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The Scope of Generic Choice of Law Clauses

*Tanya Monestier**

Non-proceduralists have the perception that questions of jurisdiction or choice of law are just preliminary issues that need to be dealt with before getting to the real dispute, the things that matter. What they do not realize is that these preliminary issues are often, themselves, the real dispute. They are the lever which permits litigation to proceed or which stops a claim dead in its tracks. Thus, these procedural matters — often dismissed as technicalities — have the potential to shape the dispute in significant ways.

Take for instance, a staple of commercial and consumer contracting: the ubiquitous choice of law clause. The choice of law clause in a contract usually does not matter. Until, of course, it does. When claims are viable under the law of one jurisdiction and not viable under the chosen law, the choice of law clause matters a great deal. Litigants now have the opportunity to craft a legal argument based on just a handful of words. How a court interprets these words will determine whether the gateway will be opened for litigants to advance their claims or whether they will, literally or figuratively, be sent home.

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The interpretation of choice of law clauses normally proceeds according to customary principles of contractual interpretation. For the most part, courts are on the same page when it comes to interpreting clauses that do not leave much wiggle-room — e.g., clauses that provide that “all disputes arising from or related to the contract will be governed by [x] law.” Where things get dicey is where parties have agreed to a generic choice of law clause. A generic choice of law clause is one that provides that “the contract” will be “governed by” or “subject to” the chosen law. Here, there is a split of authority on how to interpret such language. Some courts hold that a generic choice of law clause should be interpreted narrowly. That is, the parties’ chosen law should be applied to contractual claims and contractual claims only. By contrast, some courts interpret a generic choice of law clause in the polar opposite way. These courts hold that the parties’ chosen law should apply to any and all disputes between the parties, including, for instance, tort and statutory claims.

This Article examines this interpretative debate and sides with those courts that interpret generic choice of law clauses narrowly. It examines in detail the textual arguments in support of such an interpretation and advances arguments in favor of the textual approach that courts have not considered. It also engages with the broad approach on the merits, arguing that the assumptions underpinning such an approach are questionable at best, and flawed at worst.

While this is an Article that zooms in to the granular details of the technicalities, it does so based on the reality that these technicalities have profound implications for the litigants and for the broader administration of justice.

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INTRODUCTION

When parties enter into a contract, they will often include a choice of law clause that designates a particular body of law to govern their relationship in the event of a future dispute.¹ An issue that courts frequently face is what the appropriate scope of a choice of law clause should be. Do the parties intend for the designated law to cover contractual claims only? Or do they intend for the designated law to extend to non-contractual claims as well? Where parties include scope-related language, there is usually no difficulty. That is, where parties indicate that they intend for all claims “arising from or related to” the contract to be governed by the chosen law, there is little potential for

¹ See Julian Nyarko, *Stickiness and Incomplete Contracts*, 88 U. CHI. L. REV. 1, 42 (2021) (“Choice-of-law clauses are almost universally adopted, with most law firms including them in over 96% of their contracts.”).

disagreement about the parties' choice. However, where parties simply provide that their agreement shall be "governed by" or "subject to" the laws of a certain state, the issue is more complicated. These "generic"² choice of law clauses present courts with a difficult and consequential interpretation question: Are the claims being asserted covered by the clause?

The title of this Article might lead one to believe that the issue is very specialized. After all, how often do "scope" issues present themselves in the context of "generic" choice of law clauses? The answer is *all the time*.³ And a great deal turns on how broadly or how narrowly courts interpret these generic choice of law clauses. Take a very recent Sixth Circuit case, for example. In *Adelman's Truck Parts Corp. v. Jones Transport*,⁴ the plaintiff owner of a trucking company sought to assert claims against the defendant seller of a truck motor under the *North Carolina Unfair and Deceptive Trade Practices Act* ("UDTPA"). The plaintiff sought treble, consequential, and punitive damages in connection with the purchase of a defective motor. The defendant argued that the parties were bound by a choice of law clause which provided that, "This Purchase Order shall be governed by and construed in accordance with the laws of the State of Ohio."⁵ The issue, of course, was the appropriate scope of this generic choice of law clause. Should the clause be interpreted narrowly, such that it applied to only contractual claims? Or, should the clause be interpreted broadly, such that Ohio law governed all claims related to the contract, including statutory claims? The Sixth Circuit Court of Appeals settled on the latter interpretation — i.e., Ohio supplied the governing law for all claims related to the purchase of the truck. The result was that the plaintiff was unable to pursue a statutory remedy under the North Carolina UDTPA.⁶ Had the court interpreted the choice of law clause

² The term "generic" choice of law clause seems to have been first used extensively in *Roadway Package System, Inc. v. Kayser*, 257 F.3d 287 (3d Cir. 2001). See also John F. Coyle, *The Canons of Construction for Choice-of-Law Clauses*, 92 WASH. L. REV. 631 *passim* (2017) (adopting the terminology).

³ 1 TRANSNATIONAL CONTRACTS § 3B:10 (2022) ("A recurring issue faced by courts is whether a contractual choice of law provision encompasses claims other than those arising strictly from the contract.")

⁴ 797 F. App'x 997, 998-99 (6th Cir. 2020).

⁵ *Id.* at 1000.

⁶ *Id.* at 1001.

narrowly (that is, as extending only to breach of contract claims), the plaintiff would have been permitted to advance his North Carolina UDTPA claims.

It is clear that the interpretation question had a significant bearing on the outcome of the *Adelman's* case — i.e., it foreclosed certain statutory avenues of redress for the plaintiff.⁷ The same will be true in any other litigated case. Parties do not litigate choice of law issues unless the stakes are high enough to warrant it. It is a safe bet that every case involving a choice of law scope issue will have a considerable impact on the plaintiff's recovery or the defendant's defense.⁸ Since 2020, dozens of cases have considered scope issues in conjunction with choice of law clauses.⁹ In some of these cases, the results were probably pre-

⁷ See also *ICS N. Am. Corp. v. Collage.com, Inc.*, No. 19-11521, 2020 WL 5801191, at *5 (E.D. Mich. Sept. 29, 2020) (“Collage’s argument [in favor of a broad interpretation] carries the day. The choice of law provision at issue here is nearly identical to that at issue in *Adelman’s Truck Parts Corp. v. Jones Transp . . .*”).

⁸ See *Johnson v. Diakon Logistics*, No. 16-CV-06776, 2021 WL 4477893, at *1, *5 (N.D. Ill. Sept. 30, 2021) (“Diakon contends that the Virginia choice-of-law provisions contained within the Service Agreements preclude Plaintiffs’ claim under the IWPCA. Plaintiffs attack this position on two grounds Plaintiffs assert that the IWPCA claim, as a statutory claim, falls outside the coverage of the choice-of-law provision Both sides acknowledge, however, that if Virginia law governs, Plaintiffs will be unable to prevail on claims under the IWPCA.”).

⁹ See, e.g., *Whitesides v. E*TRADE Sec., LLC*, No. 20-cv-05803, 2021 WL 930794 (N.D. Cal. Mar. 11, 2021); *Bajwa v. United States Life Ins. Co.*, No. 19-cv-00938, 2021 WL 2661836 (E.D. Cal. June 29, 2021); *Young v. Grand Canyon Univ., Inc.*, No. 19-CV-1707, 2021 WL 3403746 (N.D. Ga. July 22, 2021); *Konair US, LLC v. DGI II, LLC*, No. 19-cv-05728, 2021 WL 135308 (N.D. Ga. Jan. 14, 2021); *Savis, Inc. v. Cardenas*, 528 F. Supp. 3d 868 (N.D. Ill. 2021); *Mirror Finish PDR, LLC v. Cosm. Car Co. Holdings*, 513 F. Supp. 3d 1054 (S.D. Ill. 2021); *Johnson*, 2021 WL 4477893; *Leblanc v. Delta Airlines*, No. 19-13598, 2021 WL 1517907 (E.D. La. Apr. 16, 2021); *Great Lakes Ins. SE v. Andersson*, 544 F. Supp. 3d 196 (D. Mass. 2021); *CRG Fin., LLC v. Two Diamond Cap. Corp.*, No. 19-cv-10182, 2021 WL 2458202 (D. Mass. June 16, 2021); *N. Shore Window & Door, Inc. v. Andersen Corp.*, No. 19-cv-6194, 2021 WL 4205196 (E.D.N.Y. Aug. 3, 2021); *Palumbo v. Provident Tr. Grp. LLC*, No. 19-CV-0252, 2021 WL 1110797 (N.D.N.Y. Mar. 23, 2021); *Audax Credit Opportunities Offshore Ltd. v. TMK Hark Parent, Corp.*, No. 565123/2020, slip op. at 1 (N.Y. Sup. Ct. Aug. 16, 2021); *Ochoa v. Indus. Ventilation, Inc.*, No. 18-CV-0393, 2021 WL 5405203 (E.D. Wash. Nov. 18, 2021); *Warwick v. Schneider Nat’l, Inc.*, 538 F. Supp. 3d 867 (E.D. Wis. 2021).

ordained.¹⁰ And in other cases, it was anybody's guess what the court would do.¹¹ Currently, the law is a hodge-podge, offering little predictability to litigants whose outcome will depend on the interpretation advanced by the court in which they sue or are sued.

This Article seeks to engage directly with the normative question of how courts should interpret these clauses. It argues that courts should adopt a textualist approach to the interpretation of generic choice of law clauses. Under a textualist approach, these clauses would be read in accordance with their plain meaning: as selecting the chosen law for contractual claims, and contractual claims only. Extra-contractual claims, such as tort or statutory claims, would be outside the ambit of these clauses. If courts were to apply the same interpretative approach to generic choice of law clauses, this would cut down on litigation posturing and the eliminate the possibility of different results in very similar cases. It would also properly place the burden on the parties to draft clear choice of law clauses that accurately capture their intentions and expectations.

This Article proceeds as follows: In Part II, I address an important preliminary question that is curiously unexplored in the case law: Do parties have the power to select the law that will govern their extra-contractual claims via a choice of law clause? While courts assume the answer is yes, it is not clear that principles underlying private ordering apply outside the contract domain and that parties actually have the power to choose their own tort, statutory, or other law. However, on the assumption that parties can designate the governing law in extra-

¹⁰ See, e.g., *Lynx Tech. Partners, Inc. v. Pitts Mgmt. Assocs., Inc.*, No. 18-cv-3881, 2021 WL 2516111, at *4 (E.D.N.Y. June 6, 2021) (holding that plaintiff's equitable claim "falls outside the scope of the contractual choice-of-law provision, which provides only that Louisiana law 'shall govern this Agreement'"); *Audax Credit Opportunities Offshore Ltd.*, slip op. at 16 (holding that tort claims are outside the scope of a generic choice-of-law clause and indicating that these "highly sophisticated parties could have drafted a broader choice-of-law provision that encompasses extra-contractual claims relating to the Original Agreement, but they did not do so").

¹¹ See, e.g., *Mirror Finish PDR, LLC*, 513 F. Supp. 3d at 1065 (conducting detailed analysis on whether the plaintiff's claims of unjust enrichment, fraud, breach of fiduciary duty, and civil conspiracy are "dependent" on the contract so as to determine whether to apply the parties' chosen law to those claims); *FinancialApps, LLC v. Envestnet, Inc.*, No. 19-1337, 2020 WL 3640063, at *4 (D. Del. July 6, 2020) (referring to "alternate strain[s] of Delaware state caselaw" on the scope issue).

contractual matters, I proceed in Part III to lay out a typology of choice of law clauses. I describe four different categories of choice of law clauses: specific, nexus-based, generic, and atypical. This typology, in turn, orients the reader to the scope issues presented by generic choice of law clauses, and how those scope issues differ from those presented by some of the other choice of law clause categories. In Part IV, I transition to examining the three main approaches that courts have developed to interpreting the scope of generic choice of law clauses: the narrow approach, the broad approach, and the relatedness approach. This sets the stage for the main thesis of this Article, explored in Part V: that courts should interpret generic choice of law clauses narrowly. I engage with this argument in two ways. First, I present a textual interpretation of generic choice of law clauses, highlighting the flaws inherent in the broad approach to interpretation. I carry the analysis further than most courts have, probing, for example, issues of ambiguity, hypothetical party intention, and the need for interpretation of such clauses. Second, I engage with the arguments in favor of the broad approach on the merits. In particular, I question the assumptions underlying the broad approach in particular, the party preference assumption and the predictability assumption. I make the argument that it is not clear that parties “prefer” for the chosen law to extend beyond the contract, and that the question of what parties prefer in this context is perhaps an unanswerable one. In the penultimate section, Part VI, I suggest the possibility of an alternative approach to interpreting generic choice of law clauses. Courts could adopt a textualist approach to the interpretation of choice of law clauses, but still apply the parties’ chosen law to extra-contractual claims as a conflict of laws matter. Nothing prevents a state from crafting a unique choice of law rule for disputes that arise in the context of a larger contractual relationship between the parties. Conceptualized as a choice of law rule, there is no obstacle to courts applying the same law chosen by the parties for their contractual disputes to other disputes emanating from that relationship. Finally, in Part VII, I suggest that courts adopting a broad approach to the interpretation of generic choice of law clauses should take a step back and examine more carefully the assumptions and underpinnings of this approach.

I. CHOOSING YOUR TORT LAW: CAN YOU DO THAT?

There is an important threshold issue that must be addressed before turning to the question of how to interpret a generic choice of law clause. That issue, which seems to have escaped any scrutiny, is whether parties actually have the power to choose the tort or other law that will apply to their dispute. Stepping back from the issue for a moment, the premise seems a bit fantastical. For instance, let's assume I walk into Wegmans to do my regular weekly grocery shopping. Before being permitted to enter, I am asked to sign a document that says, "The parties agree that any and all tort claims arising from or related to Customer's visit to Wegmans shall be governed by New York law." New York, I am told, is where Wegmans is headquartered.¹² I live in New Jersey, not New York, but I sign anyway. If I slip and fall during my Wegmans visit in New Jersey and want to sue the grocery store for negligence, am I bound by my choice of New York law? I suspect that a court might be reluctant to enforce a choice of law clause designed to *only* cover tort claims. This is true whether the clause was entered into *ex ante* or *ex post*.

In fact, it is unclear how a court would evaluate the enforceability of such a clause. Under the Restatement (Second) of the Conflict of Laws § 187,¹³ parties are allowed to choose the law that governs their contractual disputes — but within limits.¹⁴ If the "particular issue is one which the parties could not have resolved by an explicit provision in their agreement directed to that issue" then the parties' choice of governing law is circumscribed.¹⁵ How would this translate into the tort context? It wouldn't. Because, by definition, you are dealing with a tort — not a contract — so there is no "particular issue" you could have resolved by explicit agreement. What, then, would the limits be for parties' *ex ante* (or even *ex post*) choice of tort law? Could the parties choose Alaskan law to govern the slip and fall at Wegmans? Does the tort law that is selected

¹² FAQs, WEGMANS, <https://www.wegmans.com/service/faq/about-wegmans/> (last visited July 27, 2021) [<https://perma.cc/5DF7-ERCX>].

¹³ RESTATEMENT (SECOND) OF CONFLICT OF L. § 187 (AM. L. INST. 1971).

¹⁴ The Commentary to section 187 speaks exclusively to the parties having the power to determine the law that governs their contractual arrangements. *See id.* cmt. c ("The parties, generally speaking, have power to determine *the terms of their contractual engagements.*") (emphasis added).

¹⁵ *Id.* § 187.

have to bear any sort of connection to the parties or the dispute? Clearly, there is not a huge market for pure choice of tort law clauses. However, is the situation any different when parties attempt to choose their tort law through what is otherwise a valid contractual choice of law clause? If the enforceability of a choice of tort law clause — on its own — is questionable, should it not also be questionable in the context of a contractual clause designating the governing law?

Surprisingly, courts have not expressed any concern about parties being able to choose their tort or other law through a contractual choice of law clause. For the most part, they just want parties to *do it clearly*. Professor Hay is among the few scholars to consider whether parties are actually able to choose the law that governs non-contractual claims via a choice of law clause. He writes:

Section 187 of the Second Restatement speaks of the law of the state chosen by the parties to govern their “*contractual* rights and duties.” The Restatement is silent on whether the parties may agree in advance on the law that will govern the parties’ non-contractual rights, especially those arising from a future tort between them. The most logical inference is that the Restatement does not sanction such agreements. At the time of the Restatement’s drafting, the principle of party autonomy, which had been born in the contracts arena, had not migrated outside that arena.¹⁶

Professors Symonides, Purdue, and von Mehren express a similar view:

A more difficult question is whether the parties have the power to select the law that will govern issues that are not purely contractual. One should not lightly assume an affirmative answer, because, after all, the principle of party autonomy has been born and nurtured exclusively in the area of contract. . . .

