Choice of Law in the United States

Gregory E. Smith

Follow this and additional works at: https://repository.uchastings.edu/hastings_law_journal

Part of the Law Commons

Recommended Citation
Available at: https://repository.uchastings.edu/hastings_law_journal/vol38/iss6/1

This Article is brought to you for free and open access by the Law Journals at UC Hastings Scholarship Repository. It has been accepted for inclusion in Hastings Law Journal by an authorized editor of UC Hastings Scholarship Repository.
Choice of Law in the United States

by

GREGORY E. SMITH*

Perhaps no legal subject has caused more consternation and confusion among the bench and bar than choice of law.¹ Much of the bewilderment is attributable to the fact that the modern choice of law era did not begin until approximately 1963.² Since then, courts have struggled mightily to come to grips with various modern choice of law theories put forth by conflicts scholars. The decisions in any given jurisdiction are often decidedly, perhaps wildly, inconsistent. Added to this is the fact that published conflicts decisions are quite rare. Although conflicts cases arise at the trial level fairly often, many years may pass before a court of last resort is called upon to resolve a difficult choice of law problem.³ Thus, confounded judges are left to grapple with a smattering of irreconcilable and sometimes incomprehensive precedents. It is no small wonder that many judges have dreaded seeing choice of law cases on their dockets.

There are approximately a half-dozen separate choice of law theo-

---

¹ “Choice of law” is the phrase generally used to describe that branch of the subject of conflict of laws which deals with the processes by which courts select the substantive law governing particular cases. The term “conflict of laws” is often used synonymously with “choice of law,” and will be so used in this Article. Literally, however, the former term is broader than the latter, and includes within its domain such topics as domicile, establishment of jurisdiction, and enforcement of judgments. Choice of law describes only the process courts use to determine the applicable law in a case which concerns more than one jurisdiction.

² As Professor Sedler has pointed out, 1963 was a watershed year for choice of law in theory and in practice. In that year, the late great Professor Brainerd Currie’s writings were collected in B. CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS (1963). Also in that year, Judge Fuld of the New York Court of Appeals wrote the opinion in the most famous of all choice of law cases, Babcock v. Jackson, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963). See Sedler, Interest Analysis and Forum Preference in the Conflict of Laws: A Response to the “New Critics,” 34 MERCER L. REV. 593 (1983).

³ In New York, for example, there was not a single choice of law decision in the court of appeals during the thirteen-year span between Neumeier v. Kuehner, 31 N.Y.2d 121, 286 N.E.2d 454, 335 N.Y.S.2d 64 (1972) and Schultz v. Boy Scouts of Am., 65 N.Y.2d 189, 480 N.E.2d 679, 491 N.Y.S.2d 90 (1985). In the interim between these two decisions, each of the seven seats on the court of appeals changed hands at least once.

[1041]
ties currently in use. Nevertheless, courts have shown a distinct inability to distinguish them. Courts often say they are using one theory when their opinions clearly show that they are using another. At other times, courts utilize any number of choice of law methodologies in order to reach the desired results, apparently reasoning that twenty conflicts scholars cannot be wrong. This process, known as eclecticism, makes it extremely difficult to sort out the precedents.4

Unfortunately, the complexity of a legal concept is often directly proportional to its practical importance. Choice of law is no exception. The choice of law decision may determine the success or failure of a lawsuit, the amount of damages recoverable, or the legality of a defense raised. It is essential, therefore, that judges and lawyers be able to sort out the various choice of law theories and to determine which rules govern in their respective jurisdictions.

To aid in this determination, this Article catalogues and analyzes all of the significant choice of law decisions handed down in the modern era and, when appropriate, provides forecasts of which theories are likely to prevail in particular jurisdictions in the future. The Article begins with a brief introduction to the choice of law problem, including a description of the various choice of law theories currently in vogue, and then proceeds to make a comprehensive survey of the choice of law methods currently used in the fifty states and the District of Columbia.5

4. Professor Reppy, in his wonderful article, Eclecticism in Choice of Law: Hybrid Method or Mishmash?, 34 MERCER L. REV. 645 (1983), identifies seven "types of eclecticism" used by the courts. They are: (1) "methodless ad hoc decisionmaking" — the judge decides which party he wants to win and writes an opinion to match; (2) "pure better law in disguise" — the judge makes his choice of law decision on the basis of which substantive law he likes better, but disguises his method by referring to more policy-blind considerations; (3) "confused lower court or federal court judge" — conflicting precedents create confused decisions; (4) "kitchen sink" — the judge purposely utilizes all available choice of law theories and gives each theory one "vote" toward his selection decision; (5) "odd-numbered mishmash" — differs from the "kitchen sink" only in that not all available theories are given "votes"; (6) "blend of coffee" — using a second choice of law method to resolve a conflict left unresolved after application of the primary method; and (7) "uninformed judge" — the judge doesn't know what he is doing because he is incapable of recognizing the characteristics which distinguish one modern choice of law theory from another. Id. at 651-55.

5. The inspiration for this project was provided by Herma Hill Kay in her leading article, Theory into Practice: Choice of Law in the Courts, 34 MERCER L. REV. 521 (1983). Professor Kay was interested in determining precisely in what manner the theories developed by her academic colleagues were being applied in the courts. Her emphasis was on the judicial development and utilization of choice of law theory. My focus is instead on the courts themselves: What exactly have the courts of any given jurisdiction done in regard to choice of law, and where are they likely to go in the future?
I. Choice of Law Systems

A. First Restatement

The Restatement of Conflict of Laws,\(^6\) historically the primary reference for choice of law decisions in the United States, requires in each case the application of the law of the geographical place where the key event occurred by which plaintiff became possessed of a cause of action. This key event, in the case of a tort, is the place where the defendant allegedly committed the wrong.\(^7\) The place of wrong, in turn, is the place where the last event necessary to create the defendant's liability occurred.\(^8\) Ordinarily, this last event is the plaintiff's injury. For this reason, the place of wrong rule is often renamed, as is done here, the place of injury rule.

The First Restatement also provides an all-encompassing rule for choice of law in contract cases. Under that rule, the validity and construction of a contract will be determined with reference to the law of the place of making,\(^9\) where "the principal event necessary to make a contract occurs."\(^10\) Issues concerning the sufficiency of performance under a contract are governed not by the place of making, but by the law of the place where performance is to occur.\(^11\) In the great majority of cases, the place of making and the place of performance are within the same jurisdiction. In cases where they are not, however, the court's characterization of the issue as one of validity or performance of the contract becomes crucial in the choice of law process.\(^12\)

