FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PROGRESSIVE GULF INSURANCE COMPANY, an Ohio corporation, *Plaintiff-Appellant*, v. RANDALL K. FAEHNRICH, individually and as natural parent and/or legal guardian of RANDY FAEHNRICH and CHRISTIAN FAEHNRICH, minors; TONI A. FAEHNRICH, individually and as natural parent and/or legal guardian of RANDY FAEHNRICH and CHRISTIAN FAEHNRICH, minors; DOES I THROUGH X; ROE BUSINESS ENTITIES I THROUGH X; inclusive, *Defendants-Appellees*.	No. 09-16487 D.C. No. 2:05-cv-01067-BES-PAL OPINION

Appeal from the United States District Court
for the District of Nevada
Brian E. Sandoval, District Judge, Presiding

Argued and Submitted
October 6, 2010—San Francisco, California

Filed May 7, 2014

Before: Andrew J. Kleinfeld, Susan P. Graber, and Richard C. Tallman,* Circuit Judges.

Per Curiam Opinion

* Judge Beezer was a member of the panel but passed away after oral argument. Judge Tallman was drawn to replace him. He has read the briefs, reviewed the record, and listened to the audio recording of oral argument held on October 6, 2010.

SUMMARY[**]

Nevada Insurance Law

The panel reversed and remanded to the district court for entry of summary judgment in favor of Progressive Gulf Insurance Company after the Nevada Supreme Court answered a certified question concerning choice-of-law in an insurance contract.

The panel certified a question to the Nevada Supreme Court, and the Nevada Supreme Court rephrased the question. The Nevada Supreme Court held that Nevada public policy did not "preclude giving effect to a household exclusion clause in an automobile liability insurance policy delivered in Mississippi to Mississippi residents and choosing Mississippi law as controlling, where Mississippi law permits household exclusions but the effect of the exclusion is to deny Nevada residents who were injured in Nevada recovery of the minimum coverages specified in NRS 485.3091."

The panel held that because Mississippi law applied, summary judgment should have been granted in favor of Progressive Gulf Insurance Company where the parties stipulated that if Mississippi law applied, there was no coverage under the Progressive Gulf Insurance Company policy.

[**] This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

COUNSEL

Dennis M. Prince, Prince & Keating LLP, Las Vegas, Nevada, for Plaintiff-Appellant.

Brett A. Carter, Benson Bertoldo Baker & Carter, Chtd., Las Vegas, Nevada, for Defendants-Appellees.

OPINION

PER CURIAM:

Progressive Gulf Insurance Company seeks review of the district court's order denying its motion for summary judgment and of a later order entering judgment in favor of the defendants. The sole issue before us is whether Nevada or Mississippi law applies to the parties' insurance contract. Because Mississippi law applies, we reverse the judgment of the district court.

Randall and Toni Faehnrich lived in Mississippi with their two minor children. They contracted with Progressive Gulf for automobile insurance. The policy was delivered in Mississippi. It covered cars garaged in Mississippi, bearing Mississippi license plates, driven by Mississippi-licensed drivers. The policy specified that it was governed by Mississippi law.

The Faehnrichs divorced and, in 2003, Toni Faehnrich moved to Nevada. On June 8, 2003, Toni Faehnrich was involved in a rollover vehicle accident while the two children were passengers in her car. Randall Faehnrich presented a bodily injury claim to Progressive Gulf on behalf of the

children, which Progressive Gulf denied, citing the policy's family-member exclusion.

The parties stipulated that, "if Mississippi law is applicable, there is no coverage under the terms and conditions of the Progressive policy." We certified the following question to the Nevada Supreme Court:[1]

> Does Nevada's public policy preclude giving effect to a choice-of-law provision in an insurance contract that was negotiated, executed, and delivered while the parties resided outside of Nevada, when that effect would deny any recovery under Nevada Revised Statutes section 485.3091 to Nevada residents who were injured in Nevada?

The Nevada Supreme Court chose to rephrase the question, as is its prerogative. Rephrased, the question the Nevada Supreme Court answered was:[2]

> Does Nevada public policy preclude giving effect to a household exclusion clause in an automobile liability insurance policy delivered in Mississippi to Mississippi residents and choosing Mississippi law as controlling, where Mississippi law permits household exclusions but the effect of the exclusion is to deny Nevada residents who

[1] *Progressive Gulf Ins. Co. v. Faehnrich*, 627 F.3d 1137 (9th Cir. 2010).