¹⁶ PETER HAY, PATRICK J. BORCHERS & SYMEON C. SYMEONIDES, *CONFLICT OF LAWS* § 18.10, at 1141 (5th ed. 2010); *see also id.* (“Recent codifications, including the two American codifications, have had the opportunity to address this issue. The 1991 Louisiana codification explicitly confines pre-dispute choice-of-law agreements to *contractual* issues. Oregon’s contracts codification of 2001 also does not allow pre-dispute choice-of-law agreements for non-contractual issues.”).

These authors posit that the question of whether parties have the ability to choose the law that applies to non-contractual claims “has not been sufficiently explored.”¹⁷ However, they note that “[w]ith few exceptions, . . . courts tend to assume that contracting parties have the power to submit to the chosen law not only the purely contractual disputes, but also tort-like issues arising from the same contractual relationship.”¹⁸

It seems like the overwhelming, albeit implicit, consensus is that parties can choose their tort or other law through a choice of law clause. Even the courts that adopt the most conservative approach to the enforceability of generic choice of law clauses allow parties to designate their choice of law for tort and other non-contractual claims.¹⁹ I therefore proceed on the unsettled, but nonetheless accepted, assumption that parties are permitted to choose the law that governs their non-contractual claim through a choice of law clause.²⁰ I leave the predicate question of whether choosing this law is permissible for another day and for another author. The focus instead is on inquiring into *when* the parties have, in fact, chosen their tort law.

II. A TYPOLOGY OF CHOICE OF LAW CLAUSES

This Article focuses on how courts should interpret generic choice of law clauses. Prior to embarking on this task, however, it is helpful to situate generic choice of law clauses within the landscape of choice of law clauses in general. I suggest that there are four broad categories of choice of law clauses: (1) specific; (2) nexus-based; (3) generic; and (4)

¹⁷ SYMEON C. SYMEONIDES, WENDY COLLINS PERDUE & ARTHUR TAYLOR VON MEHREN, *CONFLICT OF LAWS: AMERICAN, COMPARATIVE, INTERNATIONAL CASES AND MATERIALS* 359 (2d ed. 2003).

¹⁸ *Id.*

¹⁹ One notable exception is found in the corporate affairs doctrine. See Sagi Peari, *An Assessment of the U.S. Rules Which Determine the Relevant Law Applicable to Corporations: A Suggestion for Reform*, 45 DEL. J. CORP. L. 469, 495 (2021) (applying law of the state of incorporation despite choice of law clause).

²⁰ See *Pac. Controls Inc. v. Cummins Inc.*, No. 19-cv-03428, 2021 WL 4462725, at *4 (S.D.N.Y. Sept. 29, 2021) (“[B]oth parties agree that New Jersey law governs Pacific’s tort claims because Pacific is headquartered in New Jersey and alleges to have suffered harm there. Where the parties agree on which State’s law controls, ‘this is sufficient to establish choice of law.’” (citations omitted)).

atypical.²¹ These categories are intended to enable a reader to readily distinguish generic choice of law clauses from other choice of law clauses.

A specific choice of law clauses is one that specifically designates the clause's scope by enumerating the particular disputes to which it is intended to apply. A specific choice of law clause might provide something to the effect that "any and all claims, arising out of or related to this Agreement, whether sounding in contract, tort, or otherwise, shall be governed by the laws of the State of New York."

A nexus-based choice of law clause, as its name suggests, contains relatedness language such as "arise from" or "relate to."²² A nexus-based choice of law clause may provide something to the effect that "Any and all claims arising from or relating to this Agreement shall be governed by the laws of the State of New York."²³ Nexus-based choice of law clauses are simply a less detailed version of specific choice of law clauses.

A generic choice of law clause is one that refers to the contract being "governed by," "construed and interpreted in accordance with," or "subject to" a certain law. Notably, a generic choice of law clause does not contain nexus-based language.

Finally, an atypical choice of law clause is one that does not neatly fit into the other categories or combines aspects of different categories. For instance, the clause might provide that the "parties agree that all claims will be resolved under" a certain law.²⁴ This is not quite a nexus-based clause, since the provision does not explicitly say that all claims arising from the contract will be governed by the chosen law. Likewise, it is not quite a generic choice of law clause because it does not provide that "the

²¹ This typology was developed in conjunction with Tyler Martin, Esq., who wrote an unpublished student Note on generic choice of law clauses.

²² See *McPhee v. Gen. Elec. Int'l, Inc.*, 426 F. App'x 33, 34 (2d Cir. 2011); *Cooper v. Meridian Yachts, Ltd.*, 575 F.3d 1151, 1158-59 (11th Cir. 2009); *Change Cap. Partners Fund I, LLC v. Volt Elec. Sys., LLC*, No. N17C-05-290, 2018 WL 1635006, at *2 (Del. Super. Ct. 2018); *Capital Z Fin. Servs. Fund II, L.P. v. Health Net, Inc.*, 840 N.Y.S.2d 16, 23 (App. Div. 2007).

²³ See *McPhee*, 426 F. App'x at *34.

²⁴ See, e.g., *Almeida v. BOKF, NA*, 471 F. Supp. 3d 1181, 1191 (N.D. Okla. 2020) ("Here, the trust indentures include the following choice-of-law provision: 'The effect and meaning hereof and the rights of all parties hereunder shall be governed by, and considered according to, the laws of the state of [Alabama or Georgia].'").

contract” will be subject to the chosen law.²⁵ Hence, the catch-all category.

These categories are intended to be descriptive. Not every choice of law clause can readily be placed into one of these categories, though most of them can. The chart below illustrates the four categories described above:

Specific Choice of Law Clauses	Nexus-Based Choice of Law Clauses	Generic Choice of Law Clauses	Atypical Choice of Law Clauses
“Any and all claims, controversies, and causes of action arising out of or relating to this Agreement, whether sounding in contract, tort, or statute, shall be governed by the laws of the State of New York.”	<p>“This Agreement, and claims arising from or relating to this Agreement, shall be governed by the laws of the State of New York.”</p> <p>“All disputes arising out of or in connection with this Agreement shall be governed by the laws of the State of New York.”</p> <p>“The laws of the State of New York shall govern any and all claims arising between the parties.”</p>	<p>“This Agreement shall be governed by the laws of the State of New York.”</p> <p>“This contract is subject to the laws of the State of New York.”</p> <p>“This Agreement shall be interpreted and enforced in accordance with the Laws of the State of New York.”</p>	<p>“The effect and meaning hereof and the rights of all parties hereunder shall be governed by, and considered according to, the laws of the State of New York.”</p> <p>“The law of New York governs all matters with respect to this Agreement.”</p> <p>“The parties choose New York as the governing law.”</p> <p>“Governing Law: New York.”</p> <p>“Any dispute between the</p>

²⁵ See, e.g., *King v. Bumble Trading, Inc.*, 393 F. Supp. 3d 856, 864 (N.D. Cal. 2019) (“Both cases involved terms with only the generic ‘governed by and construed in accordance with’ phrasing with no other qualifiers. Conversely, Bumble’s specifically target its users’ ‘access to the App . . . Content, and any Member Content . . .’ Thus, Bumble’s added language distinguishes its terms from the narrower choice of law provisions cited by Plaintiffs.” (citations omitted)).

			parties will be governed by New York law.”
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Each choice of law clause category discussed above presents interpretation challenges that vary in difficulty. Interpreting a specific choice of law clause is a usually very straightforward exercise because of the express mention of the extra-contractual claims it is designed to cover. The same can be said about nexus-based choice of law clauses. Despite lacking the level of detail contained in a specific choice of law clause, there is a general consensus among courts that these clauses are drafted broadly enough to encompass any and all claims that arise from or relate to the agreement in question.²⁶ Atypical choice of law they tend to attract the most interpretative scrutiny.²⁷ Because the analysis will track the exact wording of the clause, it is not surprising to see courts reach “inconsistent results”²⁸ even though they are interpreting very similar clauses.

²⁶ See *Pike Co. v. Universal Concrete Prods., Inc.*, 524 F. Supp. 3d 164, 179 (W.D.N.Y. 2021) (“As a general rule of thumb, provisions applying to disputes ‘arising out of’ or ‘relating to’ a contract are capacious enough to reach related tort claims, while provisions stating that a contract will be ‘governed by’ or ‘construed in accordance with’ the law of a state are not.” (internal citations omitted)).

²⁷ See, e.g., *Facility Wizard Software, Inc. v. Se. Tech. Servs., LLC*, 647 F. Supp. 2d 938, 944 (N.D. Ill. 2009) (“The choice-of-law provision clearly states that Illinois law shall apply to the ‘Agreement’ and ‘all rights and obligations hereunder, including matters of construction, validity and performance.’ . . . [B]ecause FWS’s claims concern CPSS’s (non-)performance under the contract, the choice of law provision clearly applies Illinois law to the ‘performance’ of the contract. Thus, the parties intended Illinois law to apply to FWS’s tort-based claims.”); *El Pollo Loco, S.A. de C.V. v. El Pollo Loco, Inc.*, 344 F. Supp. 2d 986, 989 (S.D. Tex. 2004) (“The Court recognizes that the phrase ‘[a]ll disputes which may arise in connection with the performance of this Agreement’ is broader than the choice of law clauses at issue in *Benchmark* and *Caton*, which only govern how the respective agreements ‘shall be construed,’ and more closely resembles the phraseology of the arbitration clause in *Valero*. Given the wording of the choice of law clause in the Agreement, the Court finds that the choice of law clause applies to Plaintiff’s tort claims, as well as its contract claims, because the tort claims are disputes that are connected ‘with the performance of th[e] Agreement.’”).

²⁸ *Pike Co.*, 524 F. Supp. 3d at 179.

The focus of this Article is generic choice of law clauses. A large swath of choice of law clauses in contracts are of this generic variety.²⁹ When disputes arise, these clauses tend to provide fodder for litigation.³⁰ Generally speaking, neither party will take issue with the chosen law applying to the contractual matters in dispute.³¹ However, the plaintiff will often seek to advance a tort, statutory, or other claim that is viable only under some law *other than* that designated in the choice of law clause. The plaintiff will argue that the choice of law clause should be interpreted narrowly to apply only to contractual claims. This, in turn, would allow the plaintiff to advance extra-contractual claims under some other body of law.³² How courts interpret these generic choice of law clauses matters a great deal to the outcome of any given case. And currently, courts have diametrically opposed approaches to how they interpret generic choice of law clauses.

III. CURRENT APPROACHES TO THE INTERPRETATION OF GENERIC CHOICE OF LAW CLAUSES

The two most common variations of generic choice of law clauses are: “This contract shall be interpreted and construed in accordance with X law” and “This contract shall be governed by X law.” Other iterations include: “This contract is subject to X law,” “The parties agree that X law applies to this contract,” and “The parties choose X law for their contract.” The commonality is that all these clauses is that they explicitly refer only to “this” contract and contain no nexus-based language. Despite the difference in the language employed, courts have largely

²⁹ This is likely because choice of law clauses tend to be boilerplate, and boilerplate tends to be sticky. See MITU GULATI & ROBERT E. SCOTT, *THE THREE AND A HALF MINUTE TRANSACTION: BOILERPLATE AND THE LIMITS OF CONTRACT DESIGN* 11 (Univ. of Chi. Press 2013).

³⁰ This is true for other choice of law categories as well.

³¹ Unless, of course, there is some basis for resisting the applicability of the chosen law — such as public policy concerns.

³² This is a typical litigation posture in which this issue presents itself, but not the only one. See, e.g., *Heskiaoff v. Sling Media, Inc.*, 719 F. App'x 28, 29-31 (2d Cir. 2017) (plaintiffs arguing that the choice of law clause should be interpreted broadly to allow for the chosen law, California law, to apply to their extra-contractual claims).

treated these generic choice of law clauses as interchangeable.³³ For the purpose of this Article, I, too, treat these clauses as interchangeable and place them in the broad bucket of generic choice of law clauses.

The difficulty with these clauses lies not in distinguishing them from one another (i.e., determining whether “interpreted in accordance with” is different than “governed by”), but rather in determining how far they should extend. In particular, courts must decide whether a generic choice of law clause should be interpreted narrowly to apply exclusively to contractual claims, or broadly to apply to any and all claims arising out of the contract.³⁴

This issue is complicated by the lack of clarity on what law governs the interpretation of a choice of law clause. When a court is tasked with assessing whether to interpret a generic choice of law clause to encompass non-contractual claims, should it use forum law to do so? Or, should it use the parties’ chosen law? Courts are divided on this issue. Most courts use forum law to interpret the scope of a choice of law clause.³⁵ The leading case in this respect is *Finance One Public Co. v. Lehman Brothers Special Financing, Inc.*³⁶ There, the Second Circuit Court of Appeals noted that “courts consider the scope of a contractual choice-of-law clause to be a threshold question like the clause’s validity” and thus “[c]ourts . . . determine a choice-of-law clause’s scope under the

³³ Coyle, *supra* note 2, at 656 (referring specifically to courts’ treatment of the two most common iterations of generic choice of law clauses). Professor Coyle calls this “the canon of linguistic equivalence.” See also Stephen L. Sepinuck, *Drafting a Choice-of-Law Clause*, 10 *TRANSACTIONAL L.* 4, 4 (2020) (“In theory, there is a difference between a choice-of law clause that provides that a chosen state’s law is to be applied in ‘interpreting’ or ‘construing’ the agreement and one that provides that the chosen law ‘governs’ the contract Most courts to address this matter of phrasing have rejected this theoretical distinction and concluded that the wording does not matter.”). *But see* Run Them Sweet, LLC v. CPA Glob. Ltd., 224 F. Supp. 3d 462, 466-67 (E.D. Va. 2016) (drawing distinction between the words “construed” and “governed”).

³⁴ Coyle, *supra* note 2, at 666-67.

³⁵ *Pyott-Boone Elecs. Inc. v. IRR Tr. for Donald L. Fetterolf* Dated Dec. 9, 1997, 918 F. Supp. 2d 532, 542 (W.D. Va. 2013) (“[I]t appears that a majority, albeit not an overwhelming one, of courts that have addressed this issue have concluded that the scope of a choice-of-law provision is a threshold issue of enforceability to be decided under forum law.”).

³⁶ 414 F.3d 325 (2d Cir. 2005).

same law that governs the clause’s validity — the law of the forum.”³⁷ Not all courts agree, however. Some courts, notably those in California, apply the parties’ chosen law to determine the scope of the choice of law clause.³⁸ The divergent approaches to the threshold determination of which law governs the scope issue adds to the complications immensely.³⁹

This Article concentrates on the correct doctrinal approach to the interpretation of a generic choice of law clause. If courts were to apply a consistent approach to interpreting generic choice of law clauses, the “forum law” vs. “chosen law” question would be rendered moot. Below, I explore in more detail the three main approaches that courts use to interpret generic choice of law clauses.

A. *The Narrow Approach*

Certain courts, following the lead of New York, hold that generic choice of law clauses should be construed narrowly to apply to contractual claims only.⁴⁰ These courts largely focus on characterizing the claim at issue: Is the claim advanced contractual or non-contractual in nature? If the claim is non-contractual, it is simply not covered by the parties’ generic choice of law clause. Three seminal New York cases paved the way for the bright-line rule that generic choice of law clauses do not extend to non-contractual claims.

³⁷ *Id.* at 333.

³⁸ Wash. Mut. Bank, FA v. Superior Ct., 15 P.3d 1071, 1078 n.3 (Cal. 2001) (“[T]he scope of a choice-of-law clause in a contract is a matter that ordinarily should be determined under the law designated therein . . .”).

³⁹ If parties choose California law to govern their contract and the case is heard in a jurisdiction that applies forum law to decide the scope issue, the result may be that the clause is interpreted narrowly (despite the parties choosing California law, which interprets such clauses broadly). Similarly, if the parties choose New York law and the case is heard in a jurisdiction that applies the chosen law, the clause will be interpreted narrowly, even if that jurisdiction follows a broad approach to interpretation. Multiple permutations abound. An additional wrinkle presents itself in federal cases that are transferred under 28 U.S.C. § 1404 (2018). *See, e.g.,* Maltz v. Union Carbide Chems. & Plastics Co., 992 F. Supp. 286, 296 (S.D.N.Y. 1998) (New York court applying Texas choice of law principles to ascertain both validity and scope of choice of law clause).

⁴⁰ Sepinuck, *supra* note 33, at 5 (“In most states, a choice-of-law clause that selects the law of a state to govern ‘the contract’ will apply only to contract claims; it will not cover tort claims or statutory claims.”).