The courts did not question the appropriateness of these broad rules

---

6. RESTATEMENT OF CONFLICT OF LAWS (1934) [hereinafter First Restatement].
7. See id. §§ 377-397.
8. See id. § 377.
9. See id. §§ 311-347.
10. Id. § 311 comment d.
11. Id. §§ 355-372.
12. Indeed, one of the criticisms of the First Restatement's contract rules is that a court may avoid the application of the law called for by the rule through the expedient of recharacterizing an issue of contractual validity as one of performance, or vice versa. In conflicts parlance, this is known as an "escape device," an exercise in creative verbiage by which a court makes an a priori decision as to which law it will apply, and then defines the issue in such a way as to lead to the desired result. Another escape device is the familiar substantive/procedural dichotomy, under which issues relating to the merits of the case are determined via the normal choice of law process, but issues which can be presented as relating merely to procedure are governed by the law of the forum. Another frequently used escape device is a refusal, based on the forum's public policy, to apply the foreign law which would otherwise obtain by operation of the state's choice of law system. This escape device is basically a subterfuge for applying a governmental interest analysis approach and thereby serving the felt needs of the forum.
until the 1945 case of *W. H. Barber Co. v. Hughes*, in which the Indiana Supreme Court adopted a "significant contacts" test to determine the applicable law in contract cases. Then, in the 1954 case of *Auten v. Auten*, the New York Court of Appeals espoused the center of gravity approach, which, though similar to that used by the Indiana court, put somewhat more emphasis on the policies behind the competing laws. The choice of law revolution, however, did not take hold until 1963, when the famous New York guest statute case of *Babcock v. Jackson* was decided.

In the years since *Babcock*, use of the First Restatement approach has steadily declined. This system of broad, single-contact, policy-blind rules, which was almost universally accepted as gospel a quarter of a century ago, is now the law of fewer than half the states. In many of these states, the courts have not recently had a chance to replace the old rules, and might well be inclined to do so at the next opportunity.

**B. Second Restatement**

Even before the seminal decision in *Babcock*, the American Law Institute (ALI) had begun a project designed to forge a new choice of law system. The project was completed in 1971 when the "most significant relationship" test was finally approved by a thirteen to twelve vote of the ALI's choice of law council. This test, incorporated in the *Restatement (Second) of Conflict of Laws*, requires a court to apply the law of that state which has the closest relationship to the parties and issues involved, taking into consideration a number of general principles collected in section 6. In addition, the Second Restatement suggests specific contact points which should be taken into account in applying the principles of

---

13. 223 Ind. 570, 63 N.E.2d 417 (1945).
18. The Second Restatement provides:
   (1) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.
   (2) When there is no such directive, the factors relevant to the choice of the applicable rule of law include
      (a) the needs of the interstate and international systems,
      (b) the relevant policies of the forum,
section 6. The relevant contact points for tort are listed in section 14519 and for contract in section 188.20 As an added feature, the drafters included a number of presumptive references which point the court to the law of a specific jurisdiction unless, with respect to any given issue, another state has a more significant relationship to the issues and the parties than does the state presumptively chosen.21 Finally, with regard to contracts, the drafters added an element of flexibility to the system by providing, in section 187,22 a mechanism for upholding, in most cases,

(c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
(d) the protection of justified expectations,
(e) the basic policies underlying the particular field of law,
(f) certainty, predictability and uniformity of result, and
(g) ease in the determination and application of the law to be applied.

Id. § 6.
19. Contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:
(a) the place where the injury occurred,
(b) the place where the conduct causing the injury occurred,
(c) the domicile, residence, nationality, place of incorporation and place of business of the parties, and
(d) the place where the relationship, if any, between the parties is centered.
These contacts are to be evaluated according to their relative importance with respect to the particular issue.

Id. § 145(2).
20. In the absence of an effective choice of law by the parties (see § 187), the contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:
(a) the place of contracting,
(b) the place of negotiation of the contract,
(c) the place of performance,
(d) the location of the subject matter of the contract, and
(e) the domicile, residence, nationality, place of incorporation and place of business of the parties.
These contacts are to be evaluated according to their relative importance with respect to the particular issue.

Id. § 188(2).
21. One such presumptive reference, for example, provides:
In an action for a personal injury, the local law of the state where the injury occurred determines the rights and liabilities of the parties, unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 to the occurrence and the parties, in which event the local law of the other state will be applied.

Id. § 146.
22. Section 187 provides:
(1) The law of the state chosen by the parties to govern their contractual rights and duties will be applied if the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed to that issue.
(2) The law of the state chosen by the parties to govern their contractual rights and duties will be applied, even if the particular issue is one which the parties could not
contractual choice of law provisions selected by the parties themselves.

The Second Restatement is the most popular of the modern choice of law theories, having been adopted in toto by thirteen states, and in part by several others.²³

The Second Restatement has considerable merit as a flexible mixture of the current thinking on choice of law. Certainly it is far superior to the First Restatement's single-contact, policy-blind rules. Its fatal flaw, however, is its complexity. The basic theory behind the Second Restatement is that a court is supposed to make its decision on the basis of the interest and policy factors listed in section 6, and is to use the contact factors in sections 145 and 188 only as indicia of which states are sufficiently implicated that their interests should be considered in the ultimate choice of law decision governed by section 6.

Unfortunately, the system is almost never applied in this way. Courts that purport to follow the Second Restatement generally engage in a contact-counting exercise, with the Second Restatement relegated to the status of a guide for determining which particular contacts are generally relevant to the choice of law inquiry. In short, sections 145 and 188 are being used as ends in themselves, rather than as starting points for the choice of law decision, which ultimately should be governed by the principles identified in section 6. Those who drafted the Second Restatement were, for the most part, advocates of the governmental interest analysis, which is subsequently described. Paradoxically, the substantial success of the Second Restatement has undercut the vitality of the true interest analysis, a theory which has floundered somewhat in the courts since the ALI adopted the Second Restatement.

C. Center of Gravity Test

Closely related to the most significant relationship test is the so-called grouping of contacts or center of gravity test. The oldest of the

---

²³ Arizona, Colorado, Idaho, Illinois, Iowa, Maine, Massachusetts, Mississippi, Missouri, Ohio, Nebraska, Texas, and Washington have adopted the Second Restatement for use in both tort and contract. Alaska, Florida, and Oklahoma have adopted § 145 for use in tort cases. Conversely, Delaware, Kentucky, and New Hampshire have adopted the Second Restatement in contract but not in tort.
modern choice of law theories, it authorizes the court to look at all of the significant factors which might logically influence it in deciding which law to apply, and to choose the law of the state that has the greatest contacts with the case. Its virtue and its vice lie in its almost infinite flexibility.

The center of the gravity approach was, for many years, virtually the exclusive province of the New York Court of Appeals. The New York courts no longer follow the theory, but some other courts do. Additionally, it is applied surreptitiously by many courts purporting to apply the Second Restatement.

D. Interest Analysis

Beginning in the fifties, a new choice of law theory, articulated by Professor Brainerd Currie of Duke University, came into vogue. This theory has come to be known as the “governmental interest analysis,” or simply, “interest analysis” theory of choice of law. The principal purpose of interest analysis theory is to ensure that the law which is applied in the majority of cases will be one whose application in a particular context will serve the purposes for which that law was created. The process begins by identifying the specific law in each state touching upon the disputed legal issue. Next, the court must determine the precise policies which the respective laws were designed to augment. Finally, the court examines each jurisdiction's factual relationship with the litigation and determines whether or not the application of a particular state's law would be consistent with the purposes identified as supporting that law.

