www.llaw.org/release_030912.html. Even the maximum threshold is \$35,000 less than Louisiana's threshold. REDUCING ACCESS TO THE COURTS: THE IMPACT OF LOUISIANA'S JURY TRIAL THRESHOLD, A RESEARCH REPORT BY LOUISIANA LAWSUIT ABUSE WATCH 4 (2012), *available at* http://www.llaw.org/docs/ReducingAccessstotheCourts_FINAL.pdf.

207. 28 U.S.C. § 1332 (2006). *See supra* Part IV.A.1.

208. *See Arabie v. CITGO Petroleum Corp.*, No. 2007-2738, 2009 WL 7170890 (La. Dist. Ct. Oct. 22, 2009) (order for an itemization of plaintiffs' damages).

2. *The Substantive and Procedural Clash: Consequences of Codal Silence*

In addition to forum considerations, there are also policy concerns over the differences in state substantive and procedural law that are not always resolved in a choice-of-law analysis under Louisiana's codal framework. Although courts are bound to follow the procedural law of the forum state, the procedural law may be at odds with another state's substantive law, especially in multistate tort cases. The *Arabie* litigation revealed substantive and procedural issues involving the classification of punitive damages and the requisite burden of proof in a punitive damages claim under Louisiana's conflict-of-laws provisions.

a. *The Classification of the Availability of Punitive Damages*

Courts nationwide are split on whether the classification of punitive damages should be a substantive or procedural issue. Some courts classify the availability of punitive damages as a procedural issue and apply the law of the forum, whereas other courts classify punitive damages as a substantive tort issue.²⁰⁹ The substantive classification leads to the consideration of the following factors both singly and jointly: the place of the injurious conduct, the situs of the plaintiff's injury, and the defendant's domicile or principal place of business.²¹⁰ These factors mirror those embodied in the Louisiana Civil Code articles, namely the factors of article 3546 on punitive damages in a multistate tort conflict.²¹¹ This connection lends itself to the inference that Louisiana courts view the issue of punitive damages as a substantive issue, therefore requiring consideration of the article 3546 factors.

Additionally, the U.S. Supreme Court's decision in *State Farm Mutual Automobile Insurance Co. v. Campbell*, which limited the ratio of compensatory and punitive damages,²¹² could be viewed as questioning the constitutionality of states imposing punitive damages "extraterritorially" in states other than where the defendant acted.²¹³ This idea drawn from *State Farm* supports weighing the place of the injurious conduct as the foremost factor under a

209. Borchers, *supra* note 23, at 531.

210. *Id.* at 530–31.

211. See LA. CIV. CODE art. 3546 (2013).

212. See *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003); Borchers, *supra* note 23, at 531 (citing *Campbell v. State Farm Mut. Auto Ins. Co.*, 98 P.3d 409 (Utah 2004)).

213. See Borchers, *supra* note 23, at 531 (citing *Campbell*, 98 P.3d 409).

substantive analysis of punitive damages.²¹⁴ The conflict of laws would then be resolved by applying the law of the forum where the injurious conduct occurred. Once again, the consideration of the classification of punitive damages as substantive or procedural circles back to the argument in *Arabie* over whether the place of the injurious conduct was at corporate headquarters or at the refinery in Louisiana.

However, the consideration of the place of the injurious conduct in a substantive analysis of punitive damages creates a loophole, allowing manipulation of where the injurious conduct occurred, which is why it might be more predictable to consider the place of the resulting injury instead. This provides further support for an amendment to the conflict-of-laws provisions to strike the consideration of the place of the injurious conduct and to clarify the analysis, especially because Louisiana law seems to classify punitive damages as a substantive issue by requiring consideration of these factors. The classification of the availability of punitive damages also raises an issue over the classification of the necessity of a jury trial in a claim for punitive damages, which may be substantive in some states, yet procedural in others.

b. The Classification of the Necessity of a Jury Trial

In a claim for punitive damages under Texas law, there must be a unanimous jury on the questions of liability for and the amount of punitive damages.²¹⁵ This requirement alone raises a procedural dilemma in applying Texas substantive law on punitive damages under Louisiana's conflict-of-laws provisions in a civil case brought in Louisiana state court. Louisiana procedural law does not provide for a jury trial in civil claims worth less than \$50,000, yet Louisiana procedural law governs the award of damages in a Louisiana forum.²¹⁶ For this reason, it is impossible to return a unanimous jury verdict on punitive damages without asserting a claim for Louisiana's requisite threshold amount. Thus, the lower court decisions in *Arabie* could not have possibly applied Texas substantive law on punitive damages because the plaintiffs each asserted claims for less than \$50,000. Arguably, the district court judge and the appellate court judge abused their discretion in awarding punitive damages under Texas law without a unanimous jury verdict because such an award conflicts with the black-letter law. This is the essence of a substantive and procedural clash to