In *Knieriemen v. Bache Halsey Stuart Shields Inc.*,⁴¹ the plaintiff filed suit against a brokerage firm alleging that it engaged in, among other things, churning with respect to the plaintiff's commodity trading account.⁴² The parties had entered into an agreement that contained the following generic choice of law clause: "[t]his contract shall be governed by the laws of the State of New York."⁴³ The defendant argued that the plaintiff's tort claim should be governed by Louisiana law, not by the law designated in the choice of law clause.⁴⁴ The court agreed, though its reasoning was sparse. The fact "[t]hat the parties agreed that *their contract* should be governed by an expressed procedure does not bind them as to causes of action sounding in tort"⁴⁵ The court further emphasized that "there is no reason why all [claims] must be resolved by reference to the law of the same jurisdiction"⁴⁶

In *Klock v. Lehman Brothers Kuhn Loeb Inc.*,⁴⁷ the parties entered into a contract providing that the agreement "shall be governed by the laws of the State of New York."⁴⁸ The court in *Klock* rejected the plaintiff's argument that the parties' chosen law should govern the fraud claim, reasoning that "[r]egardless of whether these clauses . . . can be said to govern the entire relationship between the parties, it has been held in New York that a contractual choice of law provision governs only a cause of action sounding in contract."⁴⁹

In *Krock v. Lipsay*,⁵⁰ parties entered into a transaction for the sale of a waterfront property.⁵¹ A mortgage document executed by the parties contained a generic choice of law clause providing that "[t]his mortgage shall be governed by and construed in accordance with the law of the Commonwealth of Massachusetts"⁵² The Second Circuit Court of

⁴¹ 427 N.Y.S.2d 10 (App. Div. 1980).

⁴² *Id.* at 12.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.* at 12-13 (emphasis added).

⁴⁶ *Id.* at 13.

⁴⁷ 584 F. Supp. 210 (S.D.N.Y. 1984).

⁴⁸ *Id.* at 215.

⁴⁹ *Id.*

⁵⁰ 97 F.3d 640 (2d Cir. 1996).

⁵¹ *Id.* at 643.

⁵² *Id.*

Appeals rejected the plaintiff's argument that the parties' choice of law provision applied to the tort-based fraudulent misrepresentation claim.⁵³ The court held that there was "no way [the parties' clause] could be read broadly enough to apply to fraudulent misrepresentation" because the clause did not reflect any intention to include non-contractual claims.⁵⁴ The court further explained that "[u]nder New York law, a choice-of-law provision indicating that the *contract* will be governed by a certain body of law does not dispositively determine that law which will govern a claim of *fraud* arising incident to the contract."⁵⁵ Although the clause in *Krock* was construed narrowly, the court expressed its willingness to interpret a choice of law clause to apply to non-contractual claims so long as the "express language of the provision [is] 'sufficiently broad' as to encompass the [parties'] entire relationship"⁵⁶ But, of course, in such a case, the clause is no longer a generic one, but instead a specific or a nexus-based one.

Since the 1990s, there have been a myriad of decisions by New York courts reaffirming the principle that generic choice of law clauses do not extend to non-contractual claims. Most states that have considered this issue have followed New York's lead in interpreting generic choice of law clauses narrowly.⁵⁷

B. *The Broad Approach*

By contrast, some states employ what might be called a broad approach to the interpretation of generic choice of law clauses.⁵⁸ These courts interpret generic choice of law clauses to encompass non-

⁵³ *Id.* at 645.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ Courts in Texas, Pennsylvania, Arizona, Connecticut, Florida, Georgia, Iowa, Indiana, Louisiana, Massachusetts, Michigan, New Jersey, North Carolina, Oregon, Oklahoma, Wisconsin, and Washington follow the broad approach. See Coyle, *supra* note 2, at 668-70 (listing states); see also *Ochoa v. Indus. Ventilation, Inc.*, No. 18-CV-0393, 2021 WL 5405203, at *4 (E.D. Wash. Nov. 18, 2021); *Norred & Assocs., Inc. v. ADP Inc.*, No. 20-CV-00239, 2020 WL 10576414, at *2 (N.D. Ga. Sept. 17, 2020); *Almeida v. BOKF, NA*, 471 F. Supp. 3d 1181, 1192 (N.D. Okla. 2020).

⁵⁸ These states include Arkansas, California, Delaware, Illinois, Kansas, Minnesota, Montana, Nebraska, and Virginia. See Coyle, *supra* note 2, at 680.

contractual claims despite the clauses' lack of nexus-based language.⁵⁹ Under the broad approach, there is a sort of presumption that generic choice of law clauses supply the controlling law for all claims arising from or relating to the parties' agreement.

The broad approach is most commonly associated with California and the *Nedlloyd Lines B.V. v. Superior Court* decision.⁶⁰ In *Nedlloyd*, the parties entered into a shareholders' agreement which provided that "[t]his agreement shall be governed by and construed in accordance with Hong Kong law . . ."⁶¹ The plaintiff asserted a violation of the implied covenant of good faith and fair dealing and breach of fiduciary duty.⁶² The defendant argued that the plaintiff's claim was governed by Hong Kong law pursuant to the choice of law clause.⁶³ The plaintiff, by contrast, argued that its non-contractual claims should be governed by California law.⁶⁴

The *Nedlloyd* court held that the law specified in the choice of law clause governed all claims arising from the parties' agreement. The court focused on the phrase "governed by" and explained that the phrase signifies a relationship of "absolute direction, control, and restraint."⁶⁵ According to the court, the words "governed by" evidenced the parties' "clear contemplation" that their agreement would be governed by Hong Kong law absolutely.⁶⁶ The court further reasoned that the plaintiff's non-contractual claims were governed by Hong Kong law because its claims arose from, and could only exist because of, the parties' agreement.⁶⁷ The court expressed the view that this broad approach to

⁵⁹ See *Nw. Airlines, Inc. v. Astraeva Aviation Servs., Inc.*, 111 F.3d 1386, 1392 (8th Cir. 1997) (Minnesota); *Pyott-Boone Elecs. Inc. v. IRR Tr. for Donald L. Fetterolf* Dated Dec. 9, 1997, 918 F. Supp. 2d 532, 544 (W.D. Va. 2013) (Virginia); *Freedman v. Am. Online, Inc.*, 325 F. Supp. 2d 638, 653-54 (E.D. Va. 2004) (Virginia); *Nedlloyd Lines B.V. v. Superior Ct.*, 834 P.2d 1148, 1155 (Cal. 1992) (California); *Abry Partners V, L.P. v. F & W Acquisition LLC*, 891 A.2d 1032, 1048 (Del. Ch. 2006) (Delaware).

⁶⁰ *Nedlloyd Lines B.V.*, 834 P.2d 1148.

⁶¹ *Id.* at 1150.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.* at 1154.

⁶⁶ *Id.*

⁶⁷ *Id.*

interpreting choice of law clauses was consistent with “common sense and commercial reality.”⁶⁸ The court in *Nedlloyd* emphasized that if parties intend for a choice of law clause to be limited to contractual claims only, the burden should be on them to use express contractual language reflecting this intention.⁶⁹

Post-*Nedlloyd*, a number of courts have focused on whether a clause contains “governed by” language. If so, they automatically interpret the clause to apply to non-contractual claims. For example, in *Olinick v. BMG Entertainment*, the parties’ choice of law clause provided “[t]his Agreement shall be governed by and construed and enforced in accordance with the laws of the State of New York”⁷⁰ The court reasoned that because the clause contained the words “governed by,” the clause “encompass[e]d all causes of action arising from or related to that agreement, regardless of how [the claims] are characterized”⁷¹

It is not clear how much actually hinges on the particular phraseology of the generic choice of law clause, however. There is dicta in some California cases that generic choice of law clauses should be interpreted broadly to apply to all claims arising from a contract, regardless of how the clause is written.⁷² For example, in *G.P.P. Inc. v. Guardian Protection Products, Inc.*, the parties entered into a contract that contained a choice of law clause which provided “[t]he choice of law of the parties is the law of the State of California.”⁷³ This was not a generic choice of law clause, but rather an atypical choice of law clause. Nonetheless, the court’s reasoning was instructive. The court held that “[u]nder California law, the *Nedlloyd* test applies and broadly construes choice-of-law provisions to encompass any claims — however styled — arising out of or related to

⁶⁸ *Id.*

⁶⁹ *Id.*; see *Pyott-Boone Elecs. v. IRR Tr. for Donald L. Fetterolf* Dated Dec. 9, 1997, 918 F. Supp. 2d 532, 545 (W.D. Va. 2013).

⁷⁰ *Olinick v. BMG Ent.*, 42 Cal. Rptr. 3d 268, 276 (Ct. App. 2006) (emphasis omitted).

⁷¹ *Id.* at 278 (quoting *Nedlloyd Lines B.V.*, 834 P.2d at 1155). For another case where the court focused on the “governed by” language, see *Unit Process Co. v. Raychem Corp.*, Nos. A092407, A094012, 2002 WL 173286, at *1, *6 (Cal. Ct. App. Mar. 7, 2002).

⁷² Note that it is unusual to find a generic choice of law clause without the word “govern” in it.

⁷³ *G.P.P., Inc. v. Guardian Prot. Prods., Inc.*, No. 15-CV-00321, 2015 WL 3992878, at *15 (E.D. Cal. June 30, 2015) (alteration in original).

the contract.”⁷⁴ In that case, the court referred to the choice of law clause as “similarly broad and set[ting] forth the parties’ choice of law as the State of California, with no exceptions or qualifications.”⁷⁵ Similarly, in *Wissot v. Great-West Life & Annuity Insurance Co.*, the court considered the following generic choice of law clause: “This policy is subject to the laws of the State of Illinois”⁷⁶ Although the court applied Illinois law to read the clause broadly, it indicated that “the result would remain the same” under California law.⁷⁷ It is probably a safe bet to say that any generic choice of law clause will be interpreted in a manner consistent with *Nedlloyd* despite minor differences in wording.

One final point about the California approach. Even though California courts state that the non-contractual claims must be related to the contract, there is little meaningful scrutiny of relatedness in the cases.⁷⁸ Pretty much any tort, statutory, or other claim has been held to fall within the scope of a generic choice of law clause under California law. In fact, no court in California has articulated or employed a specific relatedness test in the context of generic (or other) choice of law clauses.

The bottom line is that courts following the broad approach to generic choice of law clauses typified by California courts will deem any such clause to encompass non-contractual claims.⁷⁹ The only way to avoid such a result would be for the parties to specifically denote their intention not to have the chosen law extend beyond contractual claims.

⁷⁴ *Id.*

⁷⁵ *Id.* at *16; *see also* *Medimatch, Inc. v. Lucent Techs. Inc.*, 120 F. Supp. 2d 842, 861 (N.D. Cal. 2000) (contract provided that the “construction, interpretation and performance of [the contract]” would be governed by New Jersey law; court agreed with the parties that New Jersey law covered all claims but did not specifically address the scope issue).

⁷⁶ *Wissot v. Great-W. Life & Annuity Ins.*, No. CV 11-10040 (JCGx), 2012 WL 13059733, at *7 (C.D. Cal. Dec. 12, 2012).

⁷⁷ *Id.*

⁷⁸ *See, e.g.*, *Gustafson v. BAC Home Loans Servicing, LP*, 294 F.R.D. 529, 536 (C.D. Cal. 2013); *Dos Beaches, LLC v. Mail Boxes Etc., Inc.*, No. 09CV2401 (RBB), 2012 WL 506072, at *19 (S.D. Cal. Feb. 15, 2012).

⁷⁹ *See, e.g.*, *Brighton v. Lutheran Church-Mo. Synod*, No. SACV 12-883 (MLGx), 2013 WL 12136522, at *3 (C.D. Cal. Feb. 1, 2013) (applying *Nedlloyd* and readily concluding that the claims fell within the scope of the choice of law clause); *Cannon v. Wells Fargo Bank N.A.*, 917 F. Supp. 2d 1025, 1051-52 (N.D. Cal. 2013) (same); *Estrella v. Freedom Fin. Network, LLC*, No. C 09-03156, 2010 WL 2231790, at *4 (N.D. Cal. June 2, 2010) (same).

C. *The Relatedness Approach*

A third approach might be characterized as a “relatedness” approach. The focus is largely on whether the non-contractual claims are sufficiently related to the parties’ agreement so as to be encompassed by the choice of law clause. Essentially, the relatedness approach is a slightly more stringent version of the broad approach to the interpretation of generic choice of law clauses. Courts that follow this approach are prepared to interpret a generic choice of law clause broadly, but only with respect to non-contractual claims that are “related” to the contract.⁸⁰

Interestingly, some of these courts adopt a “one/two punch” approach to determining whether to apply the parties’ choice of law to tort and other non-contractual claims. The first “punch” is to look at the wording of the clause itself to ascertain whether it is broad enough to cover the tort claim. If it is not, the second “punch” involves looking at whether the tort claim is nonetheless so connected to the contract that the law specified in the choice of law clause should apply regardless of its particular phraseology.⁸¹ This one/two punch is aptly described in *Bajwa v. United States Life Insurance Co.*, a recent California case applying Illinois law to determine the scope of a choice of law clause.⁸² In *Bajwa*, the court concluded that the language of the choice of law clause — “the policy, and all claims arising out of the policy, are governed by the laws of Illinois” — did not extend to tort claims.⁸³ Nonetheless, under Illinois law, any “tort claims that are *dependent* upon the contract are subject to a contract’s choice-of-law clause regardless of the breadth of the clause.”⁸⁴

⁸⁰ See, e.g., *Nw. Airlines, Inc. v. Astraea Aviation Servs., Inc.*, 111 F.3d 1386, 1392 (8th Cir. 1997) (“These [tort] claims are closely related to the interpretation of the contracts and fall within the ambit of the express agreement that the contracts would be governed by Minnesota law.”).

⁸¹ See, e.g., *Amakua Dev. LLC v. Warner*, 411 F. Supp. 2d 941, 956 (N.D. Ill. 2006) (“The Court concludes that the language of the Choice of Law Clause does not indicate that the parties intended California law to apply to tortious conduct. . . . The Court next considers whether Count III should be viewed as dependent on the Agreement, such that the Choice of Law Clause should govern the fraud claim.”).

⁸² *Bajwa v. U.S. Life Ins.*, No. 19-cv-00938, 2021 WL 2661836 (E.D. Cal. June 16, 2021).

⁸³ *Id.* at *6.

⁸⁴ *Id.*; see also *Cunningham Charter Corp. v. Learjet, Inc.*, 870 F. Supp. 2d 571, 577 (S.D. Ill. 2012) (“Thus, the language does not indicate the intent that Kansas law apply to the

The specific doctrinal test that courts adopt to determine relatedness will differ from state to state. For instance, Illinois courts have adopted the following three-part test to determine whether the tort claims at issue are “dependent upon the contract”: “(1) the claim alleges a wrong based on the construction and interpretation of the contract; (2) the tort claim is closely related to the parties’ contractual relationship; or (3) the tort claim could not exist without the contract.”⁸⁵ Some states do not seem to articulate a particular test, so much as focus on whether the tort claims are somehow meaningfully connected to the contract. For instance, in *Credit Payment Services, Inc. v. Moneygram Payment Systems, Inc.*, the court applied the parties’ choice of law clause to a tort claim because “any duty of care owed by Defendant can only be predicated on the Parties’ business relationship as created by the Agreement.”⁸⁶ In *Northwest Airlines, Inc. v. Astraea Aviation Services, Inc.*, the court noted that “[a]lthough mainly styled as torts, these claims stem from Northwest’s alleged failure promptly to provide functioning parts and adequate support . . . as required under the contracts.”⁸⁷ Thus, the tort claims were “closely related to” the interpretation of the contracts and fell within the choice of law clause.⁸⁸ In *Adelman’s Truck Parts Corp. v. Jones Transport*, the Sixth Circuit Court of Appeals noted that the plaintiff’s statutory claim “arose out of and [was] directly related to” the contract and therefore would be subject to the parties’ choice of governing law.⁸⁹ In all of these cases, courts employed a loose, but unarticulated, connection-based test to determine whether the parties’ choice of law clause extended to tort claims.

The relatedness approach usually leads courts to interpret a choice of law clause broadly. In this respect, there is often little difference between

instant fraud-related claims. However, as defendant points out, the breadth of the language is not determinative. Thus, the Court must consider whether the fraud-related claims in Counts IV and VI are dependent upon the contract.”).

⁸⁵ *Amakua Dev. LLC*, 411 F. Supp. 2d at 955.

⁸⁶ *Credit Payment Servs. Inc. v. Moneygram Payment Sys., Inc.*, No. 14-CV-62, 2015 WL 12531989, at *4 (E.D. Tenn. Feb. 13, 2015) (emphasis added).

⁸⁷ *Nw. Airlines, Inc. v. Astraea Aviation Servs., Inc.*, 111 F.3d 1386, 1392 (8th Cir. 1997) (emphasis added).