Once the court has completed this three-step technique, the actual choice of law decision is routine. If application of neither law would serve the purposes behind that law, the case is an unprovided-for case and the court should apply its own law for the mere sake of convenience. If application of one law would further the purposes behind that law, but application of the other law would not serve a purpose, the choice is easy: the court should apply the former law. This is known as a false conflict. Finally, if the case is such that application of either law would serve the purposes behind that law, a true conflict is presented and the court is left with several options as to how to resolve it. It can proceed as Currie

24. The North Dakota Supreme Court is especially fond of this “contacts” theory. It has adopted it for use in both tort and contract and has managed to keep its approach distinct from that of the Second Restatement. In addition, Indiana continues to adhere to its Barber precedent, and Pennsylvania has followed an eclectic approach to contract cases which can properly be classified as a center of gravity method. The District of Columbia and New Jersey also follow this approach in contract cases.

25. Professor Currie’s writings are collected in B. CURRIE, supra note 2.
originally suggested and apply the forum’s law; it can sharpen its analysis and determine whether “a more moderate and restrained interpretation” of the forum law will show that its application is unnecessary for the fulfillment of the purpose behind the law; it can apply the law of the state whose interests would be most impaired by not having its law applied; or, it can simply use one of the other choice of law theories as a true conflict tie breaker.

The virtue of the interest analysis theory lies in its sensitivity to the substantive aspects of the laws being considered. It is not a jurisdiction-selecting tool but a law-selecting tool. It makes the choice of law painless in many situations by rejecting the application of a given law only if applying that law would fail to further the legislature’s purposes in enacting it. The primary difficulty with the theory, however, has been its historical failure to deal with the resolution of true conflicts: what is to be done when the purposes behind either law would be served by its application? As it has been suggested, there is no one satisfactory answer to this question. Additionally, the theory is quite manipulable. A court can alter the result in many cases merely by identifying alternative governmental interests or by describing alternative purposes for the creation of one law. Finally, interest analysis, especially in the pure form advocated by Professor Currie, is heavily forum-favoring in operation: the categories of true conflicts and unprovided-for cases will constitute a substantial percentage of the total number of cases encountered by a court. In each of these categories Currie favors application of forum law.

E. Leflar

The last of the major theories is that propounded by Professor Rob-
Leflar in a 1966 law review article, in which he undertook to capsulize those factors that had influenced courts in their choice of law analyses. He articulated the following five factors: (1) predictability of result, (2) maintenance of interstate and international order, (3) simplification of the judicial task, (4) advancement of the forum’s governmental interests, and, by far the most controversial factor, (5) application of the better rule of law. The Leflar factors have proven to be exceedingly flexible in practice, often allowing a court to apply a law which could not be selected under any other modern theory, but which, for any number of reasons, might provide an appropriate rule of decision in a particular case. Unfortunately, the theory is plagued by excessive forum-favoritism. The third and fourth factors will almost never point to the application of foreign law. Moreover, the fifth factor also points to forum law in the great majority of cases, since judges rarely consider their state’s own laws to be inferior to those of another state. A final problem with the Leflar test is that the first three factors are totally irrelevant in tort cases and tend to be ignored by judges. This further heightens the significance of the incredibly pro-forum fourth factor and the highly subjective fifth factor. Several states, however, have found this system to their liking.

F. Cavers, Fuld’s Rules, and Lex Fori

The remaining choice of law systems have been relegated to minor roles in the courts. Pennsylvania appears to have adopted for tort conflicts a system of ready-made rules formulated by Professor David Cavers. The system is known as the principles of preference system, and embodies seven such principles, the first two of which are most commonly encountered. To date, the Pennsylvania courts have utilized

32. In nearly every case, these two factors will either point to application of forum law or be neutral. It is hard to imagine how the judicial task could be simplified by requiring the court to resort to foreign law as the rule of decision. Equally as unusual will be the case in which applying a foreign law advances the governmental interests of the forum. But see Lichter v. Fritsch, 77 Wis. 2d 178, 252 N.W.2d 360 (1977), an odd case in which the court held that applying Illinois law would further Wisconsin’s governmental interests.
33. Hawaii, Minnesota, and Wisconsin are the leading proponents of the Leflar approach. A few other states utilize the Leflar factors in tort only.
35. The first two principles outlined by Professor Cavers are as follows:
   1. Where the liability laws of the state of injury set a higher standard of conduct or of financial protection against injury than do the laws of the state where the person causing the injury has acted or had his home, the laws of the state of injury should determine the standard and the protection applicable to the case, at least where the
only the second of these principles, but they have done so three times.\textsuperscript{36} It remains to be seen whether these rules, designed to take into account both governmental interests and party expectations, will find favor in future cases.

Related to Professor Cavers' principles are the rules first announced by Judge Fuld of the New York Court of Appeals in a concurring opinion in \textit{Tooker v. Lopez},\textsuperscript{37} and adopted by the full court three years later in \textit{Neumeier v. Kuehner}.\textsuperscript{38} Judge Fuld's rules were designed exclusively for application in guest statute cases, but have recently been extended by the court of appeals and adopted for use in tort cases generally.\textsuperscript{39} Like Professor Cavers' principles of preference, Judge Fuld's rules emphasize governmental interests and party expectations. Although these two systems are admirable, each suffers from the same defect: it is simply impossible to design choice of law rules that will reach all of the myriad conflicts situations that arise. Although expertly drafted, these systems are necessarily incomplete.

Finally, what is perhaps the most obvious choice of law approach of all has been adopted for use only in tort cases in Kentucky and Michigan. Under this approach, the court simply eschews choice of law entirely and applies the law of the forum.\textsuperscript{40} This approach, entitled \textit{lex fori}, is to be distinguished from the more common situation where a court simply fails to recognize a conflicts problem and instinctively applies local law.

\section*{II. Survey of Choice Of Law}

The following is a state-by-state survey of the choice of law rules in practice.

\begin{itemize}
\item person injured was not so related to the person causing the injury that the question should be relegated to the law governing the relationship.
\item Where the liability laws of the state in which the defendant acted and caused an injury set a lower standard of conduct or of financial protection than do the laws of the home state of the person suffering the injury, the laws of the state of conduct and injury should determine the standard of conduct or protection applicable to the case, at least where the person injured was not so related to the person causing the injury that the question should be relegated to the law governing the relationship.
\end{itemize}

\textit{Id.} at 138, 146.

38. 31 N.Y.2d 121, 286 N.E.2d 454, 335 N.Y.S.2d 64 (1972).
40. \textit{See infra} notes 195-200, 247-56 and accompanying text.
Alabama

Alabama follows the traditional First Restatement choice of law rule in tort cases, referring to the place where the injury occurred. In 1980, the Alabama Supreme Court described the arguments against the traditional rule as "compelling," and hinted that a change was in the wind.\textsuperscript{41} Four years later, however, the court, without dissent, dismissed a suit by an injured worker against two co-employees, on the theory of lex loci delicti.\textsuperscript{42} Most recently, in \textit{Powell v. Sappington},\textsuperscript{43} the supreme court held that lex loci delicti required the application of Georgia law, forbidding a suit against a co-employee, even though the plaintiff, injured in Georgia, had elected to receive worker's compensation benefits in his home state of Alabama, which permits co-employee suits.