[2] *Progressive Gulf Ins. Co. v. Faehnrich*, No. 57324, 2014 WL 1258808, at *2 (Nev. March 27, 2014).

> were injured in Nevada recovery of the minimum coverages specified in NRS 485.3091?

The Nevada Supreme Court answered this question in the negative, holding that "giving effect to the choice-of-law provision in the parties' automobile insurance policy does not violate Nevada's public policy."[3] Because Mississippi law applies, summary judgment should have been granted in favor of Progressive Gulf. The facts and reasoning are fully set out in the Nevada Supreme Court's decision, *Progressive Gulf Ins. Co. v. Faehnrich*, No. 57324, 2014 WL 1258808 (Nev. March 27, 2014), which we attach as an appendix.

REVERSED AND REMANDED for entry of summary judgment in favor of Progressive Gulf Insurance Company.

[3] *Progressive Gulf Ins. Co.*, 2014 WL 1258808, at *6.

APPENDIX

BEFORE THE COURT EN BANC.

OPINION

By the Court, PICKERING, J.:

The United States Court of Appeals for the Ninth Circuit has certified the following question to this court: "Does Nevada's public policy preclude giving effect to a choice-of-law provision in an insurance contract that was negotiated, executed, and delivered while the parties resided outside of Nevada, when that effect would deny any recovery under NRS 485.3091 to Nevada residents who were injured in Nevada?"

I.

The certified question grows out of a dispute over the validity of a household exclusion in an automobile liability insurance policy. The policy was negotiated, delivered, and renewed several times in Mississippi, where Randall and Toni Faehnrich lived with their two children. The policy was entitled "Mississippi Motor Vehicle Policy." The Faehnriches' insurance application listed Mississippi as their state of residence. This made Mississippi the state whose statutory law the policy incorporated:

> **TERMS OF POLICY CONFORMED TO STATUTES**
>
> If any provision of this policy fails to conform with the legal requirements of the state listed on your application as your residence [Mississippi], the provision shall be deemed amended to conform with such legal requirements. All other provisions shall be given full force and effect. *Any disputes as to the coverages provided or the provisions of this policy shall be governed by the law of the state listed on your application as your residence.*

(Emphasis added.) The parties and the Ninth Circuit refer to the italicized language as the policy's choice-of-law provision.

Eventually, the couple divorced and Toni moved to Nevada. She drove here in a Jeep that she and Randall co-owned.[1] The couple's minor children, both boys, then flew out to join their mother in Las Vegas. The next day, while driving the Jeep with the children as passengers, Toni was involved in a single-car accident; the car rolled, and the boys suffered serious injuries. At the time, the Jeep still carried Mississippi registration and license plates, and Toni had a Mississippi driver's license.

The insurance policy, issued by Progressive Gulf Insurance Co., generally provides bodily injury liability coverage up to $100,000 per person and $300,000 per accident. But it includes a household exclusion that, on its face, eliminates coverage for the boys' claims against Toni. The exclusion states that the policy's liability coverage "does not apply to . . . bodily injury to you or a relative." "Relative" is defined as

> a person residing in the same household as you, and related to you by blood, marriage, or adoption . . . . Your unmarried dependent children temporarily away from home will be considered residents if they intend to continue to reside in your household.

When the policy was issued, Progressive offered, but the Faehnriches declined, "All Uninsured/Underinsured Bodily Injury . . . Coverage."

Randall presented a claim to Progressive for his sons' injuries. Citing the household exclusion, the insurer denied coverage. Progressive then brought a declaratory judgment action in Nevada federal district court, followed by a motion for summary judgment, seeking, among other

[1]The Ninth Circuit describes the Jeep as an "insured vehicle." We accept that designation. *See In re Fontainebleau Las Vegas Holdings, L.L.C.*, 127 Nev. ___, ___, 267 P.3d 786, 794-95 (2011).

things, an order declaring the household exclusion valid and applicable. Stressing that "[t]he family member [or household] exclusion does not [afford] the minimum [$15,000/$30,000 bodily injury] coverage required by the Nevada Insurance Code," *see* NRS 485.185; NRS 485.3091, the district court denied summary judgment. It held that the "exclusion violates Nevada public policy [and] is unenforceable; and, in accordance with Nevada choice of law rules, Mississippi law [validating such exclusions] cannot apply."