⁸⁸ *Id.*

⁸⁹ *Adelman’s Truck Parts Corp. v. Jones Transp.*, 797 F. App’x 997, 1001 (6th Cir. 2020).

the broad approach and the relatedness approach to determining the scope of a generic choice of law clause.⁹⁰ Unless the context dictates otherwise, reference to the broad approach in this Article is intended to include the relatedness approach as well.

IV. HOW SHOULD COURTS INTERPRET GENERIC CHOICE OF LAW CLAUSES?

I transition in this Part to the question of how courts should interpret generic choice of law clauses. I argue that courts should interpret generic choice of law clauses narrowly to apply only to contractual claims. For non-contractual claims such as tort or statutory claims, courts should conduct a choice of law analysis to ascertain the appropriate governing law. The narrow approach remains faithful to the actual words of the parties and preserves the distinction between specific or nexus-based choice of law clauses and generic choice of law clauses.

A. *Contractual Interpretation of a Generic Choice of Law Clause*

The goal of contract interpretation is to ascertain the meaning of the parties, as expressed in their contract.⁹¹ Despite this wholly uncontroversial proposition, the normal rules of contractual interpretation are largely disregarded by courts adopting a broad

⁹⁰ See Coyle, *supra* note 2, at 673 (“In practice, the two approaches are more alike than they are different. Both posit that tort and statutory claims that are ‘related’ to a contract claim are generally governed by the law set forth in a generic choice-of-law clause. The only meaningful difference between them is the rigor with which the courts police the boundary between related and unrelated claims.”).

⁹¹ 11 SAMUEL WILLISTON & RICHARD A. LORD, WILLISTON ON CONTRACTS § 30:2 (4th ed. 1990) (“[T]he process of interpretation and construction of contracts requires that when a written memorial of the parties’ bargain exists, the law cannot recognize their will or, as it is more frequently stated, their intent *unless it is expressed or implied in the writing*” (emphasis added)); see also *id.* § 31:4 (“Except in cases of ambiguity, . . . the object in interpreting or construing a written contract is to ascertain the meaning and intent of the *parties as expressed in and determined by the words they used*, irrespective of their supposed actual, subjective intent, and to give effect to their apparent, objectively expressed intent” (emphasis added)); *Pyott-Boone Elecs. Inc. v. IRR Tr. for Donald L. Fetterolf* Dated Dec. 9, 1997, 918 F. Supp. 2d 532, 544 (W.D. Va. 2013) (“A court interpreting one of these provisions, therefore, should always be guided primarily by its effort to effectuate the intent of the parties as reflected in the language of their agreement.”).

approach to the scope of generic choice of law clauses. These courts ignore the ambiguity threshold for contractual interpretation, fail to apply basic principles of contractual interpretation, read generic choice of law clauses as nexus-based choice of law clauses, place the onus on the parties to exclude non-contractual claims, fail to demonstrate consistency in interpreting forum selection clauses and choice of law clauses, and improperly consider hypothetical intent instead of actual intent. Each of these considerations is discussed in turn.

1. The Ambiguity Threshold

A choice of law clause is subject to the same rules of interpretation as any other contractual provision.⁹² At common law, prior to interpreting a provision of a contract, a party must demonstrate that the clause is ambiguous.⁹³ The ambiguity threshold is complicated in and of itself. There are two approaches that courts use to assess whether a word or phrase in a contract is ambiguous: the plain meaning approach and the contextual approach. The plain meaning approach looks at the contractual language on its face. If the words have a “plain meaning,” the court will conclude that the provision is not ambiguous and simply go ahead and apply its plain meaning.⁹⁴ By contrast, some courts follow the contextual approach, which is based on the premise that words do not have constant meaning and that ambiguity can only be divined from

⁹² William J. Woodward, Jr., *Constraining Opt-Outs: Shielding Local Law and Those It Protects from Adhesive Choice of Law Clauses*, 40 *LOY. L.A. L. REV.* 9, 16 (2006) (“In the complex analysis that often accompanies choice of law clauses, it is easy to lose sight of the fact that the enforcement of these provisions depends on plain, ordinary contract law.”).

⁹³ 11 *WILLISTON & LORD*, *supra* note 91, § 30:4 (“It is a generally accepted proposition that when the terms of a writing are plain and unambiguous, there is no room for interpretation or construction since the only purpose of judicial construction is to remove doubt and uncertainty.”). Note that Article 2 of the Uniform Commercial Code does not require a threshold finding of ambiguity prior to a court being able to interpret the words of a contract.

⁹⁴ *Malmsteen v. Universal Music Grp., Inc.*, 940 F. Supp. 2d 123, 130 (S.D.N.Y. 2013) (“To give effect to the intent of the parties, a court must interpret a contract by considering all of its provisions, and ‘words and phrases . . . should be given their plain meaning.’ ‘A written agreement that is clear, complete and subject to only one reasonable interpretation must be enforced according to the plain meaning of the language chosen by the contracting parties.’” (citations omitted)).

context and extrinsic evidence.⁹⁵ The contextual approach thus looks to extrinsic evidence to determine whether an otherwise facially unambiguous provision is, in fact, ambiguous. Regardless of which approach a jurisdiction purports to follow,⁹⁶ the bottom line is that ambiguity is the threshold gate *into* interpretation. Only once a court determines that a word or phrase is ambiguous is it permitted to engage in contractual interpretation. Ironically, there is almost no effort in any of the choice of law clause cases to address this threshold inquiry.⁹⁷ Instead, most courts following a broad approach to the scope of generic choice of law clauses seem to proceed on the assumption that such clauses are *de facto* ambiguous and therefore require interpretation.⁹⁸ Seldom is mention ever made of ambiguity.⁹⁹ Instead, the entire focus is on interpreting the choice of law clause.

Under the plain meaning approach, generic choice of law clauses are not ambiguous. Therefore, there is no need to interpret them; one simply applies the plain meaning of the clause.¹⁰⁰ A typical generic choice of law

⁹⁵ See *Pac. Gas & Elec. Co. v. G. W. Thomas Drayage & Rigging Co.*, 442 P.2d 641, 644 (Cal. 1968) (“A rule that would limit the determination of the meaning of a written instrument to its four-corners merely because it seems to the court to be clear and unambiguous, would either deny the relevance of the intention of the parties or presuppose a degree of verbal precision and stability our language has not attained.”).

⁹⁶ See Alan Schwartz & Robert E. Scott, *Contract Interpretation Redux*, 119 *YALE L.J.* 926, 964 n.1 (2010) (“A strong majority of U.S. courts continue to follow the traditional, ‘formalist’ approach to contract interpretation. A state-by-state survey of recent court decisions shows that thirty-eight states follow the textualist approach to interpretation. Nine states, joined by the Uniform Commercial Code for sales cases (UCC) and the Restatement (Second) of Contracts, have adopted a contextualist or ‘antiformalist’ interpretive regime. The remaining states’ doctrines are indeterminate.”).

⁹⁷ For an exceptional case that did make some effort to address the ambiguity question, see *Warren E. Johnson Cos. v. Unified Brand, Inc.*, 735 F. Supp. 2d 1099, 1108 (D. Minn. 2010).

⁹⁸ Those courts that follow a narrow approach to contractual interpretation have presumably concluded that the generic choice of law clause is not ambiguous and proceed to apply the plain meaning of the clause. There is rarely reference, however, in these cases to the ambiguity issue at all.

⁹⁹ For a rare case referencing ambiguity, see *King v. Bumble Trading, Inc.*, 393 F. Supp. 3d 856, 863 (N.D. Cal. 2019) (holding that choice of law provision was not ambiguous).

¹⁰⁰ There is disagreement on this point as well. See, e.g., *Nedlloyd Lines B.V. v. Superior Ct.*, 834 P.2d 1148, 1168 (Cal. 1992) (Kennard, J., concurring and dissenting)

clause reads, “This contract shall be governed by X law.” Under a plain meaning approach, there is nothing ambiguous about the clause.¹⁰¹ It provides that “*this* contract” will be governed by X law.¹⁰² It does not provide that other claims related to this contract will also be governed by X law.

The silence with respect to other claims does not render the clause ambiguous.¹⁰³ In the words of the Seventh Circuit Court of Appeals, “[s]ilence creates ambiguity . . . only when the silence involves a matter naturally within the scope of the contract as written. A contract is not ambiguous merely because it fails to address some contingency[.]”¹⁰⁴ An illustration to underscore this point might be helpful. Assume I enter into a contract with a painter to paint my “kitchen and dining room walls.” The fact that I did not specify whether I wanted the painter to paint my family room, bedroom, and bathroom does not render the clause in the contract ambiguous.¹⁰⁵ The clause is clear: there is a contract

(“[I]t cannot be said of the choice-of-law clause in this case that it was clearly intended by the parties to encompass related noncontractual causes of action. Nor, however, can it be said that the choice-of-law clause here was plainly intended to exclude related noncontractual causes of action. Instead, *the clause is ambiguous*; it is not clear whether the parties intended it to govern related noncontractual causes of action.” (emphasis added)); *see also id.* at 1170 (“Indeed, the very fact that Justices Panelli and Mosk disagree with the majority regarding the meaning of the clause, and that both the majority and these two justices find the clause clear, but conclude it has opposite meanings, ironically and convincingly demonstrates that the clause *is* ambiguous.”).

¹⁰¹ *See id.* (“Indeed, the ambiguity in the scope of this clause proceeds not so much from its language as from its context. Taken without reference to context, the clause *is* unambiguous, but not in the manner suggested by the majority. Because the clause refers only to ‘this Agreement,’ and not, like the similar clause at issue in *Smith*, to ‘matters arising under or growing out of this agreement . . .’, it appears on its face not to apply to noncontractual causes of action.”).

¹⁰² GLEN BANKS, *NEW YORK PRACTICE SERIES - NEW YORK CONTRACT LAW* § 9:24 (2d ed. 2006) (“Ambiguity generally does not arise from a contract’s silence on an issue. An ambiguity does not arise out of what was not written at all, but only out of what was written so blindly or imperfectly that its meaning is doubtful.”).

¹⁰³ 11 WILLISTON & LORD, *supra* note 91, § 30:4 (“A contract’s silence on a particular issue does not, by itself, create ambiguity as a matter of law, though it will create an ambiguity when it involves a matter naturally within the scope of the contract.”).

¹⁰⁴ *Consol. Bearings Co. v. Ehret-Krohn Corp.*, 913 F.2d 1224, 1233 (7th Cir. 1990).

¹⁰⁵ *See* Steven J. Burton, *A Lesson on Some Limits of Economic Analysis: Schwartz and Scott on Contract Interpretation*, 88 *IND. L.J.* 339, 343 (2013) (chronicling four types of contractual ambiguity identified by Professor Farnsworth: “term ambiguity”; “sentence

to paint kitchen and dining room walls. Full stop. The analysis with respect to choice of law clauses is identical. When parties have agreed to a generic choice of law clause, they have agreed to have “the contract” interpreted in accordance with the chosen law. The failure of the parties to include broader language signals only one thing: that the parties did *not* — by their words — intend anything but the contract to be subject to the chosen law.¹⁰⁶

Of course, there is another approach to ambiguity. Under the contextual approach, a court may interpret words in a contract that appear on their face to be clear but are rendered ambiguous in light of extrinsic evidence. *Pacific Gas Company v. G.W. Thomas Drayage & Rigging Co.* is one of the leading cases in this respect.¹⁰⁷ In *Pacific Gas*, the defendant agreed to indemnify the plaintiff against “against all loss, damage, expense and liability resulting from . . . injury to property, arising out of or in any way connected with the performance of this contract.”¹⁰⁸ Despite the seemingly clear obligation to indemnify the plaintiff against “all loss,” the defendant argued that the clause was intended to cover only injury to the property of third parties and not injury to the plaintiff’s property (i.e., it was a third party indemnification agreement).¹⁰⁹ The court allowed the defendant to adduce extrinsic evidence to establish that the clause was ambiguous and to establish its meaning.¹¹⁰ Notably the defendant was permitted to introduce evidence of “admissions” by plaintiff’s agents and evidence of “defendant’s conduct under similar contracts entered into with plaintiff,” among other things, to show that the parties intended the clause to cover only injury to the property of third parties.¹¹¹

ambiguity”; “structural ambiguity” and “vagueness”). A generic choice of law clause does not fit into any of these categories.

¹⁰⁶ See BANKS, *supra* note 102, § 9:24 (“When the parties’ contract omits terms — particularly those found in other, similar contracts — the inescapable conclusion usually is that the parties intended the omission.”).

¹⁰⁷ *Pac. Gas & Elec. Co. v. G. W. Thomas Drayage & Rigging Co.*, 442 P.2d 641 (Cal. 1968).

¹⁰⁸ *Id.* at 642.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 646.

¹¹¹ *Id.* at 642.

When interpreting generic choice of law clauses, courts adopting a broad approach must be assuming that a clause is ambiguous but failing to say so explicitly. In the words of one of the dissenting judges in *Nedlloyd*, “the very fact that [the dissenting judges] disagree with the majority regarding the meaning of the clause, and that both the majority and these two justices find the clause clear, but conclude it has opposite meanings, ironically and convincingly demonstrates that the clause *is* ambiguous.”¹¹² Simply because a judge *can* interpret a clause in two different ways does not, in itself, render a clause ambiguous under the contextual approach. What is required, per *Pacific Gas*, is that the party seeking to establish ambiguity introduce extrinsic evidence that the parties had a meaning other than that facially evidenced by the words of the contract.¹¹³ In the generic choice of law clause cases, parties may be arguing that the contractual language is ambiguous but are failing to provide evidence of actual party intent to establish that ambiguity — a prerequisite to contractual interpretation, even under the contextual approach.

In short, these courts are working from the wrong starting point. They are working from the starting point of “We can conjure up two different meanings and therefore the clause is ambiguous.” Rather, they should be working from the starting point of “Is there evidence *from the parties* that in selecting these words for the clause, they intended something other than the plain meaning?” All of this to say that even under the contextual approach, interpretation of a generic choice of law clause should be a non-starter unless a party introduces extrinsic evidence of actual party intent.¹¹⁴

2. Basic Contractual Interpretation

It is clear that courts are bypassing ambiguity as threshold inquiry and proceeding right to the “meat” of contractual interpretation. And there,

¹¹² *Nedlloyd Lines B.V. v. Superior Ct.*, 834 P.2d 1148, 1170 (Cal. 1992) (Kennard, J., concurring and dissenting).

¹¹³ *See, e.g., M & G Polymers USA, LLC v. Tackett*, 574 U.S. 427, 444 (2015) (Ginsburg, J., concurring) (“If, after considering all relevant contractual language in light of industry practices, the Court of Appeals concludes that the contract is ambiguous, it may turn to extrinsic evidence — for example, the parties’ bargaining history.”).

¹¹⁴ *Id.* at 443.

courts like *Nedlloyd* are failing to remain faithful to the actual words of the parties' contact. The choice of law clause in *Nedlloyd* read as follows: "This agreement shall be governed by and construed in accordance with Hong Kong law[.]"¹¹⁵ The court in *Nedlloyd* ascribed great significance to the two words "governed by." The court stated:

The phrase "governed by" is a broad one signifying a relationship of absolute direction, control, and restraint. Thus, the clause reflects the parties' clear contemplation that "the agreement" is to be completely and absolutely controlled by Hong Kong law. No exceptions are provided. . . .

If Hong Kong law were not applied . . . , it would effectively control only part of the agreement, not all of it. Such an interpretation would be inconsistent with the unrestricted character of the choice-of-law clause.¹¹⁶

Notice the hyperbolic language: "absolute direction, control and restraint"; "completely and absolutely controlled"; "no exceptions provided"; "unrestricted character." The court in *Nedlloyd* read far too much into two words, divorced from the actual clause in which they appeared. The court put the exclusive emphasis on the words "governed by" while largely ignoring what it qualified: "[t]his agreement."¹¹⁷ The clause simply says that *this* agreement will be "governed by" a certain law.¹¹⁸ This means that matters related to performance obligations, breach, interpretation, and the like — matters concerning *this* contract

¹¹⁵ *Nedlloyd*, 834 P.2d at 1150 (majority opinion).

¹¹⁶ *Id.* at 1154.

¹¹⁷ See Anya Bernstein, *Before Interpretation*, 84 U. CHI. L. REV. 567, 568 (2017) ("Interpretation requires an object: a text, an act, a concept, a *something* to be interpreted. An interpreter must pick out that object. . . . As communicators, they can creatively deploy and combine a variety of rhetorical moves."). Bernstein was speaking specifically of statutory interpretation, but the comments are no less true of contractual interpretation.

¹¹⁸ See, e.g., *Ochoa v. Indus. Ventilation, Inc.*, No. 18-CV-0393, 2021 WL 5405203, at *4 (E.D. Wash. Nov. 18, 2021) ("The sole term 'agreement' supports the Court's conclusion that the contracts solely govern claims sounding in contract."); *Com. Point Cap., Inc. v. First Data Corp.*, No. 19-cv-556-W (LL), 2019 WL 7020057, at *3 (S.D. Cal. Dec. 20, 2019) ("The clearest reference to the agreement's scope is the phrase '[t]his agreement.'").