A federal district court sitting in diversity has recently described the rule of lex loci delicti as "well settled" in Alabama.\textsuperscript{44}

Research reveals no Alabama cases involving choice of law in contract actions. The First Restatement rules would probably govern here as well.

Alaska

Alaska follows the Second Restatement in tort cases. In 1985, the Alaska Supreme Court utilized sections 145 and 146 of the Second Restatement to determine that Alaska's more liberal law of damages for products liability would govern in a wrongful death suit. The suit was

\textsuperscript{41} In \textit{Bodnar v. Piper Aircraft Corp.}, 392 So. 2d 1161 ( Ala. 1980), the court stated as follows: "Some of the arguments advanced by the scholars and some courts in adopting a more flexible conflict of laws rule are compelling and may well find favor in this jurisdiction in the proper case, but the case before us is not such a case." \textit{Id.} at 1163.

\textsuperscript{42} Norris v Taylor, 460 So. 2d 151 ( Ala. 1984). The opinion contains no indication that the court contemplates departure from the traditional rule:

It is well settled that the traditional conflict rule of lex loci delicti applies to tort actions brought in this jurisdiction. \textit{Bodnar v Piper Aircraft Corp.}, 392 So. 2d 1161 ( Ala. 1981). Under this principle, an Alabama court will determine the substantive rights of an injured party according to the law of the state where the injury occurred. \textit{Id.} at 152. A separate concurrence was no less resolute: "The applicable law is the law of the state where the injury occurred. We have not adopted the 'significant interests' rule; nor do I contend for the adoption of this minority view." \textit{Id.} at 153 (Jones, J., concurring).


\textsuperscript{44} Thomas v FMC Corp., 610 F. Supp 912, 913 (M.D. Ala. 1985).
brought by a Florida resident on behalf of her husband, an air taxi pilot who was killed in a plane crash in Barrow, Alaska, while flying for his Alaska employer. Prior to that case, the state's highest court had departed from lex loci delicti on only one occasion, when it held that the question of interspousal immunity from tort action would be governed by the place of marital domicile rather than the situs of the injury. That decision expressly left open the possibility that Alaska might adopt a modern choice of law theory.

There have been no contractual choice of law cases in Alaska since statehood, perhaps due to the state's isolation and its infrequency of contacts with the lower forty-eight states. Presumably, the place of making rule governs.

Arizona

Arizona is one of the most consistent adherents to the Second Restatement approach to choice of law. The break with the past began in 1968, when Arizona became the first state to adopt the new section 379 (now section 145) in tort cases. The Arizona Supreme Court actually applied section 309g (now section 169) as the rule of decision in that case, holding that the place of marital domicile governs the question of interspousal immunity. The Arizona courts have had numerous other opportunities to apply the Second Restatement in tort cases, and they have done so unhesitatingly.

47. The court stated:
   In deciding not to adopt the choice-of-law rule that the place of the wrong governs interspousal immunities and liabilities in tort actions we find it unnecessary at this time to decide whether or not we will adopt the Babcock v. Jackson criterion for determination of choice-of-law questions arising out of tortious conduct.
   Id. at 703.
   Cognizant of the fact that we are charting paths through a developing area of the law, we have felt it necessary to make the foregoing extensive examination of the competing choice-of-law theories . . . [T]he contacts theory offers the brightest prospects for a rational yet flexible approach to choice-of-law problems. Accordingly, we adopt the contacts theory, as embodied in the Restatement (Second) of Conflict of Laws as the rule for Arizona.
49. The most recent case in the Arizona Supreme Court was Bryant v. Silverman, 146 Ariz. 41, 703 P.2d 1190 (1985), which involved plaintiffs from Arizona, New Mexico, and Texas; a defendant airline headquartered in Phoenix; and an airplane crash in Durango, Colorado. In a dutiful, seven-page analysis under § 145 and § 146, the court opted for the Arizona law allowing unlimited recovery for wrongful death, rather than the Colorado law, which limited recovery for wrongful death and prohibited an award of punitive damages. Other cases utilizing the Second Restatement in tort include: Wendelken v. Superior Court, 137 Ariz. 455,
An Arizona appellate court, without discussion, used the Second Restatement approach in determining the law governing an insurer's right, under an insurance contract, to intervene in a suit against the insured. In a breach of contract case, the appellate court relied upon sections 6 and 188, applying Arizona's statute permitting the award of attorney's fees against the breaching Wisconsin defendant. Given the state supreme court's consistent resort to the Second Restatement in tort cases, there is no reason to doubt that the court will find occasion to adopt the principles of section 188 in contract cases as well.

Arkansas

The dawn of the modern era in Arkansas was Wallis v. Mrs. Smith's Pie Co., which involved a suit by Arkansas residents against a Pennsylvania corporation for injuries caused primarily by the negligence of its employee truck driver in an accident on an interstate freeway in Missouri. In that case, the Arkansas Supreme Court abandoned the place of the wrong rule and used Arkansas' rule of comparative negligence, rather than Missouri's law of contributory negligence. The court cited Leflar's choice-influencing considerations and also relied upon three out-of-state cases which discussed the Leflar approach approvingly. Although the opinion did not expressly adopt any choice of law theory, it appeared to rely on the last two Leflar factors—advancement of the forum's governmental interests and application of the better law. This is


54. Wallis, 261 Ark. at 628, 550 S.W. 2d at 456 (citing Mitchell v. Craft, 211 So. 2d 509 (Miss. 1968); Woodward v. Stewart, 104 R.I. 290, 243 A.2d 917 (1968); Clark v. Clark, 107 N.H. 351, 222 A.2d 205 (1966)).

55. The Wallis court stated as follows:

This State's governmental interest in its citizens is best served by application of our comparative fault statute rather than Missouri's contributory negligence law. As expressed in Clark v. Clark, 107 N.H. 351, 222 A.2d 205 (1968) [sic], probably the truest governmental interest the forum has is "in the fair and efficient administration of justice," and in our opinion application of our statute better achieves that result. The decided trend is away from the harsh results which occur in the application of
consistent with the approach of other states utilizing Leflar’s method. The Arkansas Supreme Court’s adoption of Leflar’s choice-influencing considerations was clear by 1978.\textsuperscript{56} An Eighth Circuit panel recently relied on the Leflar factors in a strict liability case.\textsuperscript{57}

In a 1987 guest statute case, the court utilized the five Leflar factors once again in holding that Arkansas’ “archaic and unfair” guest statute would not be permitted to deny recovery in tort to a Tennessee plaintiff who was injured in Arkansas, when her Arkansas friend lost control of the car in which they were riding.\textsuperscript{58} Not only was Tennessee’s law better, but application of the Arkansas guest statute would not have advanced the forum’s governmental interests since the statute had been repealed two years after the accident.