Progressive appealed. Because the order denying summary judgment did not resolve the case, the Ninth Circuit dismissed the first appeal for lack of a final, appealable judgment. There followed a stipulation designed to convert the summary judgment denial into a final judgment. In the stipulation, the parties "agreed that if Mississippi law is applicable, there is no coverage under the terms and conditions of the Progressive policy." They further agreed that, "[i]n the event that Nevada law is applicable, Progressive would owe a duty to . . . indemnify [Toni] Faehnrich consistent with the terms and conditions of its policy up to the applicable limits of $15,000.00 per person and $30,000.00 per occurrence," and that this would entitle the two children to $15,000 apiece for their bodily injuries. In the stipulation "Progressive waives any other coverage defenses," and both sides agree that "there are no other issues to adjudicate."

A second Ninth Circuit appeal followed. After briefing and argument, a divided panel concluded that this case turns on an unsettled question of Nevada public policy and certified that question to this court.

II.

A.

Rule 5 of the Nevada Rules of Appellate Procedure gives this court discretionary authority to accept and answer certified questions of Nevada law that "may be determinative of the cause then pending in the certifying court." *See Volvo Cars of N. Am., Inc. v. Ricci*, 122 Nev. 746, 749-51, 137 P.3d 1161, 1163-64 (2006). As the answering court, our role "is limited to answering the questions of law posed to [us;] the certifying court retains the duty to determine the facts and to apply the law provided by the answering court to those facts." *In re Fontainebleau Las Vegas Holdings, L.L.C.*, 127 Nev. ___, ___, 267 P.3d 786, 794-95 (2011). We accept "the facts as stated in the certification order and its attachment[s]." *Id.* at ___, 267 P.3d at 795.

These rules, combined with the parties' stipulation, prompt us to narrow the question posed by the Ninth Circuit. *See Chapman v. Deutsche Bank Nat'l Trust Co.*, 129 Nev. ___, ___, 302 P.3d 1103, 1105-06 (2013) (this court may, in its discretion, rephrase a certified question). Rephrased, the question we consider is: Does Nevada public policy preclude giving effect to a household exclusion clause in an automobile liability insurance policy delivered in Mississippi to Mississippi residents and choosing Mississippi law as controlling, where Mississippi law permits household exclusions but the effect of the exclusion is to deny Nevada residents who were injured in Nevada recovery of the minimum coverages specified in NRS 485.3091?

B.

Nevada tends to follow the Restatement (Second) of Conflict of Laws (1971) in determining choice-of-law questions involving contracts, generally, *see Ferdie Sievers & Lake Tahoe Land Co. v. Diversified*

P.2d at 899-900, inapplicable.[2] The question, then, is whether the policy's choice of Mississippi law, which validates the household exclusion,[3] offends a fundamental Nevada policy in the circumstances of this case. This depends not just on Nevada public policy but also on Mississippi public policy and whether Nevada or Mississippi has a materially greater interest in the matter. "Application of the chosen law will be refused only (1) to protect a fundamental policy of the state which, under the rule of § 188 [choice-of-law in contract cases without choice-of-law clauses], would be the state of the otherwise applicable law, provided (2) that this state has a materially greater interest than the state of the chosen law in the determination of the particular issue." Restatement (Second) of Conflict of Laws § 187 cmt. g. "An important consideration is [where and to what extent] the significant contacts are grouped. For the forum will be more inclined to defer to the policy of a state which is closely related to the contract and the parties than to the policy of a state where few contacts are grouped." *Id.*

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[2]In *Daniels*, the insurer sold "group life insurance" to military veterans pursuant to a master policy that recited it was "delivered" in Missouri, whose law the policy chose. 103 Nev. at 677-78, 747 P.2d at 899-900. We determined the policy was not true group insurance but "'franchise insurance,' which is to be treated as an individual policy." *Id.* at 678, 747 P.2d at 899. Since the policy was applied for and delivered to a Nevada domiciliary in Nevada, Nevada law applied notwithstanding the master policy's recitation that it was issued and delivered in Missouri. *Id.* at 678, 747 P.2d at 900.

[3]We accept the parties' stipulated representation that Mississippi law validates household exclusions even as to minimum statutory coverages. *See Thompson v. Miss. Farm Bureau Mut. Ins. Co.*, 602 So. 2d 855, 856 (Miss. 1992).