— are controlled by the parties’ chosen law. That is all.¹¹⁹ The wording itself does not speak to the parties’ intention to have their entire relationship governed by the chosen law.

Additionally, the language of generic choice of law clauses can readily be contrasted with the language of specific or nexus-based choice of law clauses. With the latter, parties specify that all claims arising from or related to their contract will be governed by a certain law; under the former, they simply provide that “the contract” will be governed by a certain law. It is not hard to see how the existence of this alternate phraseology would have an impact on the proper interpretation of a generic choice of law clause. The clauses use very different language: one includes “arising from or related to” language and one does not. As a basic interpretation matter, the omission of the critical relatedness language should mean that the choice of law clause does not extend any further than the contract itself. If the parties wanted a choice of law clause to govern non-contractual claims, there was plenty of language readily available to effectuate that intention. The choice not to include that relatedness language must be given effect.¹²⁰ These are basic bread-and-butter principles of contractual interpretation that are used by courts all the time. Yet, they are seemingly ignored by those courts seeking to give generic choice of law clauses a broad interpretation.¹²¹

¹¹⁹ Contrast this with the following choice of law clause: “This Agreement shall be construed, interpreted and enforced in accordance with, *and the Company [Plaintiff] shall be governed by*, the laws of the State of New York excluding any that may direct the application of the laws of another jurisdiction.” *Credit Payment Servs., Inc. v. Moneygram Payment Servs.*, No. 14-CV-62, 2015 WL 12531989, at *4 (E.D. Tenn. Feb. 13, 2015) (emphasis added).

¹²⁰ Some courts that employ the relatedness approach acknowledge that as a matter of *contractual interpretation*, generic choice of law clauses do not extend beyond contractual claims. *See, e.g.,* *Cunningham Charter Corp. v. Learjet, Inc.*, 870 F. Supp. 2d 571, 577 (S.D. Ill. 2012) (finding that the general choice of law clause extends only to contract claims and not tort claims because the parties did not specify their intent for the clause to govern all claims). Despite this conclusion, these courts proceed to nonetheless apply the chosen law where the tort or other claims are sufficiently related to the contract.

¹²¹ This is particularly problematic since the party alleging that the choice of law clause applies bears the burden of proof on this issue. *See Clark v. Advanceme, Inc.*, No. CV 08-3540 (FFMx), 2009 WL 10672598, at *3 (C.D. Cal. Jan. 20, 2009) (“The advocate of the choice-of-law clause — here, Defendant — has the burden of establishing that claims are within its scope.”). Thus, even if it were a close call (which it is not), the tie

This Southern District of New York in *In re Lois/USA, Inc.* laid out this common-sense interpretation of a generic choice of law clause.¹²² The court there was dealing with the following choice of law clause: “*This Agreement and the other Financing Agreements . . . shall be construed in all respects in accordance with, and governed by, . . . Illinois [law].*”¹²³ The court noted that the language “is about as broad as this Court can imagine when it comes to covering any actual or alleged agreement or contract” but was “notably silent in covering matters other than agreements between the parties.”¹²⁴ The court pointed out that the clause “does not, by way of example, say what it easily could have — saying, in words or substance, that ‘any and all dealings between the parties with respect to the financing,’ or that ‘any dispute between the parties with respect to the subject matter of the financing,’ shall be governed by Illinois law.”¹²⁵ Because the contract was silent on the clause’s extra-contractual applicability, the court declared that it was “reluctant to rewrite the Agreement to broaden the choice-of-law clause’s scope to cover claims that the choice-of-law clause did not address.”¹²⁶

One quick drafting exercise illustrates the illogic of the broad approach to “governed by” or similar language in generic choice of law clauses. Consider the following drafting variations:

1. This contract is governed by New York law.
2. Any disputes arising from or related to this contract are governed by New York law.

Under the broad approach to interpretation, (1) is interpreted as though it were (2). That is, a generic choice of law clause is interpreted as though it contained “arising from” or “related to” language. Put a different way, courts using the broad approach to interpretation treat a generic choice of law clause the exact same way they would a nexus-based

would go to the party resisting the application of the choice of law clause to extra-contractual claims.

¹²² *Lois/USA, Inc. v. Conseco Fin. Servicing Corp. (In re Lois/USA Inc.)*, 264 B.R. 69, 97 (Bankr. S.D.N.Y. 2001).

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.* at 101.

or specific choice of law clause. So, whether parties provide that “All matters arising from or related to this contract are governed by X law” or they provide that “This contract will be governed by X law,” it all means the same thing. The distinction between specific or nexus-based choice of law clauses and generic choice of law clauses is collapsed. It is hard to understand how a court could read these clauses the exact same way.

One final note: generic choice of law clauses, like most choice of law clauses, tend to be boilerplate. They are usually lifted wholesale from standard templates and then plopped into contracts without meaningful scrutiny.¹²⁷ It is safe to say that lawyers generally give the decision to select a particular law little thought,¹²⁸ and that they give the actual *wording* of the clause even less thought. In light of this, are we putting too much stock in the “textual” interpretation? It is really appropriate to parse words when everyone knows that the parties (or, more accurately, their lawyers) gave virtually no thought to those words? The answer is yes. Contractual interpretation is contractual interpretation. There is no basis for saying “these terms are boilerplate and so we are not going to apply normal principles of contractual interpretation to them.” To conclude otherwise would not only be unworkable, but it would put all contract boilerplate beyond interpretation’s reach.¹²⁹

3. A Reverse Onus?

Proponents of the broad approach to generic choice of law clauses would put the onus on the drafters of the contract to somehow exclude

¹²⁷ Coyle, *supra* note 2, at 641.

¹²⁸ Many lawyers reflexively choose a particular state’s law based not on its content *per se* but based on other factors: it is the corporation’s “home” law; it is the law with which the lawyer is most familiar; it is a sophisticated body of law that other lawyers typically choose for this sort of contract. Sepinuck, *supra* note 33, at 4 (“It would be tempting to assume that transactional lawyers drafting choice-of-law clauses determine what state’s law to select based on research; that is, they make an informed decision about what state’s law is in the client’s best interest. Unfortunately, that is not always the case. Some transactional lawyers reflexively select the law of the client’s home state or principal office, or select the law of a jurisdiction, such as New York or Delaware, that is widely believed to be well developed or conducive to business.”).

¹²⁹ Forum selection clauses are also boilerplate, and yet courts (including California courts) interpret them using normal principles of contractual interpretation.

the chosen law for non-contractual disputes.¹³⁰ They would have the parties clearly spell out in the choice of law clause that the clause only covers contractual claims. This suggestion is peculiar. Why would a drafter of a choice of law clause ever think to explicitly exclude something that has not been included? The requirement to draft around something that is being *read into* the clause is illogical. The painting example neatly illustrates this point. One would never draft a clause that says “Painter agrees to paint my kitchen and dining room. Painter does *not* agree to paint my family room, bedroom, and bathroom.” The silliness of this example illustrates the silliness of placing the burden on the parties to exclude something they have not agreed to in the first place.

Moreover, aside from using a generic choice of law clause, it is actually quite difficult to draft a choice of law clause that evidences a party’s intent to limit the choice of law clause to contractual claims only. Consider the following language that parties might use to convey their intention: “This contract is governed by New York law. Any matters outside this contract, including tort and statutory claims, are not governed by New York law.” This language was chosen to mimic the structure of the first choice of law clause referred to in the previous section. There are myriad problems with this formulation.

First, it contains a generic choice of law clause *along with* limiting language, which means that the *Nedlloyd* interpretation of “governed by” falls apart. *Nedlloyd* provides that the words “governed by” show that the parties intend for the entirety of their relationship to be subject to the chosen law. With limiting language embedded within the clause, “governed by” can no longer be read this way. In other words, it is inconsistent to read “governed by” broadly when the remainder of the clause clearly denotes the parties’ intention not to have the chosen law apply to non-contractual claims.

¹³⁰ *Pyott-Boone Elecs. Inc. v. IRR Tr. for Donald L. Fetterolf* Dated Dec. 9, 1997, 918 F. Supp. 2d 532, 545 (W.D. Va. 2013) (“If parties wish to exclude causes of action arising in tort or by statute from the coverage of their agreement, they may do so, but they should reflect that intent in their contract.”); *Olinick v. BMG Ent.*, 42 Cal. Rptr. 3d 268, 278 (Ct. App. 2006) (“If sophisticated parties, such as those now before us, truly intended the result being advocated by Olinick, they should have specified what jurisdiction’s law applies to what issues.”). To the author’s knowledge, no court has actually suggested language on how parties would actually do so.

Second, the provision as written does not actually make sense. The provision states that tort and statutory claims “are not governed by New York law.” The problem is that the parties cannot by contract exclude the operation of New York law if that happens to be the law that would otherwise apply under the forum’s choice of law rules. If a New York court concludes that the chosen law is the otherwise applicable law under whatever choice of law analysis it adopts, the parties’ intentions to the contrary will not be honored.

Alternative formulations fare slightly better but could still lead to interpretive issues. For instance, the contract might provide that “The parties choose New York law to govern their contractual claims only.” Again, the parties cannot prevent the court from applying New York law if that is the otherwise applicable law. Moreover, it is hard to see much of a difference between “The parties choose New York law to govern their contractual claims only” and “This contract is governed by New York law.” The best formulation would probably be something to the effect of “The parties do not intend for this choice of law clause to extend to non-contractual claims.” Here, we avoid a statement that purports to displace a court’s authority to decide the otherwise applicable law. But, choice of law clauses are usually not drafted using words of intention; they are drafted as categorical imperatives: “X law governs”; “The contract is subject to X law”; “All disputes will be resolved in accordance with X law.” The problem is not insurmountable, but it does illustrate the awkwardness of having parties draft a clause which is unmistakably explicit about its coverage.

One final point about drafting. One might question why the better solution is to require parties to *exclude* non-contractual claims rather than to *include* non-contractual claims.¹³¹ It involves next-to-zero effort for a party to convert a generic choice of law clause into a specific or a nexus-based one and therefore evidence its intent to include non-contractual claims within its ambit. By contrast, it requires jumping through hoops to do the reverse, as the exercise above has demonstrated.

¹³¹ See Ronald J. Gilson, Charles F. Sabel & Robert E. Scott, *Text and Context: Contract Interpretation as Contract Design*, 100 CORNELL L. REV. 23, 41 (2014) (“[A] textualist theory of interpretation also creates an incentive to draft carefully. Under a contextualist theory, a party for whom a deal has turned out badly has an incentive to claim that the parties meant their contract to have a different meaning than the obvious or standard one.”).

To do so, one must read a generic choice of law clause as implicitly including non-contractual claims, and then draft around this implicit reading. If parties cannot be expected to do the former, they certainly will not do the latter.

Reality should not be ignored here. Parties simply *will not* change drafting practices either way.¹³² The scope issue has presented itself for decades and still, scores of cases take up the issue every year. If parties refuse to change their drafting to incorporate best practices, why should they be rewarded through an extremely generous interpretation of their clauses? And why should parties who insist a clause be interpreted in accordance with its actual and literal meaning be punished for failing to engage in drafting gymnastics? All of this to say that courts adopting a broad approach to generic choice of law clauses are putting the burden on the wrong party.

4. A Textual Disconnect Between Choice of Law and Choice of Forum Clauses

There is another interpretative anomaly that is worth exploring in the context of generic choice of law clauses. Courts that follow a broad approach to generic choice of law clauses do not seem to employ comparable principles to the interpretation of forum selection clauses. In other words, there is a disconnect between the interpretative approach courts use for forum selection clauses, on the one hand, and choice of law clauses, on the other.

As discussed, California courts interpret choice of law clauses *without* relatedness language very broadly. By contrast, they interpret forum selection clauses *with* relatedness language fairly narrowly. A recent California case, *Clark-Alonso v. Sw. Airlines Co.*,¹³³ illustrates this point. In *Clark-Alonso*, the forum selection clause provided:

You and we consent to the personal and exclusive jurisdiction and venue of the state and federal courts within Dallas County, Texas. You and we also agree to litigate any disputes between or involving you and us exclusively in the state and federal courts

¹³² Coyle, *supra* note 2, at 672 (“To date, however, many contracting parties have declined to redraft their clauses to give them a more expansive scope.”).

¹³³ 440 F. Supp. 3d 1089 (N.D. Cal. 2020).

within Dallas County, Texas. You agree that any cause of action arising out of and/or relating to this program be commenced within (2) years after the cause of action accrues.¹³⁴

The plaintiff filed suit in California in contravention of the Texas forum selection clause. The plaintiff argued that his claim was “not covered” by the Texas forum selection clause and therefore he was entitled to proceed in California.¹³⁵ The court agreed. In concluding that the forum selection clause did not extend to the plaintiff’s claim, the court carefully scrutinized the words of the forum selection clause at issue. It distinguished between forum selection clauses containing “arising out of” language and forum selection clauses containing “related to” language.¹³⁶ The court indicated that a forum selection clause that contains the words “arising out of” only applies to disputes concerning the interpretation and performance of the contract. By contrast, forum selection clauses that use “related to” language are broader and cover all disputes having some “logical or causal connection” to the contract.¹³⁷ Thus, if a clause contained “arising from” language, it would be read narrowly; if it contained “related to” language, it would be interpreted broadly. Because the forum selection clause in *Clark-Alonso* utilized the “arising from” formulation, it would be interpreted narrowly. As such, the court concluded that the Texas forum selection clause at issue did not cover the plaintiff’s extra-contractual claims and therefore, he could proceed to adjudicate those claims in California.¹³⁸

For our purposes, the takeaway is twofold. First, California courts engage in a robust contractual interpretation analysis when it comes to forum selection clause in a way that they do not with generic choice of

¹³⁴ *Id.* at 1092. Forum selection clauses and choice of law clauses tend to match. Nyarko, *supra* note 1, at 40 (“If a contract includes both a choice-of-forum and a choice-of-law clause, parties consistently match the substantive law to the forum.”).

¹³⁵ *Clark-Alonso*, 440 F. Supp. 3d at 1093-94.

¹³⁶ *Id.* at 1094-95. The court in *Clark-Alonso* may actually have misinterpreted the forum selection clause since the parties actually agreed to litigate “any disputes” between them in Texas. The “arising out of” language was found in a separate clause dealing with a two-year statute of limitations.

¹³⁷ *Id.* at 1094.

¹³⁸ *Id.* at 1095.

law clauses.¹³⁹ And second, California courts are not prepared to extend forum selection clauses broadly even when they contain relatedness language,¹⁴⁰ even though they will extend generic choice of law clauses broadly when they do not contain relatedness language.¹⁴¹

The anomaly is even more acute when one considers that choice of law clauses and forum selection clauses tend to appear in tandem. Most contracts that contain a forum selection clause will also contain a choice of law clause choosing the law of the state designated in the forum selection clause.¹⁴² Consider, for instance, the choice of law clause and

¹³⁹ California courts also engage in robust contractual interpretation of atypical choice of law clauses. See *Yotrio Corp. v. Coop*, No. 18-10101 (FFMx), 2019 WL 1877598, at *2 (C.D. Cal. Apr. 12, 2019) (concluding that choice of law provision was narrow in scope and “merely provides that California law will apply to issues relating to the ‘meaning, effect or validity’ of the Agreement”).

¹⁴⁰ See, e.g., *Rey v. Rey*, 666 F. App’x 675, 676 (9th Cir. 2016) (“First, we note that it is not enough for the Euroinvest Agreement to merely ‘relate in some way’ to Jean Pierre’s claims. A broad forum selection clause may reach that far by its terms, but the clause at issue here encompasses only disputes ‘stemming from’ the Euroinvest Agreement. We conclude this language is comparable to ‘arising under’ language — i.e. the forum selection clause at issue here is narrow in its scope.” (citation omitted)); *Guo v. Kyani, Inc.*, 311 F. Supp. 3d 1130, 1141 (C.D. Cal. 2018) (“[T]hese claims arise out of alleged conduct outside of what occurred and was contemplated by that agreement, i.e., [defendant’s] alleged fraudulent business practices, including the alleged deceptive misrepresentations it made to prospective distributors. Consequently, they are not within the scope of the forum selection clause . . .”).