In contrast to its commitment to Leflar in tort cases, the Arkansas Supreme Court has been anything but consistent in contract cases. The cases have proceeded along either of two lines. The first line of decisions, characterized by the Babcock era case of \textit{Cooper v. Cherokee Village Development Co.},\textsuperscript{59} feature the traditional rule, looking to the place of making and the place of performance, with an emphasis on intention validation.\textsuperscript{60} A second line of decisions, beginning with \textit{Standard Leasing Corp. v. Schmidt Aviation, Inc.},\textsuperscript{61} follow a center of gravity or most

\begin{itemize}
\item the contributory negligence rule of law. Approximately 35 jurisdictions, including Pennsylvania, the home state of appellant corporation, have now enacted comparative negligence statutes in some form.
\item 261 Ark. at 632, 550 S.W.2d at 458.
\item 56. See Williams v. Carr, 263 Ark. 326, 333, 565 S.W.2d 400, 403-04 (1978).
\item 59. 236 Ark. 37, 364 S.W.2d 158 (1963). The \textit{Cooper} court found that New York law controlled regardless of whether one looked to the place of making, the place of performance, or the contractual choice of law clause expressing intentions of the parties. Cases following the \textit{Cooper} approach to choice of law include Stacy v. St. Charles Custom Kitchens, 284 Ark. 441, 443, 683 S.W.2d 225, 226 (1985); Grogg v. Colley Home Center, Inc., 283 Ark. 120, 122-23, 671 S.W.2d 733, 734 (1984); Snow v. CIT Corp., 278 Ark. 554, 557, 647 S.W.2d 465, 467 (1983); and Ladd v. Ladd, 265 Ark. 725, 731, 580 S.W.2d 696, 699 (1979).
\item 60. In Grogg v. Colley Home Center, Inc., 283 Ark. 120, 123, 671 S.W.2d 733, 734 (1984), for example, the court stated:
\begin{quote}
In \textit{Cooper} we noted that in determining what law governs the validity of a multistate contract we had on different occasions applied three different theories: 1) the law where the contract was made; 2) the law where the contract was to be performed in its most essential features; and 3) the law of the state which the parties intended to govern the contract. We noted, too, in \textit{Cooper} a consistent preference for the law of the state that would make the contract valid rather than void.
\end{quote}
\item 61. 264 Ark. 851, 576 S.W.2d 181 (1979). The case held that Arkansas law governed a lease agreement despite the fact that the lease provided that Tennessee law would govern.
\end{itemize}
significant contacts approach without citation to the Second Restatement. Until recently, it appeared that the *Standard Leasing* view would prevail, but two recent supreme court cases have relied exclusively on *Cooper*. The Arkansas rule is now most accurately characterized as the traditional place of making rule. As has been the case in some other Leflar states, the Arkansas courts have so far failed to extend the better law approach to contract cases.

Federal courts sitting in diversity have been unsurprisingly perplexed by the oscillations and variations of Arkansas' high court in contract cases. Some have relied on *Cooper*, others on *Standard Leasing*. The trend in the state courts, however, appears to be toward recognizing that Arkansas remains a place of making state in contractual conflict cases.

California

More than any other state, California represents "pure Currie." Interest analysis has been the chosen method of resolving conflicts cases in the Golden State since *Reich v. Purcell* was decided two decades ago. That case involved a suit by an Ohio plaintiff against a California defendant over an accident that occurred in Missouri. Justice Traynor evaluated the relevant governmental interests of three concerned states, and found that Ohio law, allowing unlimited recovery in actions for wrongful death, controlled. Ohio therefore was interested in providing full compensation to its injured citizens; California's law allowing unlimited recovery demonstrated that it had no interest in shielding its resident defendant from liability; Missouri's law, limiting damages in such cases

With scant analysis and no citations, the court reasoned that "the principal significant contacts occurred in Arkansas." *Id.* at 855, 576 S.W.2d at 184. Cases following this center of gravity approach include McMillen v. Winona Nat'l & Sav. Bank, 279 Ark. 16, 18, 648 S.W.2d 460, 462 (1983) ("The principal significant contracts [sic] were in Minnesota") and Tri-State Equip. Co. v. Tedder, 272 Ark. 408, 409-10, 614 S.W.2d 938, 939-40 (1981) (relying exclusively on *Standard Leasing*).

65. 67 Cal. 2d 551, 432 P.2d 727, 63 Cal. Rptr. 31 (1967).
to $25,000, sought to protect its own tortfeasors from excessive financial burdens, but this interest did not extend to the nonresident defendant. The case, therefore, presented a classic false conflict, and the laws of Ohio, the only interested state, were applied.

The next major California case was *Hurtado v. Superior Court.* *Hurtado* was an unprovided-for case. Both defendants were California residents and the fatal automobile accident occurred there. Plaintiff's decedent, however, was a Mexican domiciliary, and Mexico imposed severe limits on the amount recoverable in a suit for wrongful death. The California Supreme Court upheld the trial court's pretrial ruling that California law, allowing unlimited recovery, would govern. Mexico had no interest in protecting an American national from excessive liability. At the same time, California had no governmental interest in compensating a Mexican widow and her family. True to its selected theory, the court opted for forum law, not because California had any overriding governmental interests, but simply because there was no reason to displace the presumption of lex fori.

The first true conflict arose in the famous dram shop case of *Bernhard v. Harrah's Club.* There, the defendant, a Nevada casino, served intoxicants to a visiting California couple after the couple had reached "a point of obvious intoxication rendering them incapable of safely driving a car." On the way home and shortly after crossing back into California, the couple drifted over the center median, causing an accident which severely injured Bernhard, a passing motorcyclist and resident of California.

Bernhard sued the casino on a common law theory of dram shop liability. California was clearly interested in ensuring full compensation for its injured citizen. Nevada, however, was also an interested jurisdiction: it had purposely refrained from enacting dram shop legislation in order to protect its vital casino and nightclub industry. The true conflict was resolved, not by the Currie method of presumptive lex fori, but according to a concept known as comparative impairment, by which a court evaluates each state's interest and determines "which state's interest would be more impaired if its policy were subordinated to the policy of the other state." Using this analysis, the court noted that the de-

---

68. Id. at 315, 546 P.2d at 720, 128 Cal. Rptr. at 216.
69. The phrase was first used by Professor Baxter, in *Choice of Law and the Federal System,* 16 STAN. L. REV. 1, 8-22 (1963).
70. *Bernhard,* 16 Cal. 3d at 320, 546 P.2d at 723, 128 Cal. Rptr. at 219.
fendant had advertised heavily in California and, therefore, "by the
course of its chosen commercial practice ha[d] put itself at the heart of
California's regulatory interest, namely to prevent tavern keepers from
selling alcoholic beverages to obviously intoxicated persons who are
likely to act in California in the intoxicated state." California's interest
would, therefore, be every bit as impaired by excepting Harrah's Club
from California's rule of dram shop liability as by excepting a tavern in
San Jose or Placentia. Conversely, Nevada's interests were not as acute.
Although the state attempted to protect casinos and taverns from mon-
etary liability, it by no means condoned the defendant's actions in this
case. In fact, it was a criminal violation in Nevada to serve liquor to an
intoxicated person. Accordingly, California law was applied and the
trial court's dismissal of plaintiff's complaint was reversed.