214. *See id.*

215. TEX. CIV. PRAC. & REM. CODE § 41.003(d) (West 2008).

216. LA. CODE CIV. PROC. art. 1732 (2013).

which the current Louisiana conflict-of-laws articles open the door by allowing the application of potentially incompatible substantive law under Louisiana procedural provisions. Because of this conflict, the choice-of-law articles should be amended to further restrict the award of punitive damages under the law of other states in an effort to minimize this substantive and procedural clash in future cases.

c. The Classification of the Standard of Proof

Another substantive versus procedural debate arises over how states classify the standard of proof for an award of punitive damages. For instance, some states might have a bifurcated approach of applying the law of the forum to the standard of proof as a procedural issue but applying another state's law to the standard of conduct for the same issue.²¹⁷ This issue also rose to the forefront in the *Arabie* litigation because Louisiana law, which was the law of the forum, statutorily dictates the requisite standard of liability for each codal exception allowing punitive damages, which is a substantive determination based on the tort at issue, but Louisiana law is silent on the standard of proof for punitive damages in conflict-of-laws situations. Texas law, on the other hand, allows for three standards of proof to be considered in the award of punitive damages, which is a procedural determination. This differentiation in the standard of proof is yet another weak point in the Louisiana conflict-of-laws provisions because the provisions do not clearly reconcile standard of proof issues and open the door to another state's procedural law. While amending the codal provisions to restrict the award of punitive damages under another state's law may minimize the issue, it might also be advisable to amend the choice-of-law provisions on punitive damages to explicitly require a heightened standard of proof, as is required for Louisiana's statutory exceptions for punitive damages, as a procedural law of the forum, which would simultaneously minimize corporate exposure.

3. Corporate Exposure: The Result of Multijurisdictional Business Transactions

Yet another policy concern raised in *Arabie* is the exposure that corporate defendants face in choosing to conduct business in Louisiana. In *Arabie*, Justice Knoll alone took note of this very real economic concern embedded within the conflict-of-laws provisions.²¹⁸ The *Projet* drafters obviously recognized this as a

217. See Borchers, *supra* note 23, at 531.

218. See *supra* Part III.C.

valid point because they provided specific provisions to govern the domicile of juridical persons incurring delictual liability while conducting business in Louisiana.²¹⁹ This policy concern parallels the other policy concerns embedded throughout the choice-of-law rules, such as the consideration of pertinent contacts and the situs of the injurious conduct.

The domicile provisions specific to multistate tort cases should be viewed as specifically insulating corporations seeking to do business in Louisiana by allowing them to predict the applicable law and conduct business accordingly.²²⁰ It would certainly be unfair from a policy standpoint to have subjected CITGO to Texas law on punitive damages when it clearly anticipated liability for tortious conduct to be addressed under Louisiana law, as the conflict-of-laws provisions dictate. As the Louisiana Supreme Court noted, the plaintiffs were adequately compensated with an award of compensatory damages, without the need for an award of punitive damages.²²¹ Application of specific domicile provisions in such situations is also supported by the policy concern of subjecting corporate defendants to inconsistent laws of multiple forums, which the *Projet* drafters noted as a core reason for the conflicts codification. Therefore, the Louisiana Supreme Court was correct in its statutory interpretation of CITGO's domicile.²²² As such, the codal domicile provisions should be amended to strike policy considerations and the multifactor interest analysis, as used in *Arabie*, as a loophole to domicile corporate defendants out of state.