¹⁴¹ Some California courts interpret forum selection clauses with “arising from” or “related to” language broadly, using the *Nedlloyd* holding as loose precedent. *Olinick v. BMG Ent.*, 42 Cal. Rptr. 3d 268, 279 (Ct. App. 2006) (“*Nedlloyd*’s rationale with respect to the scope of the choice-of-law provision is equally applicable to the scope of the forum selection clause. As indicated, with respect to forum selection, the Agreement provides: ‘The parties agree to the exclusive jurisdiction and venue of the Supreme Court of the State of New York for New York County and/or the United States District Court for the Southern District of New York for the resolution of all disputes arising under this Agreement.’ In the absence of any limiting or qualifying language in Paragraph G, we conclude the forum selection clause ‘encompasses all causes of action arising from or related to [the] [A]greement, regardless of how they are characterized.’” (citation omitted)). The court in *Olinick* referred to this logic as “parity of reasoning.” *Id.* What it did not seem to grasp is that the language of the choice of law clause was decidedly different than the language of the forum selection clause, with the former omitting the critical nexus-based language.

¹⁴² Kyle Chen, Harold S. Haller, Juliet P. Kostritsky & Wojbor A. Woyczynski, *Empirical Study Redux on Choice of Law and Forum in M&A: The Data and Its Limits*, 16 J.

the forum selection clause in *Verdugo v. Alliantgroup, L.P.*¹⁴³ In that case, the parties agreed “that . . . personal jurisdiction shall be had solely in [the] State of Texas [and that] [t]he sole venue for disputes arising hereunder shall be in Harris County, Texas.”¹⁴⁴ They also agreed to a generic choice of law clause whereby “this [a]greement” would be “governed in all respects” by Texas law.¹⁴⁵ Even though the interpretation of these clauses was not at issue in *Verdugo*,¹⁴⁶ it is clear that a California court would read the forum selection clause narrowly because it included “arising out of” language.¹⁴⁷ And it would read the generic choice of law clause broadly because of the rule laid out in *Nedlloyd*. Consequently, extra-contractual claims would not be covered by the broad forum selection clause but would be covered by the narrow choice of law clause. This disconnect is nonsensical.

New York courts have compared the language employed in typical forum selection clauses to that employed in generic choice of law clauses. They reason, quite logically, that broad forum selection clauses containing nexus-based language should be read broadly and that narrow generic choice of law clauses should be read narrowly. In a recent case, the Southern District of New York commented that the “differing language utilized in the forum selection clause and the choice-of-law clause illustrates a divergence in the two provisions’ scopes.”¹⁴⁸ The court observed that the “agreement’s forum selection clause requires ‘any legal suit, action or proceeding . . . arising out of or relating to this agreement’ to be brought in New York.”¹⁴⁹ In contrast, “the choice-of-law clause provides that ‘matters of construction, validity and performance . . . shall be governed by, and construed in accordance with’ New York

BUS. & SEC. L. 1, 2 (2016) (“Parties are reluctant to split choice of law and choice of forum, tending to prefer a court to apply its own state’s laws.”).

¹⁴³ 187 Cal. Rptr. 3d 613, 616 (Ct. App. 2015).

¹⁴⁴ *Id.* at 617.

¹⁴⁵ *Id.*

¹⁴⁶ The issue in the case largely centered around whether the forum selection clause was contrary to public policy. *See id.* at 618.

¹⁴⁷ *See id.* at 616.

¹⁴⁸ *J&R Multifamily Grp., Ltd. v. U.S. Bank Nat’l Ass’n as Tr. for Registered Holders of UBS-Barclays Com. Mortg. Tr. 2012-C4, Com. Mortg. Pass-Through Certificates, Series 2012-C4, No. 19-cv-1878, 2019 WL 6619329, at *4 (S.D.N.Y. Dec. 5, 2019).*

¹⁴⁹ *Id.*

law.”¹⁵⁰ The Court noted that the “drafters’ decision to utilize different, narrower language in the choice-of-law provision reflects an intended distinction” and that “[t]he drafters were capable of writing a choice-of-law provision sufficiently broad to cover torts by mimicking the adjacent forum selection clause, but chose not to do so.”¹⁵¹

Thus, we are left with inconsistent interpretations of similar provisions. California courts will largely gloss over the actual wording of a generic choice of law clause, while strictly dissecting the wording of a forum selection clause. The net effect of this is to construe forum selection clauses narrowly, so that parties can advance claims in California courts, and to simultaneously construe choice of law clauses broadly so that causes of action arising under California law (rather than the chosen law) are not able to be pursued by the parties.

5. The Intention of the Parties

Although the court in *Nedlloyd* proffered a textual interpretation of the words “governed by,” it is clear that the broad approach to the interpretation of generic choice of law clauses is premised on assumptions about what reasonable people in the position of the parties would have wanted if they had directed their minds to the issue.¹⁵² The court in *Nedlloyd* surmised that no “rational businessperson, attempting to provide by contract for an efficient and businesslike resolution of

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² A number of courts have piggybacked off *Nedlloyd*’s “reasonable businesspeople” argument. See *Volvo Grp. N. Am., LLC v. Forja de Monterrey S.A. de C.V.*, No. 16-cv-114, 2019 WL 4919632, at *4 (M.D.N.C. Oct. 4, 2019) (“[M]any courts . . . have found it reasonable to assume that, when sophisticated parties agree to a choice-of-law clause, the law selected in that clause should apply to all causes of action arising from or substantially related to their contract.”); *Zaklit v. Glob. Linguist Sols., LLC*, No. 14cv314 (JCC/JFA), 2014 WL 3109804, at *11 (E.D. Va. July 8, 2014) (“The only reasonable inference is that the parties intended to provide for an efficient and businesslike resolution of possible future disputes by choosing a single forum and a single body of law to govern all claims, irrespective of where the events giving rise to those claims occurred.”); *Masters Grp. Int’l, Inc. v. Comerica Bank*, 352 P.3d 1101, 1115 (Mont. 2015) (“This case involves a large-scale financial transaction negotiated between two sophisticated and counseled entities that had an ongoing business relationship over two years. It is reasonable under these circumstances to infer that [the parties] intended the choice-of-law provision to apply to all disputes arising out of their dealings.”).

possible future disputes, would intend that the laws of multiple jurisdictions would apply to a single controversy having its origin in a single, contract-based relationship.”¹⁵³ The court assumed that “[w]hen a rational businessperson enters into an agreement establishing a transaction or relationship and provides that disputes arising from the agreement shall be governed by the law of an identified jurisdiction, the logical conclusion is that he or she intended that law to apply to *all* disputes arising out of the transaction or relationship.”¹⁵⁴ This raises the following question: Can courts interpret contracts by resorting to assumptions about what the parties hypothetically *would have* wanted?

A number of commentators and jurists say yes.¹⁵⁵ But a recent United States Supreme Court decision seems to say no. In *M & G Polymers USA, LLC v. Tackett*, the Court plainly stated that courts cannot rely on the assumed or supposed intent of the parties in interpreting their contractual language. In that case, a collective bargaining unit entered into a contract with an employer on behalf of retirees. The contract stated that “Effective January 1, 1998, and *for the duration of this Agreement thereafter*, the Employer will provide the following program of [benefits]”¹⁵⁶ The contract provided for renegotiation of its terms in three years.¹⁵⁷ After the contract expired, the employer announced that it would begin requiring retirees to contribute to the cost of their health care benefits. The retirees argued that the employer “had promised to provide lifetime contribution-free health care benefits for them, their surviving spouses, and their dependents”¹⁵⁸

¹⁵³ *Nedlloyd Lines B.V. v. Superior Ct.*, 834 P.2d 1148, 1154 (Cal. 1992).

¹⁵⁴ *Id.*

¹⁵⁵ See Bruce L. Hay, *Procedural Justice – Ex Ante vs. Ex Post*, 44 UCLA L. REV. 1803, 1811 (1997) (“These preferences may be actual or they may be ‘hypothetical’ (meaning preferences the parties would have expressed had they been asked).”); Richard A. Posner, *The Law and Economics of Contract Interpretation*, 83 TEX. L. REV. 1581, 1590 (2005) (referring to one of the options for contractual interpretation as: “Pick the economically efficient solution on the assumption that that is probably what the parties intended, or at least would have intended had they thought about the issue”). *But see* Schwartz & Scott, *supra* note 96, at 939 (“We now assume for purposes of discussion that interpretations should be goal neutral; the state should seek to recover *the parties’* objective ex ante intentions.” (emphasis added)).

¹⁵⁶ *M & G Polymers USA, LLC v. Tackett*, 574 U.S. 427, 431 (2015) (emphasis added).

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 432.

The Sixth Circuit Court of Appeals determined that the contractual provision stating that the employer “will provide” certain benefits was ambiguous as to duration.¹⁵⁹ Consequently, it looked to other provisions of the agreement to help resolve the ambiguity. It also turned to “the context” of labor negotiations to conclude that even though the contract contained a general durational clause (i.e., the contract would expire in three years), other contextual clues “outweigh[ed] any contrary implications derived from a routine duration clause.”¹⁶⁰

The Supreme Court was tasked with determining whether the Sixth Circuit had followed appropriate principles of contractual interpretation. The Court concluded that it had not. The Court stated that the Sixth Circuit’s approach “violate[d] ordinary contract principles” and “distort[ed] the attempt ‘to ascertain the intention of *the parties*.’”¹⁶¹ It referred to the lower court’s assessment of “likely behavior” in the collective bargaining arena to be “too speculative and too far removed from the context of any particular contract to be useful in discerning the parties’ intention.”¹⁶² Thus, the Court was clear that the goal of contractual interpretation is to ascertain the intention of “the parties” themselves and that certain “context” evidence was too attenuated to be helpful in that determination. The Court further stated:

[T]he Court of Appeals derived its assessment of likely behavior not from record evidence, but instead from its own suppositions about the intentions of employees, unions, and employers negotiating retiree benefits. . . . Although a court may look to known customs or usages in a particular industry to determine the meaning of a contract, the parties must prove those customs or usages using affirmative evidentiary support in a given case.¹⁶³

The Court thus held that judges cannot rely on their “own suppositions” about the intent of similarly-situated parties, but instead must base their interpretation on “affirmative evidentiary support.”¹⁶⁴ The Court

¹⁵⁹ *Id.* at 436.

¹⁶⁰ *Id.* at 437.

¹⁶¹ *Id.* at 438.

¹⁶² *Id.* at 438-39.

¹⁶³ *Id.* at 439 (citations omitted).

¹⁶⁴ *See id.*

ultimately determined that where a contract is silent on the duration of benefits in a collective bargaining agreement, a court is not permitted to simply “infer” that the parties intended for those benefits to vest for life.¹⁶⁵ Finally, the Court called particular attention to the strain of case law that required a contract “to include a specific durational clause for retiree health care benefits to *prevent* vesting.”¹⁶⁶ The Court reasoned that such a requirement would “distort the text of the agreement”¹⁶⁷ and conflict with ordinary principles of contract law.

Though the context is quite different (interpretation of a collective bargaining agreement versus interpretation of a choice of law clause), the Supreme Court’s opinion is nonetheless on point. The retirees’ contract was arguably¹⁶⁸ silent on how long benefits were supposed to last. In this respect, it is similar to a generic choice of law clause that is silent on its scope. The Court’s conclusion was that courts cannot fill this silence by speculation and inferences about what the parties would have wanted. They must fill this silence by resort to evidence in the record. Accordingly, the Court rejected contractual interpretation premised on what a hypothetical party would have wanted the clause to mean. The goal is to get at the actual intent of *the parties* to this contract,¹⁶⁹ using the words of the contract itself, and perhaps relevant extrinsic evidence.¹⁷⁰ The goal is not to make a policy decision based on

¹⁶⁵ *Id.* at 442. The concurrence added: “Today’s decision rightly holds that courts must apply ordinary contract principles, shorn of presumptions, to determine whether retiree health-care benefits survive the expiration of a collective-bargaining agreement.” *Id.* at 443 (Ginsburg, J., concurring).

¹⁶⁶ *Id.* at 440 (majority opinion) (emphasis added).

¹⁶⁷ *Id.*

¹⁶⁸ I say “arguably” because a plain reading of the contract would suggest that the benefits were to last the duration of the contract, three years. *See id.* at 431.

¹⁶⁹ *See id.* at 438.

¹⁷⁰ *See, e.g.,* Joshua M. Silverstein, *The Contract Interpretation Policy Debate: A Primer*, 26 STAN. J.L. BUS. & FIN. 222, 227 (2021) (“Under textualism, interpretation focuses principally on the text of the parties’ agreement. The locus of contextualist interpretation is broader. While adherents of contextualism grant critical weight to the words set forth in the parties’ compact, contextualist interpretation emphasizes reading contractual language *in context*. Thus, contextualist authorities focus on both the contract’s express terms and extrinsic evidence.”). It is also noteworthy that the Court in *M & G Polymers USA* rejected the idea that parties should be obligated to contract around a presumption that is based upon speculation about what hypothetical parties would have intended. *M*

assumptions, speculation, or conjecture about what reasonable people in the position of the parties would have preferred.

6. The Need for Interpretation

Despite the Supreme Court's decision in *M & G Polymers USA*, it is likely that courts will continue to use intuition and speculation about hypothetical party intent as a guide to interpretation. That is, courts that adopt a broad approach to the interpretation of generic choice of law clauses will continue to do so based largely on assumptions about what parties "would want" the clause to mean.¹⁷¹ I suggest, however, that there is a distinction to be drawn between using hypothetical intent to interpret *substantive* provisions of a contract and using hypothetical intent to interpret *procedural* provisions of a contract.¹⁷² By substantive provisions, I am referring to those provisions that bear directly on the parties' performance obligations. And by procedural provisions, I am referring to clauses that purport to regulate by contract certain procedural aspects of litigation such as forum selection and choice of law.

With substantive contractual provisions, if it is impossible to divine party intent from the contract itself or from the context, then a court is often obligated to *do something* to fill that interpretative void. For instance, in *Frigalment Importing Co. v. B.N.S. International Sales Corp.*¹⁷³ — the darling of 1L Contracts textbooks — the court needed to figure out what the parties meant by "chicken." If the parties meant "broiler," then the seller was in breach. If the parties meant "stewing chicken," then the seller was not in breach. The court needed to pick one

& G Polymers, 574 U.S. at 438. In this regard, there is another parallel with choice of law clauses: parties should not be required to "include a specific" clause in their contract in order to prevent it from being read in accordance with its plain meaning. *See id.* at 440.

¹⁷¹ Most of the cases citing *Nedlloyd* reference the "rational businessperson" argument, not the textual argument.

¹⁷² *See* Christopher R. Drahozal & Peter B. Rutledge, *Contract and Procedure*, 94 MARQ. L. REV. 1103, 1105-06 (2011) ("Here, we address a related but underexplored manifestation — bargaining over procedural rights even before a dispute arises We refer to such pre-dispute agreements as 'procedural contracts.'"); Judith Resnik, *Procedure as Contract*, 80 NOTRE DAME L. REV. 593, 626-28 (2005) (referring to matters such as forum selection clauses as "contract procedure").

¹⁷³ 190 F. Supp. 116, 117 (S.D.N.Y. 1960).

interpretation or the other, even if it would have meant resorting to the hypothetical intention of buyers and sellers “dealing in” chicken.¹⁷⁴

With generic choice of law clauses, things are different. All courts agree that a generic choice of law clause covers contractual disputes. What they do not agree on is the meaning to be ascribed to the clause’s purported silence on non-contractual claims.¹⁷⁵ But, unlike the chicken conundrum, courts do not *need* to resolve this issue as a contractual matter.¹⁷⁶ And they certainly do not need to resolve this issue by reference to hypothetical party intent. This is because there is a fallback: the forum’s default rules on choice of law. If the court in the *Frigalment* case did not resolve the issue of “what is chicken?” the case would be at a standstill. There would be no determination of whether the seller breached the contract and whether the buyer was obligated to pay for the chicken. By contrast, if a court considering a generic choice of law clause does not resolve the “silence” issue, then the court can simply proceed by applying normal conflict of laws rules to ascertain the appropriate governing law.

Thus, one can draw a distinction between those terms that *need* to be interpreted as a matter of contract law¹⁷⁷ and those terms that do not *need* to be interpreted as a matter of contract law.¹⁷⁸ To the extent that

¹⁷⁴ The court did not need to do this since there was ample textual and extrinsic evidence of the parties’ actual intent. *See id.* at 121.

¹⁷⁵ *See generally* Robert E. Scott, *The Case for Formalism in Relational Contract*, 94 *Nw. U. L. REV.* 847, 859-60 (2000) (“[T]here is a third strategy for courts to consider: decline to fill gaps at all. . . . If correct interpretation is indeed an important value and if this requires interpretation that is transparent and predictable, then it follows that restricting the role of legal enforcement to the enforcement of facially unambiguous express terms will (over time) generate better and more accurate interpretations of those portions of disputed contracts that the parties choose to reduce to formal, legal terms.”). Professor Scott advocates this mode of interpretation for all contractual terms in general — but the case is particularly compelling for those terms that do not actually require interpretation pursuant to the contract.