California courts have applied Currie's interest analysis not only in
tort, but elsewhere as well. Less than sixty days after its decision in
Reich, the California Supreme Court applied interest analysis to find Cal-
ifornia law applicable to separate questions of agency and contract law.
Lower courts have even extended interest analysis to the traditionally
procedural context of statute of limitations conflicts.

California's devotion to interest analysis has not been lost on federal

71. *Id.* at 322, 546 P.2d at 725, 128 Cal. Rptr. at 221.
72. *Id.* (citing Nev. Rev. Stat. § 202.100 (repealed)).
73. Comparative impairment was used again in Offshore Rental Co. v. Continental Oil
conflict resolution factor the degree to which each state was committed to the soundness of its
law. It found that California's "key employee" statute, allowing corporations to recover for
harm done to certain employees, was "unusual and outmoded." *Id.* at 168, 583 P.2d at 728,
148 Cal. Rptr. at 874, and rarely enforced by California courts. On that basis, it refused to
apply California law.
(applying Oklahoma law and refusing to allow bad faith suit against insurer by one not a party
to the insurance contract); Nicolet, Inc. v. Superior Court, 179 Cal. App. 3d 7, 224 Cal. Rptr.
408 (applying California rule allowing recovery of punitive damages in bad faith tort claim
against insurer), *vacated*, Cal.3d, 719 P.2d 987, 227 Cal. Rptr. 391 (1986); Hernandez v. Bur-
ger, 102 Cal. App. 3d 795, 162 Cal. Rptr. 564 (1980) (a strange decision applying Mexico's
$2,000 limit on personal injury damages in favor of a California defendant); Cable v. Sahara
Tahoe Corp., 93 Cal. App. 3d 384, 155 Cal. Rptr. 770 (1979) (distinguishing Bernhard and
refusing to impose dram shop liability on Nevada casino); Kelley v. Von Kuznick, 18 Cal.
App. 3d 805, 96 Cal. Rptr. 184 (1971) (refusing to apply New Mexico guest statute to bar suit
between Californians injured in New Mexico car accident).
75. Travelers Ins. Co. v. Workmen's Compensation Appeals Bd., 68 Cal. 2d 7, 13-14, 434
P.2d 992, 996, 64 Cal. Rptr. 440, 444 (1967).
76. See North Am. Asbestos Corp. v. Superior Court, 180 Cal. App. 3d 902, 906-07, 225
courts sitting within the state. These too have applied the Currie method without exception.\textsuperscript{77}

Colorado

Colorado is a leading proponent of the Second Restatement approach to conflict of laws. In \textit{First National Bank v. Rostek},\textsuperscript{78} the Colorado Supreme Court announced that it would apply the Second Restatement prospectively.\textsuperscript{79} \textit{Rostek} was a guest statute case involving an airplane crash in South Dakota that killed a Colorado pilot and his passenger spouse. The guardian of the surviving children brought an action against the father’s estate, which asserted the South Dakota Aircraft Guest Statute\textsuperscript{80} as a complete defense. The court “consider[ed] this issue a narrow one, occurring with enough frequency and repetitiveness to enable us to extract specific guidelines that will satisfactorily regulate this issue,”\textsuperscript{81} and it therefore turned for guidance to Judge Fuld’s guest statute rules, first announced in \textit{Tooker v. Lopez}\textsuperscript{82} and adopted by the New York Court of Appeals in \textit{Neumeier v. Kuehner}.\textsuperscript{83} Specifically, the \textit{Rostek} court utilized the first of Judge Fuld’s rules, that of applying the law of the parties’ common domicile regardless of where the accident occurred. Colorado law was applied and the trial court’s grant of summary judgment to defendant was reversed.

The Colorado Court of Appeals, following \textit{Rostek}’s lead, has applied the Second Restatement in three tort cases.\textsuperscript{84} In the most sophisticated of these opinions, the court evaluated the relevant contacts and


\textsuperscript{78} 182 Colo. 437, 514 P.2d 314 (1973).

\textsuperscript{79} Id. at 448, 514 P.2d at 320.

\textsuperscript{80} S.D. CODIFIED LAWS ANN. § 50-13-15 (1967).

\textsuperscript{81} 182 Colo. at 446, 514 P.2d at 319. The court here cited Professor Reese’s article, \textit{Choice of Law: Rules or Approach}, 7 \textit{CORNELL L. REV.} 315 (1972), in which the author argues that replacement of the outmoded lex loci delicti rule does not require abandonment of conflicts rules generally.


\textsuperscript{83} 31 N.Y.2d 121, 129, 286 N.E.2d 454, 457-58, 335 N.Y.S.2d 64, 70 (1972).

interests in a negligence suit involving an accident in Iowa between a Colorado plaintiff and a nationwide truck line. The court held that Iowa law would govern the minimum standards of conduct because of its overriding interest in highway safety, but that Colorado's pro-plaintiff law of comparative negligence would be applied in lieu of Iowa's contributory negligence law, since Iowa was relatively unconcerned with apportioning liability between nonresident parties. Federal courts sitting in diversity have consistently applied the Second Restatement in Colorado.

The Rostek approach was extended to contract cases in *Wood Brothers Homes, Inc. v. Walker Adjustment Bureau*, which involved a suit for breach of an interstate construction contract. Later, in 1986, the supreme court applied section 191 of the Second Restatement to determine that Texas law applied to a breach of warranty claim. Contract cases in federal court have been similarly handled.

Connecticut

In 1986, the Connecticut Supreme Court formally abandoned lex loci delicti and adopted its stead sections 6 and 145 of the Second Restatement. The case was *O'Connor v. O'Connor*. *O'Connor* involved a suit by a woman against her husband for injuries sustained in an accident in Quebec. The law of Connecticut, the site of the marital domicile, would have allowed the suit to proceed, but the law of Quebec, which has a scheme of exclusive compensation by the provincial government, would not have allowed recovery from the tortfeasor.

After rejecting several arguments which had been advanced in favor of the lex loci delicti rule, the court decided it would no longer follow

---


90. 201 Conn. 632, 519 A.2d 13 (1986).
that rule in all conflicts cases.\textsuperscript{91} Perceiving a choice among the Second Restatement, interest analysis, and Leflar, the court adopted the former approach "as the governing principles for those cases, in which application of the doctrine of lex loci would produce an arbitrary, irrational result."\textsuperscript{92} The court, emphasizing Quebec's total lack of interest in the apportionment of liability between two residents of Connecticut, refused to apply Quebec law.\textsuperscript{93}

In contract cases, Connecticut courts apply the traditional rules of the First Restatement. The place of making approach was reaffirmed by the Connecticut Supreme Court as recently as 1980.\textsuperscript{94} Federal courts, likewise, adhere to this approach.\textsuperscript{95}

\textbf{Delaware}

There is little doubt but that the Delaware courts continue to follow the lex loci delicti rule in tort conflicts. The leading case is Friday \textit{v. Smoot},\textsuperscript{96} where the Delaware Guest Statute\textsuperscript{97} was held inapplicable to a suit by a Delaware automobile passenger against a Delaware driver arising from an accident in New Jersey. The Delaware Supreme Court specifically rejected an invitation to adopt section 379 (now section 145) of the proposed Second Restatement, due to the perceived uncertainty of the new rule and because the court thought adoption of such a choice of law theory was best left to the legislature. All later state\textsuperscript{98} and federal\textsuperscript{99}

\textsuperscript{91} The court stated:
We are, therefore, persuaded that the time has come for the law in this state to abandon categorical allegiance to the doctrine of lex loci delicti in tort actions. Lex loci has lost its theoretical underpinnings. Its formerly broad base of support has suffered erosion. We need not decide today, however, whether to discard lex loci in all of its manifestations. It is sufficient for us to consider whether, in the circumstances of the present case, reason and justice require the relaxation of its stringent insistence on determining conflicts of law solely by reference to the place where a tort occurred.