4. Louisiana's Purported Policy Against Punitive Damages: The Contradiction and the Clarification

Perhaps the most important policy concern—made apparent by the *Arabie* litigation—is Louisiana's purported policy against punitive damages. One could argue, as the lower courts and the plaintiffs did in *Arabie*, that Louisiana has no true policy against the award of punitive damages.²²³ While scholars may debate the issue, the Louisiana Supreme Court clearly affirmed the policy and maintained this civil law tradition in its ultimate decision in *Arabie*.²²⁴

219. See *supra* Part II.B.1.

220. See *supra* Part II.B.1.

221. See *supra* Part III.C.

222. See LA. CIV. CODE arts. 3518, 3548 (2013).

223. See *supra* Parts III.A, B.

224. In *Arabie*, the Louisiana Supreme Court noted that “the legislature has seen fit to authorize punitive damages only in certain specific instances. The fact that punitive damages are only authorized in particular situations shows that the

Aside from those specific, statutorily excepted awards of punitive damages, perhaps the most stunning contradiction in both the statutory exceptions and the current conflict-of-laws articles is that there is no cap on the award of punitive damages in Louisiana.²²⁵ This is against the very essence of the idea that Louisiana has a strict policy against punitive damages, if the instances in which they are allowed by statutory exception allow them without limit.

Furthermore, the common law predecessor to this notion and Louisiana's common law neighbors leave punitive damages to the discretion of a jury. Again, Louisiana's limitation on jury trials resurfaces as a procedural flaw in leaving the limitless award of punitive damages to only a judge's discretion in many cases that would require a jury trial under the substantive law of other jurisdictions from which the punitive damages provisions are imported in a choice-of-law situation. Consequently, this leaves the award to a judge with little experience in awarding punitive damages at all, seeing as it is not the normal type of damages awarded in Louisiana.

In *Arabie*, the court of appeal blatantly denied Louisiana's policy against punitive damages.²²⁶ The Louisiana Supreme Court correctly refuted the appellate court on this assertion and jurisprudentially affirmed the Legislature's longstanding intent of restricting punitive damages in Louisiana, as it did more than 100 years before in *Vincent v. Morgan's Louisiana*.²²⁷ There is clear authority for Louisiana's longstanding policy against the award of punitive damages in the limited statutory exceptions for punitive damages and the recent repeal of article 2315.3. The lower courts' analyses in *Arabie* show how easy it could be to grant an award of punitive damages by importing foreign law under Louisiana's current conflict-of-laws provisions. In fact, more cases following the *Arabie* plaintiffs' lead have arisen since this initial challenge under the choice-of-law provisions. The legislative intent restricting punitive damages, along with policy concerns, should prevent

State has a general policy against punitive damages." *Arabie v. CITGO Petroleum Corp.*, 89 So. 3d 307, 318 n.3 (La. 2012).

225. deGravelles & deGravelles, *supra* note 15, at 579. When punitive damages were introduced in American common law, there was no cap either. *Id.* at 582 (citing *Atl. Sounding Co. v. Townsend*, 557 U.S. 404 (2009)). Punitive damages awards were left to the jury's "broad discretion to award damages as they saw fit." *Id.* (quoting *Atl. Sounding Co.*, 557 U.S. at 409).

226. *Arabie v. CITGO Petroleum Corp.*, 49 So. 3d 529, 554 (La. Ct. App. 2010). See *supra* Part III.C.

227. See *supra* Part II.A.1.

plaintiffs from circumventing Louisiana punitive damages law by importing the law of foreign jurisdictions through the Louisiana Civil Code provisions on conflict of laws.

V. CONCLUSION

Even after the *Arabie* litigation, the issue of punitive damages is resurfacing in Louisiana, with history repeating itself. The Louisiana courts and the Louisiana Legislature have gone back and forth, overruling each other on the issue of punitive damages over the past century. The Louisiana Supreme Court refuted the attempts to import punitive damages without a specific statutory basis in *Vincent v. Morgan's Louisiana*, more than 100 years ago, just as the Louisiana Supreme Court recently refuted the attempt to import punitive damages without a specific statutory basis in *Arabie*.

Arabie shows the need to implement a specific statutory basis for the Louisiana Supreme Court's decision to close the door to punitive damages and to provide certainty in future litigation involving corporations conducting business across multiple jurisdictions. Indeed, the Legislature may be the culprit by promulgating flawed articles on the conflict of laws and inviting the Trojan Horse of punitive damages into Louisiana. Therefore, the Legislature should act to clarify the conflict-of-laws provisions, especially those on punitive damages in multistate tort conflicts. This would save years of litigation in a climate of uncertainty for corporate defendants in both state and federal courts. The Legislature must close the door to punitive damages and definitively limit the conflict-of-laws articles governing punitive damages to only allow those strictly limited codal provisions in accordance with legislative intent.

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