¹⁷⁶ *See, e.g., Pike Co. v. Universal Concrete Prods., Inc.*, 524 F. Supp. 3d 164, 180 (W.D.N.Y. 2021) (claiming that the court “not need to resolve th[e] difficult question” of whether the atypical choice of law clause extended to non-contractual claims and simply conducted choice of law analysis instead).

¹⁷⁷ And perhaps hypothetical intention makes sense here, in the absence of actual intention.

¹⁷⁸ Where a court can simply employ its procedural rules to fill any purported gaps.

hypothetical intention is relevant at all, it should only be in the former context and not the latter.

* * *

It does not require detailed and robust contractual interpretation to discern what is patently obvious about a generic choice of law clause: that parties have not, by their language, included extra-contractual claims within its scope. Nonetheless, the courts that adopt a broad approach to the interpretation of generic choice of law clauses hold otherwise. They ostensibly do so based on the conclusion that words like “governed by” signal an absolute and unequivocal intention to submit all disputes to resolution under the chosen law. But the logic and reasoning are tenuous.¹⁷⁹ What is really motivating these courts is a desire to impose the “best” interpretation on the clause — one that they believe probably comports with parties’ expectations and appears to make the most practical sense.

B. *Exploring the Policy-Based Arguments*

Even though courts should not interpret generic choice of law clauses based on the assumed intentions of the parties, it is apparent that California (and other) courts clearly do so,¹⁸⁰ and will continue to do so

¹⁷⁹ It is particularly ironic that California courts hold fast to the myth that the text of generic choice of law clauses lends itself to a broad interpretation. This is because California courts apply the parties’ chosen law to interpret the scope of the clause, meaning that California courts often have occasion to apply non-California law to the issue. See *Triton Eng’g v. Crane Co.*, No. SACV 12-01617 (JEMX), 2013 WL 12136597, at *2 (C.D. Cal. Feb. 21, 2013). The result is a disconnect between the California cases applying the broad approach and the California cases applying the narrow approach. See, e.g., *id.* at *3 (“To determine whether the parties intended the choice-of-law clause to cover the tort claims, the Court must focus on the objective manifestations of their agreement — i.e., “the actual words used” — rather than on the unexpressed subjective intent of the parties.’ Here, the choice-of-law provision in the 2008 agreement governs only the purchase order ‘in all respects.’ Plaintiff’s present claims are only tenuously related to the purchase order None of the causes of action sound in contract, and the Defendants have not shown that the parties agreed that Washington law would apply to the [other] claims.” (citations omitted)).

¹⁸⁰ For an example of a case that did so, see *Volvo Group North America, LLC v. Forja de Monterrey S.A. de C.V.*, No. 16-CV-114, 2019 WL 4919632, at *6 (M.D.N.C. Oct. 4, 2019) (“In sum, this Court believes that (a) the longstanding duration of the parties’ agreement,

unless persuaded otherwise.¹⁸¹ Thus, one must engage with the California “rational businesspeople” argument on its merits. Is it actually true that rational businesspeople prefer the broad approach to the interpretation of a generic choice of law clause? Is the question even one that is capable of being answered? Below, I grapple with these questions and explore the weaknesses of California’s policy-based approach to generic choice of law clauses.

1. Lawyer Intention or Party Intention?

Professor Coyle sought to answer the question of whether parties prefer a broad or narrow reading of generic choice of law clauses by interviewing fifty-seven lawyers.¹⁸² The “overwhelming majority — fifty-four out of fifty-seven respondents — stated that they generally wanted their choice-of-law clause to cover tort and statutory claims as well as contract claims.”¹⁸³ More specifically, “forty out of fifty-three [] stated that they wanted their clauses to cover *related* tort and statutory claims” while ten attorneys “wanted the chosen law to apply to *all* contract, tort, and statutory claims between the parties.”¹⁸⁴ Professor Coyle reports that “[o]nly three lawyers indicated that they wanted the choice-of-law clause to cover contract claims exclusively.”¹⁸⁵ To the extent that these findings can be extrapolated on a macro-scale, the results are not surprising.

(b) the ‘close relationship’ between Forja’s fraudulent inducement counterclaim and that agreement, and (c) the parties’ express desire to uniformly apply the laws of New York to all claims in this case would lead the North Carolina Supreme Court to construe the choice-of-law clause [broadly].”).

¹⁸¹ See Geoffrey P. Miller, *Bargains Bicoastal: New Light on Contract Theory*, 31 CARDOZO L. REV. 1475, 1478 (2010) (“New York judges are formalists. Especially in commercial cases, they have little tolerance for attempts to re-write contracts to make them fairer or more equitable, and they look to the written agreement as the definitive source of interpretation. California judges, on the other hand, more willingly reform or reject contracts in the service of morality or public policy; they place less emphasis on the written agreement of the parties and seek instead to identify the contours of their commercial relationship within a broader context framed by principles of reason, equity, and substantial justice.”).

¹⁸² Coyle, *supra* note 2, at 696-97.

¹⁸³ *Id.* at 697.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

Lawyers prefer the certainty of the known to the uncertainty of the unknown.

Professor Coyle's informal study rests on the assumption that these lawyer preferences can act as a surrogate for party preferences or party intent.¹⁸⁶ But as Professor Kostritsky explains, there is an embedded agency problem one must consider.¹⁸⁷ She notes that choice of law decisions are made by the lawyer — and not the client.¹⁸⁸ It is therefore unclear what impact this has on the determination of “party intent” with respect to a choice of law clause.¹⁸⁹ Is the lawyers' intent *de facto* the client's intent? Professor Kostritsky further notes the potential for conflicts of interest. In her words, the interests of the lawyer and the interests of the client may not be “coterminous.”¹⁹⁰ She posits that a lawyer might choose a law based on concerns unique to the lawyer such as “lower[ing] the costs of understanding” other states' laws.¹⁹¹ This is true even where this could act to the detriment of the client.¹⁹² All these

¹⁸⁶ Professors Brand and Fletchner offer a different critique of Professor Coyle's reliance on lawyer interviews to ascertain party preferences in interpreting generic choice of law clauses: “Coyle's interpretive rule is based on his empirical study of contracts drafted by U.S. parties, including interviews with U.S. contract drafters. The initial problem here is that the inquiry was limited to parties from [the United States].” Ronald A. Brand & Harry Flechtner, *Rewarding Ignorance of the CISG: A Response to John Coyle*, TRANSNAT'L LITIG. BLOG (June 13, 2022), <https://tlblog.org/rewarding-ignorance-of-the-cisg-a-response-to-john-coyle/> [<https://perma.cc/J4UQ-3RPF>]. They also echo the argument advanced earlier in this Article that parties should not be rewarded for poor draftsmanship. *See id.* (“U.S. lawyers' abject ignorance of law revealed in Professor Coyle's empirical work is not something to be encouraged and rewarded by the interpretation he advances.”). Brand and Fletchner's critique is specifically directed at Coyle's argument that generic choice of law clauses in international sales contracts should be read to exclude the Convention on the International Sale of Goods. *See id.* However, the arguments apply with similar force to generic choice of law clauses in non-sale transactions.

¹⁸⁷ Juliet P. Kostritsky, *Context Matters – What Lawyers Say About Choice of Law Decisions in Merger Agreements*, 13 DEPAUL BUS. & COM. L.J. 211, 213 (2015).

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* at 224.

¹⁹⁰ *Id.* at 222.

¹⁹¹ *Id.*

¹⁹² She also makes the argument that it is unclear whether a commercial firm “is even capable of manifesting intent.” *Id.* at 223 (“[I]n the case of a corporation, there may be a person within the corporation appointed to make certain decisions. Is this person's decision as to choice of law necessarily representative of the corporation's (the client's)

agency problems render it unclear whether extrapolations can be made from “lawyer” intent to “party” intent and whether the question of party intent (at least in this context) is a meaningful one at all.

Nonetheless, lawyer intent is the only thing we have to go by when interpreting choice of law clauses. Thus, to the extent that one thinks intent is relevant, lawyer intent must serve as a proxy for party intent because parties simply don’t have any “intent” in this regard.¹⁹³ While parties themselves may have intent concerning the substantive matters that the contract covers,¹⁹⁴ it would be foolish to think that they have any sort of intent concerning the scope of their choice of law clause. To use the language of *Nedlloyd*, no “rational businessperson” would sit her office contemplating whether she wants the chosen law, which she knows nothing about, to govern unknown extra-contractual claims which may never arise.¹⁹⁵ Thus, even though there are issues involved in imputing lawyers’ intentions to their clients, we nonetheless must do so; otherwise, the “intention” argument falls apart entirely. Accordingly, when I refer to party “intent” or party “preferences” below, I do so on the understanding that this is an imputed intent or preference.

2. What Do Parties Prefer?

Nedlloyd and the cases that follow it focus on the question of what reasonable businesspeople would have preferred if they considered the scope question in advance. Reasonable businesspeople, *Nedlloyd* tells us, would prefer one unitary body of law — that selected in the clause — to govern the entirety of the dispute between the parties. After all, who wants two (or more) different laws applying to one singular dispute

decision, or is it merely a single person’s decision? Further, should the law assess the choice differently with a sole proprietor than a corporation, or should it automatically accept that a corporation’s decision-maker represents the intent of the corporation?”); see also Nyarko, *supra* note 1, at 24 (“In particular, the relevant literature relaxes the assumption of contractual parties as unitary actors. It argues that that the provisions in the agreements are based on templates used by the drafting law firms. These law firms would generally be resistant to making changes to their templates, even if it were for the good of their client.”).

¹⁹³ Apart, of course, from the actual wording of the choice of law clause itself.

¹⁹⁴ Such as price, terms, warranties, disclaimers, specialized clauses, etc.

¹⁹⁵ See Chen et al., *supra* note 142, at 41 (“[F]ew laymen — and not all that many lawyers — have any concept of the real differences between state laws.”).

arising from a contractual relationship? Below, I explain why the question of what parties “prefer” is not one that lends itself to a simple answer.

a. Parties Prefer Favorable Law

At the time of contracting, the parties do not know what claims will eventually be asserted. In turn, they do not know if the law designated in the choice of law clause is actually favorable to them or not. So, it is not particularly helpful to ask an “all things being equal” question about which law they would want to apply when they have no idea how a dispute will arise and what side they will be on.¹⁹⁶ An analogy might be helpful. Let’s assume I’m in the market for a mortgage. I am satisfied with my current bank, and the bank is conveniently located down the street. I’m asked whether I would “prefer” to have a mortgage at this bank for the house I’m going to buy in three months. *Sure, why not?* All things being equal, it’s my local bank and I’m happy with it. But I don’t know what I don’t know. What if other bank rates are better in three months? What if my bank imposes terms that other banks don’t impose? The point is that it is an artificial question to ask what I would “prefer” when I don’t have all the relevant information. The true answer is this: I prefer the bank that gives me the best rate and terms. The same is true in the choice of law context. Parties prefer the tort, statutory, or other law that is most favorable to them. But they simply don’t know what that is until a dispute arises.

To the extent that parties “prefer” for the chosen law to govern non-contract claims, it is only because of the perceived simplicity factor, and not because — in substance — they prefer the content of the chosen law. That is, if a party is asked whether they prefer for their choice of law to extend to non-contractual claims, they will likely say yes, but only because it seems easier for all claims to fall under one body law rather than having multiple laws apply to the same dispute. These same parties will sing a different tune when a dispute arises, and they realize that some other body of law is actually more favorable for them.¹⁹⁷

¹⁹⁶ The following discussion refers to “party” intention, recognizing that the intention of the lawyers is the only proxy we have for party intention.

¹⁹⁷ Professor Hay has written about this *ex ante/ex post* preference problem. Hay, *supra* note 155, at 1804-05. He argues that fairness dictates that courts effectuate the parties’ *ex*

b. *Parties Prefer Formal Rules*

The *Nedlloyd* approach is based on the premise that parties prefer a substantive legal rule that interprets generic choice of law clauses broadly to encompass non-contractual claims. To get to this substantive legal rule, however, courts must look beyond the wording used by the parties and employ a non-formalist approach to interpretation. The *Nedlloyd* rule, in short, is a policy-based one — one that is consistent with, and emblematic of, a contextualist approach to contract interpretation.¹⁹⁸

Research, however, demonstrates that commercial parties prefer formal rules to contextual ones.¹⁹⁹ Professor Miller writes:

Both approaches to contract law [formalist and contextualist] are commendable. Both serve important social goals and employ sophisticated and well-reasoned doctrines in the service of those ends. This article takes no position on whether one is better than the other. What is clear, however, is that contracting parties do take a position on this question. The testimony of the marketplace—the verdict of thousands of sophisticated parties whose incentives are to maximize the value of contract terms—is that New York’s formalistic rules win out over California’s

ante preferences in cases where they diverge from the parties’ *ex post* preferences. The argument rests, however, on the assumption that the *ex ante* intention of the parties is known. In the generic choice of law context, what is known is that the parties prefer for a certain law — the chosen law — to govern their contractual claims. And that law *is* typically given effect, even if one of the parties changes their *ex post* preferences. What is not actually known, but is simply assumed, is that parties would also want that chosen law to govern non-contractual claims. Here, the *ex ante/ex post* argument is less persuasive. We *know* that the parties currently manifest different preferences as to the governing law. And we *assume* that the parties, *ex ante*, would have wanted the choice of law clause to govern all claims. In this situation, it is more problematic to give effect to hypothetical preferences over actual preferences.

¹⁹⁸ See *Nedlloyd Lines B.V. v. Superior Ct.*, 834 P.2d 1148, 1149 (Cal. 1992).

¹⁹⁹ Jody S. Kraus & Robert E. Scott, *Contract Design and the Structure of Contractual Intent*, 84 N.Y.U. L. REV. 1023, 1026 (2009) (“[C]ommercially sophisticated parties would prefer a regime in which courts apply formal doctrine exclusively, unless at the time of formation the parties have expressly indicated their desire for courts to apply equitable doctrine as well.”).

contextualist approach. As predicted by theory, sophisticated parties prefer formalistic rules of contract law.²⁰⁰

Thus, to the extent that the California approach to the interpretation of generic choice of law rests on party preferences, we cannot ignore the fact that parties prefer the formalist approach adopted by New York courts, and not the contextual approach adopted by California courts.²⁰¹

Thus, the question might be recast: Do parties prefer formal rules (New York) or contextual rules (California)?²⁰² Asked in this way, it is not so clear that party preferences militate in the direction that *Nedlloyd* suggests. In other words, how you ask the question matters. If one asks what *type* of regime (formal or contextual) parties prefer, one might get one answer: parties prefer the formal approach to contract interpretation which interprets generic choice of law clauses narrowly. If one asks what *specific* rule parties would prefer, one might get another answer: parties prefer a broad rule to govern scope issues.

c. *Parties Prefer Their Choice of Forum*

Above, I have addressed arguments that parties prefer favorable law and that they prefer formal rules. Another thing to consider is that parties prefer to litigate in their choice of forum far more than they prefer their chosen law to govern non-contractual claims. Professor Kostritsky

²⁰⁰ Miller, *supra* note 181, at 1478. *But see* Shawn Bayern, *Contract Meta-Interpretation*, 49 UC DAVIS L. REV. 1097, 1104-14 (2016) (taking issue with some of the premises underlying the conclusion that businesses prefer formal rules).

²⁰¹ Schwartz & Scott, *supra* note 96, at 931 (“[T]he majoritarian party preference is textualist . . . : business parties commonly prefer judicial interpretations to be made on a limited evidentiary base, the most important element of which is the contract itself.”); *see also* Lisa Bernstein, *Black Hole Apparitions*, 67 DUKE L.J. ONLINE 102, 116 n.58 (2017) (“The best available, though imperfect, empirical evidence suggests that sophisticated commercial parties prefer textualist adjudication.”); Schwartz & Scott, *supra* note 96, at 932 (“[B]oth the available evidence and prevailing judicial practice support the claim that sophisticated parties prefer textualist interpretation.”).

²⁰² *See* Bayern, *supra* note 200, at 1101 (“The article’s first, most general argument is that contracts should be interpreted using the methodology that best suits their circumstances on grounds of morality and policy. Apart from limited exceptions, the methodology that satisfies this criterion will be the one that the parties preferred — or, failing that, the one that reasonable parties in their circumstances would have preferred.”).

posits that choice of forum is really the impetus behind choice of law.²⁰³ What parties and lawyers care about is *where they litigate* — not necessarily what body of law they litigate under.²⁰⁴ It stands to reason, then, that what body of law non-contractual claims are litigated under is far removed from the nucleus of things that lawyers (and, by extension, their clients) think about or care about.²⁰⁵

I recognize that the answer “parties prefer their choice of forum” is not responsive to the question of which law parties would prefer to govern their non-contractual claims. But nonetheless, the observation is important. Parties are very concerned with where their dispute is litigated. They are somewhat concerned with the body of law under which a dispute is litigated. They are not at all concerned with the body of law under which related (or non-related) non-contractual claims are litigated. Hence the reason why several lawyers Professor Coyle interviewed suggested that this was an issue they had never thought about even after decades of practice. So, how concerned should we be about what parties “prefer” when the parties themselves really don’t care about the issue at all?²⁰⁶

d. Non-Sophisticated Parties Do Not “Prefer” Anything

Finally, whatever intention or preferences sophisticated businesspeople may have regarding choice of law clauses does not translate into preferences for non-sophisticated parties: employees,

²⁰³ Kostritsky, *supra* note 187, at 226.