\textit{Id.} at 648, 519 A.2d at 21.

\textsuperscript{92} \textit{Id.} at 648-49, 519 A.2d at 21-22.

\textsuperscript{93} \textit{Id.} at 654-58, 519 A.2d at 24-26.

\textsuperscript{94} Morin \textit{v. LeMieux}, 179 Conn. 501, 503, 427 A.2d 397, 398 (1980).


\textsuperscript{96} 58 Del. 488, 211 A.2d 594 (1965).

\textsuperscript{97} \textit{Del. Code Ann.} tit. 21, § 6101 (1965).

cases in Delaware follow the lex loci delicti rule. Escape devices have been used occasionally.\textsuperscript{100}

Until 1978, it was crystal clear that Delaware courts followed the traditional place of making rule in contract cases.\textsuperscript{101} Today that assertion would be highly dubious, though not without some support in the cases. In \textit{Oliver B. Cannon and Son v. Dorr-Oliver, Inc.},\textsuperscript{102} the Delaware Supreme Court had before it a claim for attorney fees by a contractor entitled under a painting contract to be indemnified for any loss caused by conduct of the subcontractor. Delaware case law construed such an agreement to cover only attorney fees resulting from third party claims against the indemnified party, and not attorney fees incurred in defending against an action brought by the indemnifying party itself. Delaware was not the place of making of the contract. Nevertheless, the court applied Delaware law, citing section 188 of the Second Restatement and identifying other contacts connecting Delaware to the contract.\textsuperscript{103} A
year later, an appellate court applying the place of injury rule in a tort case felt constrained to distinguish *Cannon* as an invocation of the "relationship test" confined to contract cases. Then in 1986, the supreme court, without citation to any precedent, applied section 146 of the Second Restatement in finding that a second mortgage loan executed in Pennsylvania fell within the intended range of the Delaware Secondary Mortgage Loan Act, even though the loan agreement was executed in Pennsylvania.

The federal courts sitting in diversity have not been nearly as reticent in abandoning the place of making rule. Often invoking *Cannon*, these courts have held, with only one exception, that Delaware now follows the Second Restatement in contract cases. Were the Delaware Supreme Court to be faced with the choice today, it too would doubtless opt for the Second Restatement.

**District of Columbia**

Interest analysis is the current method of conflicts resolution in tort cases brought in the District of Columbia courts. This is, however, a recent development. Originally, the District was committed to *lex loci delicti*. In 1967, the court of appeals espoused a contacts theory of

---

Id. at 1166 (citation omitted).


105. *See* Johnson v. Ronamy Consumers Credit Corp., 515 A.2d 682, 687 (Del. 1986); *see also* In re Asbestos Litigation, 517 A.2d 697, 698 (Del. Super. Ct. 1986) (law of state of most significant relationship applies to successor liability issue).

106. Curiously, the only federal case not following the Delaware Supreme Court's reference to the Second Restatement in *Cannon* was a related case in which the losing party sought coverage from its insurance carrier for damages and costs of litigation. The insurance contract was construed according to the law of Pennsylvania, where the policy was issued. Oliver B. Cannon & Son, Inc. v. Fidelity & Casualty Co., 484 F. Supp. 1375, 1382 n.29 (D. Del. 1980).


true conflicts resolution. This approach, predicated on the latest draft of the Second Restatement, has not reappeared in later cases. The District of Columbia federal courts have overwhelmingly come down on the side of an interest analysis approach, and their decisions are often cited as precedent by the District of Columbia Court of Appeals.

Moreover, in 1985 the District of Columbia Court of Appeals was faced with two conflicts cases and each time came down squarely in favor of an interest analysis approach. *Kaiser-Georgetown Community Health Plan, Inc. v. Stutsman,* was a medical malpractice suit brought by a Virginia plaintiff employed in the district against two Washington, D.C. health care organizations for treatment received in Virginia. Interest analysis revealed a false conflict: the District of Columbia had an interest in compensating its resident employee but Virginia had no interest in protecting District of Columbia corporations from excess liability, and its public policy would not be hindered by allowing plaintiff full recovery. Accordingly, the court applied District of Columbia common law, rather than the Virginia Malpractice Act, which would have mandated prior screening of plaintiff's malpractice claim and would have limited the amount of damages recoverable.

110. Restatement (Second) of Conflict of Laws § 379 (Tent. Draft No. 9, 1964) (now § 145).
112. See, e.g., McCrossin v. Hicks Chevrolet, Inc., 248 A.2d 917, 921 n.6 (D.C. 1969) (citing two D.C. Circuit opinions for the erroneous proposition that the District of Columbia courts applied interest analysis to resolve issues of warranty).
One month earlier, in *Estrada v. Potomac Electric Power Co.*, the court of appeals had adopted as its own the opinion of the superior court, finding Maryland law applicable in a suit by a Maryland minor against a District of Columbia public utility for burns suffered by the child while playing near a transformer station in Maryland. Because plaintiff was a trespasser, and there was no intentional misconduct alleged, the only theory of recovery was attractive nuisance, a doctrine recognized in the District of Columbia but not in Maryland. The District's attractive nuisance policy reflected a governmental interest in regulating the conduct of landowners, since the property on which the accident occurred was in Maryland, and since the District of Columbia had no substantial interest in compensating a Maryland resident, the law of Maryland was applied and the suit was dismissed.

The court of appeals has three times declined to alter the traditional rule that the law of the situs governs questions of interests in real property. Even here, however, the court has expressed its determination that this rule is a product of interest analysis, and not an application of the First Restatement. It is, perhaps, as far as any court has gone toward questioning the traditional conflicts rule of property.