²⁰⁴ *Id.* at 224 (“A key point I learned from counsel interviews is that clients care about forum more than they care about the choice of law issue.”).

²⁰⁵ See Coyle, *supra* note 2, at 698-99 (“Still another lawyer — who worked as an in-house counsel for many years and who served as a general counsel for a publicly traded company in Minnesota — candidly acknowledged that this was an issue that neither he nor his team had ever thought about: ‘Although I worked for a public company, I can’t say that our analysis of choice-of-law clauses was as sophisticated as you might suggest by your questions. I’d be little more proud of my efforts if I could state that we had policy positions on your questions. With a small staff and a commitment to ‘getting the transactions completed’ I admit that your [question] suggests a level of sophistication that did not exist in our practice. We were mindful of the choice-of-law clauses, and generally preferred to identify our home state with which we were most comfortable, but that was generally the extent of our focus on that specific clause.’”).

²⁰⁶ They obviously care about this issue *ex post* when the lay of the land is known to them.

consumers, franchisees, signatories to standard contracts of adhesion, and the like. Yet, the *Nedlloyd* holding applies equally across the board: generic choice of law clauses are interpreted broadly to apply to all claims arising from or related to a contract. In *Washington Mut. Bank, FA v. Superior Ct.*, the California court considered whether choice of law clauses in contracts of adhesion should be treated differently than those appearing in freely negotiated contracts between sophisticated parties.²⁰⁷ The court concluded “[e]ven though *Nedlloyd* was decided in the context of a negotiated arm’s length transaction between sophisticated business entities, its analysis appears suitable for a broader range of contract transactions.”²⁰⁸ While the court was not specifically considering scope issues, it was clear that no meaningful distinction is drawn between different categories of choice of law clauses (e.g., commercial vs. consumer).

Scholars have noted the tendency of law developed in one context to morph into a different context, denominating this phenomenon “contract creep.”²⁰⁹ The problem, of course, is that the rationales underlying the original holding do not apply with equal force (or at all) to the context of non-negotiated contracts of adhesion. Thus, even if sophisticated parties would prefer all claims related to a contract to be resolved under one body of law, those preferences cannot be said to extend to non-sophisticated parties.²¹⁰ The latter have *absolutely* no intentions in this respect. In sum, the party intention argument rings hollow outside the context in which it originated.

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²⁰⁷ *Wash. Mut. Bank v. Superior Ct.*, 15 P.3d 1071, 1078-79 (Cal. 2001).

²⁰⁸ *Id.* at 1079.

²⁰⁹ Tal Kastner & Ethan J. Leib, *Contract Creep*, 107 GEO. L.J. 1277, 1279 (2019) (“Courts and scholars too often fail to address the tendency for contract rules developed for sophisticated party transactions to migrate into contract law for consumer transactions, and for consumer contract regimes to bleed into the contract law for sophisticated transactions.”).

²¹⁰ See Mo Zhang, *Contractual Choice of Law in Contracts of Adhesion and Party Autonomy*, 41 AKRON L. REV. 123, 129 (2008) (“[C]ontracts of adhesion do not conform to the notion of autonomy that underlies the choice of law by the parties and is incompatible with the principle of mutuality on which the power of the parties to make the choice of applicable law rests.”).

Returning to the original question: What do parties prefer? This is perhaps an unanswerable question. Parties, in the abstract, prefer simplicity in the form of a choice of law clause covering all claims. Parties, in reality, prefer whatever law produces favorable results — something they will not know until after a dispute arises. Commercial parties, in general, prefer formal rules to contextual ones. Parties prefer to litigate in their chosen forum — and do not care as much about their chosen law (and certainly, do not care about whether the law does or does not extend to non-contractual claims). And non-sophisticated parties have no intentions at all to speak of. In light of this, it is not particularly helpful to talk about party preferences or intentions, much less for courts to make assumptions about them.

3. The Predictability Rationale

The desire for predictability and certainty is at the heart of the *Nedlloyd* decision. The Court observed that a rational businessperson would not “desire a protracted litigation battle concerning only the threshold question of what law was to be applied to which asserted claims or issues.”²¹¹ It pointed out that “the manifest purpose of a choice-of-law clause is precisely to avoid such a battle.”²¹²

This logic presupposes that interpreting generic choice of law clauses broadly avoids battles over threshold questions such as what law applies. That assumption is doubtful.²¹³ There have been hundreds of cases where this exact issue has been raised and litigated. Whether a court interprets a choice of law clause broadly likely does not deter a party from trying to convince a court to apply some favorable body of law other than that designated in a generic choice of law clause.²¹⁴

Moreover, *any* bright-line approach to the interpretation of generic choice of law clauses likely provides predictability for parties. Both the

²¹¹ *Nedlloyd Lines B.V. v. Superior Ct.*, 834 P.2d 1148, 1154 (Cal. 1992).

²¹² *Id.*

²¹³ There is really no way to readily test this assumption since we do not know how many parties decided not to litigate the choice of law issue in light of California’s announced broad approach to generic choice of law clauses.

²¹⁴ See Woodward, Jr., *supra* note 92, at 23-24 (“To be sure, no simple choice of law clause can eliminate later argument on a variety of ‘what part of that chosen jurisdiction’s law applies,’ but at least it tends to reduce later argument on the broader question.”).

broad and narrow approaches are bright-line rules; they just cut different ways. Certainly, there is some unpredictability on the margins of both approaches. Under the broad approach, parties may not know how stringently a court will interpret the relatedness requirement. Thus, the precise contours of “what’s in and what’s out” may not be able to be ascertained in advance. Under the narrow approach, parties may not know how a court will categorize a certain claim. For example, is an unjust enrichment claim one that sounds in contract or not?²¹⁵ But both approaches are predictable in that they let parties know where they stand. Thus, the *Nedlloyd* rationale centered on predictability and avoiding litigation applies with equal force to both the broad and narrow approaches to generic choice of law clause interpretation.

4. The Broad Approach and Weaker Parties

It should not come as a surprise that, in general, California’s anti-formalist approach to contractual interpretation favors consumers, employees, franchisees, and other individuals and entities with lesser bargaining power. It is thus ironic that California’s broad approach to the interpretation of generic choice of law clauses tends to work to the detriment of these weaker parties.²¹⁶

Recall the *Adelman’s* case discussed at the beginning of this Article.²¹⁷ In that case, Jones²¹⁸ was a small business owner from North Carolina

²¹⁵ See *Tropical Sails Corp. v. Yext, Inc.*, No. 14 CIV. 7582, 2017 WL 1048086, at *12 (S.D.N.Y. Mar. 17, 2017) (“In addition, [s]ome controversy appears to exist as to whether a claim for unjust enrichment is governed by a contract’s enforceable choice-of-law provision, or whether it is instead governed by the law of the state that New York’s interests analysis yields, being a fundamentally non-contractual cause of action.” (quoting 2002 Lawrence R. Buchalter Alaska Tr. v. Phila. Fin. Life Assurance Co., 96 F. Supp. 3d 182, 233 (S.D.N.Y. 2015)) (alteration in original)).

²¹⁶ See, e.g., *CajunLand Pizza, LLC v. Marco’s Franchising, LLC*, 513 F. Supp. 3d 801, 803 (N.D. Ohio 2021) (court interpreted choice of law clause broadly to preclude franchisee claims under Louisiana statute); *Gaby’s Bags, LLC v. Mercari, Inc.*, No. CR 20-00734, 2020 WL 1531341, at *2 (N.D. Cal. Mar. 31, 2020) (three of the plaintiff’s four claims against online selling platform were extinguished because California choice of law clause was interpreted broadly).

²¹⁷ *Adelman’s Truck Parts Corp. v. Jones Transp.*, 797 F. App’x 997 (6th Cir. 2020).

²¹⁸ Technically, Jones was the defendant since *Adelman’s Truck Parts* filed an action for a declaratory judgment. However, Jones filed a cross-motion as the buyer of the defective motor and would typically have been the plaintiff in a scenario like this.

who ran a trucking company.²¹⁹ He bought a truck motor from an out-of-state company, paying \$5000 plus \$304 in freight charges.²²⁰ The motor was fatally defective, causing Jones to temporarily shut down his business. Jones estimates that he lost over \$30,000 in business because of the defective motor. Jones sought to assert claims against the defendant seller under the consumer protection laws of his home state. Under North Carolina law, Jones would have been entitled to treble damages, an amount over \$100,000. However, the Sixth Circuit held that Ohio law, not North Carolina law, applied. That is, it interpreted the generic choice of law clause broadly to apply to *all* claims, including tort and statutory claims. Ohio law did not provide a comparable remedy to the plaintiff, and he was ultimately limited to the repair or replace remedy provided for in the contract.²²¹ In short, the broad approach to the interpretation of choice of law clauses precluded the “small guy” from being able to benefit from the consumer protection of law of his home state.²²²

Certainly, not every case will present in this manner — and sometimes it will be the plaintiff advocating for broad approach to the interpretation of a generic choice of law clause. But more times than not, the broad approach ends up subjecting weaker parties to the law chosen by the stronger party to the contract.²²³ This, in turn, precludes the party with less bargaining power from benefiting from tort, statutory or other law

²¹⁹ Second Brief of Appellant/Cross-Appellant Adelman’s Truck Parts Corp. at 1, *Adelman’s Truck Parts Corp. v. Jones Transp.*, 797 F. App’x 997, 998 (6th Cir. 2020) (Nos. 19-3349, 19-3387) (“Jones is a citizen of North Carolina.”).

²²⁰ *Adelman’s Truck Parts Corp.*, 797 F. App’x at 998.

²²¹ *Id.* at 1001-02.

²²² Indeed, the critique is broader than this. Arguably, it is unfair to enforce choice of law clauses against weaker parties in general. *See* Woodward, Jr., *supra* note 92, at 22 (“Widespread enforcement of adhesive choice of law clauses can . . . disadvantage customers by substituting a weaker form of customer protection for that which their own state offers . . .”).

²²³ *See, e.g., King v. Bumble Trading, Inc.*, 393 F. Supp. 3d 856, 867 (N.D. Cal. 2019) (certain claims of class members’ who used defendant’s dating service dismissed because of choice of law clause); *G.P.P., Inc. Guardian Innovative Sols. v. Guardian Prot. Prod., Inc.*, No. 15-CV-00321, 2015 WL 3992878, at *13 (E.D. Cal. June 30, 2015) (family furniture business’ claims of negligence *per se* and under the North Carolina UDTPA claim dismissed because of choice of law clause).

that might otherwise be available and applicable absent the interpretation given to the choice of law clause.

* * *

This Section was intended to illustrate that the broad approach to the interpretation of generic choice of law clauses lacks merit in its own right. It rests on questionable assumptions about party preferences and about predictability that simply don't hold up upon closer scrutiny. And the net effect of the broad approach to generic choice of law clauses is to foreclose avenues of redress for unsuspecting plaintiffs — something that California courts are not usually eager to do.

V. AN ALTERNATIVE APPROACH

Above, I argued that courts should interpret generic choice of law clauses narrowly. This is the only interpretation that makes sense from a textual perspective. I also argue that some of the assumptions underpinning the broad approach are questionable. Nonetheless, there is appeal to the “one and done” approach. It is cleaner, simpler, and avoids the potential for multiple laws applying to a singular dispute. From an efficiency perspective, it is obviously a preferable rule as it obviates the need for a separate choice of law analysis. But that does not mean a court can gloss over the parties' contractual language and impose what it intuitively feels is the best result. With that said, there is nothing preventing courts from fashioning a specific choice of law rule in the context of statutory, tort or other claims that arise in the context of a contractual relationship between parties.

As discussed earlier, some courts adopt what I have termed a “one/two punch” to generic choice of law clauses. These courts generally acknowledge that the wording of generic choice of law clauses does not extend to non-contractual claims. In other words, these courts are faithful to traditional contract interpretation principles. But then they go ahead and apply the chosen law anyway, as long as whatever relatedness threshold they have adopted has been satisfied. This is a curious approach — and one that is worth considering in more detail. The question is, *what exactly are these courts doing?* Are these courts extending the parties' choice to non-contractual claims with respect to claims that are sufficiently related to the contract? Or, are courts adopting a discrete

and nuanced choice of law rule? If the former, this is problematic for the reasons described. Once courts have concluded that the language does not encompass related contract claims, they should not be allowing a “do over” under the auspices of a relatedness inquiry. If the latter, however, then we these courts may be onto something.

It might be helpful to spell this out in more detail. Under Step 1, a court determines whether, as a matter of contractual interpretation, the clause extends to non-contractual claims. If yes, it applies the chosen law. If not, it proceeds to the next step. Under Step 2, a court must then decide *what* law to apply to the non-contractual claims. Ordinarily, this would be done via a traditional conflict of laws analysis. For instance, a Second Restatement jurisdiction would apply section 145’s most significant relationship test.²²⁴ A *lex loci* jurisdiction would apply the law of the place where the tort occurred.²²⁵ And so on. States are free to select and craft their own conflict of laws rules.²²⁶ There is nothing preventing a court from devising a unique conflicts rule dealing with tort or other claims that arise in the context of a contract containing a choice of law clause. In such a case, the court would not be applying the chosen law because the parties chose that law, but because their state-based conflicts rule dictated that result.

Of course, on some level, this is all just semantics — we get to the same result either way. But, conceptually, there is a big difference. It makes no sense to say that even though the parties do not intend for their choice of law clause to govern non-contractual claims, we will go ahead and

²²⁴ See, e.g., *Stanley Works Isr. Ltd. v. 500 Grp., Inc.*, 332 F. Supp. 3d 488, 498 (D. Conn. 2018) (interpreting choice of law clause narrowly and proceeding to Second Restatement choice of law analysis).

²²⁵ See, e.g., *Wilferd v. Digit. Equity, LLC*, No. 20-cv-01955, 2020 WL 6827905, at *3 (N.D. Ga. Nov. 20, 2020) (since choice of law clause did not extend to tort claim, “[c]ourt instead must apply Georgia’s traditional choice of law rules for tort claims. Georgia follows the doctrine of *lex loci delicti* . . .”).

²²⁶ Patricia Youngblood Reyhan, *Choice of What? The New York Court of Appeals Defines the Parameters of Choice-of-Law Clauses in Multijurisdictional Cases*, 82 ALB. L. REV. 1241, 1245-46 (2019) (“The menu of choice-of-law rules for other legal areas — contracts and torts particularly — is ample and varied. States have chosen ‘interest’ analysis, ‘Restatement’ or ‘most significant relationship analysis,’ ‘grouping of contacts’ analysis, ‘choice influencing factors’ analysis, and state-specific variations of these as their governing choice-of-law method. There are few constraints on a state’s decision as to which method it deems appropriate.”).

extend that chosen law anyway to related non-contractual disputes. But it does logically hold together for states to devise a unique choice of law rule to deal with claims that arise in the broader context of the parties' contractual relationship. Such an approach privileges efficiency and orderliness in the judicial administration of justice without sacrificing basic principles underlying contractual interpretation and the conflict of laws.

CONCLUSION

Since *Nedlloyd* was decided in the early 1990s, courts have hopped on the “rational businesspeople” bandwagon without much thought. This Article suggests that it may be time for those courts that adopt a broad approach to the interpretation of generic choice of law clauses to “take a beat” and really question what it is that they are doing.²²⁷ Are they remaining faithful to the text of the clause? Are they being internally consistent when it comes to the interpretation of forum selection clauses vs. choice of law clauses? Are they interpreting clauses broadly because of unsupported assumptions about what some mythical parties would “prefer”?

There is no reason that generic choice of law clauses should be interpreted in any way other than in accordance with their plain meaning. The goal of contract interpretation is to give effect to the intention of the parties as expressed in the words of their contract. The goal is not to divine what the parties would probably have wanted if they thought about it, or for a court to impose its preferred interpretation on the parties. The parties have the ability to draft a choice of law clause to encompass extra-contractual claims: let them do so. Until then, courts should remain true to basic principles of contract interpretation. This would mean interpreting generic choice of law clauses the way parties have written them — to apply to contractual claims and contractual claims only.

²²⁷ Ian Conversation, *Take a Beat*, URB. DICTIONARY (Jan. 28, 2012), <https://www.urbandictionary.com/define.php?term=Take%20a%20beat> [https://perma.cc/WX33-JEMT].