In contract cases, the court of appeals also purports to follow an interest analysis approach. The case most often cited is *Owen v. Owen*, where the court stated that "[i]n determining the formation and validity of contracts, the District of Columbia applies the law of the jurisdiction with the more substantial interest in the resolution of the issue." Unfortunately, the *Owen* court proceeded to apply a pure contact-counting approach, and other opinions purporting to apply interest analysis in contract cases are similarly bereft of true policy analysis. Moreover, the federal courts sitting in diversity have been notably inconsistent in

116. See Williams v. Williams, 390 A.2d 4, 5-6 (D.C. 1978). In Anderson v. Anderson, 449 A.2d 334 (D.C. 1982), the superior court had applied interest analysis and had actually concluded that District of Columbia law applied to a dispute involving a home in Maryland, since the parties had married in the district and plaintiff wife had left the house and re-established residence in D.C. before filing for divorce. The court of appeals, however, reversed. *Id.* at 335.
118. The court stated: "The Agreement was made by Maryland residents in Maryland and concerned real estate situated in that state. The only connection of this matter to the District of Columbia is that the husband now resides here. Accordingly, the law of Maryland applies." *Id.* at 937.
their approach to contract cases. What the District of Columbia courts will do in upcoming cases is difficult to predict, but their present practice, as opposed to their own descriptions of their present practice, is most properly characterized as a center of gravity approach, with no reliance on the Second Restatement and, as yet, no actual analysis of the relevant policies of the sovereigns concerned. In short, a contact-counting approach appears to be in vogue.

Florida

Florida applies a two-track approach, having adopted the Second Restatement in tort cases while clinging to the traditional place of making rule in contract cases. The break with the place of injury rule came in *Bishop v. Florida Specialty Paint Co.*, where the Florida Supreme Court held that South Carolina's aviation guest statute would not be enforced in a suit between Florida residents merely because the plane crash happened in South Carolina. In so doing, the court expressly adopted sections 145 and 146 of the Second Restatement, as well as the general guidelines of section 6. Other Florida courts have followed *Bishop's* lead and have applied the Second Restatement in tort cases.

The most recent Florida Supreme Court case dealing with contracts


121. 389 So. 2d 999 (Fla. 1980).


123. *Bishop*, 389 So. 2d at 1001. The court reassured traditionalists that "the conflicts theory set out in the Restatement does not reject the 'place of injury' rule completely. The state where the injury occurred would, under most circumstances, be the decisive consideration in determining the applicable choice of law." *Id.*

expressly held that the place of making rule applied.\textsuperscript{125} There have been no supreme court decisions in this area since \textit{Bishop} was handed down in 1980. Appellate courts, however, continue to apply the place of making rule, distinguishing \textit{Bishop} as applicable only in tort cases.\textsuperscript{126} Consequently, Florida should be considered a place of making state, until the supreme court states otherwise.

Georgia

Georgia applies the traditional First Restatement rules in both tort and contract cases. The Georgia Court of Appeals has disposed of most of the recent conflicts cases by applying lex loci delicti unerringly.\textsuperscript{127} When finally faced with a conflict case in 1983, the Georgia Supreme Court, without comment, followed the place of injury rule consistently applied by the court of appeals.\textsuperscript{128} Federal courts also apply this rule.\textsuperscript{129}

In 1984, on a certified question from the Eleventh Circuit,\textsuperscript{130} the Georgia Supreme Court declined to depart from the rule that contracts are to be interpreted by the law of the jurisdiction where made.\textsuperscript{131} The court cited difficulties with modern theory in other jurisdictions as its justification for retaining the old rule.\textsuperscript{132} The court has reaffirmed lex

\begin{itemize}
\item \textsuperscript{125} Goodman v. Olsen, 305 So. 2d 753, 754-55 (Fla. 1974), cert. denied, 423 U.S. 839 (1975).
\item \textsuperscript{128} Sargent Indus., Inc. v. Delta Air Lines, 251 Ga. 91, 94, 303 S.E.2d 108, 110 (1983).
\item \textsuperscript{130} General Tel. Co. v. Trimm, 728 F.2d 494 (11th Cir. 1984).
\item \textsuperscript{131} General Tel. Co. v. Trimm, 252 Ga. 95, 96, 311 S.E.2d 460, 462 (1984).
\item \textsuperscript{132} The court stated:
Although the “center of gravity” system is a more recent development in choice of
loci contractus on two more recent occasions as well.\textsuperscript{133}

Hawaii

The story of conflicts jurisprudence in Hawaii begins and ends with \textit{Peters v. Peters},\textsuperscript{134} the only Hawaii Supreme Court choice of law decision issued to date. Mr. and Mrs. Peters, both New Yorkers, were vacationing on the island of Maui and were involved in a car-truck collision in which Mr. Peters was driving a rental car and Mrs. Peters was injured. Rather than sue in New York, which has no spousal immunity law and which undoubtedly would have applied its own law on these facts, Mrs. Peters somehow decided to sue in Hawaii, which retains the spousal immunity law. The Hawaii Supreme Court ultimately dismissed the suit based on its spousal immunity law, but first addressed the choice of law issue.

In \textit{Peters}, the court decided to relinquish \textit{lex loci delicti} in favor of a more modern approach. The court considered a variety of theories,\textsuperscript{135} but adopted none expressly, instead relying on various policy considerations. It specifically rejected the Second Restatement and did not apply straight interest analysis. Application of either the Second Restatement or the Currie interest analysis certainly would have resulted in application of the law of New York, the marital domicile. In the course of its decision, the court cited three of the five factors advocated by Professor Leflar as choice-influencing considerations for conflict resolution: predictability of result; simplification of the judicial task; and advancement of the forum’s governmental interests. Indeed, the Leflar approach appears to be the only modern approach that could have led to the result reached, with the exception of \textit{lex fori}, which the court also rejected.

The \textit{Peters} decision was followed and Leflar was again applied in a 1987 Hawaii Court of Appeals case, \textit{California Federal Savings \\& Loan Assoc. v. Bell},\textsuperscript{136} involving the foreclosure of a mortgage covering an apartment in Honolulu. When the mortgagor defaulted on its land con-
tract, the mortgagee foreclosed. Receipts from the judicial sale of the apartment were insufficient to make the mortgagee whole. A deficiency judgment was entered in a Hawaii court. The deficiency judgment would not have been permitted under the law of California, where the land contract was executed. The court held Hawaii law applicable but it declined to rely exclusively on the venerable lex situs rule of property. Instead, the court utilized the five Leflar factors. The court decided that the factors of predictability, maintenance of interstate order, and advancement of the forum's governmental interests mandated that Hawaii law be applied to investments in Hawaii real estate, an important cog in the island state's economic well-being.137

Two federal decisions also emphasized the choice-influencing considerations posited by Leflar.138 The more recent of these cases, however, could also be read as an application of the Second Restatement, an approach inconsistent with the Peters decision.139

There have been no Hawaii choice of law cases involving contracts since statehood. The Hawaii Supreme Court, however, may be willing to apply its eclectic Peters approach here as well.

Idaho

Idaho has adopted the Second Restatement in both tort and contract cases. The Idaho Supreme Court reaffirmed this approach in two 1985 tort cases. In the first, Johnson v. Pischke,140 four residents of Saskatchewan were involved in a plane crash in the Idaho mountains, in which the pilot and one passenger died. The survivors and their families brought suits against the pilot's survivors and the airplane manufacturer. The choice of law issue was whether the wrongful death laws of Saskatchewan or Idaho applied. Under Saskatchewan law, all claims would have been barred because they were brought more than one year after the crash date. Idaho, however, had a two-year statute of limitations, under which the claims were timely filed. The supreme court specifically reaffirmed Idaho's adherence to the Second Restatement in contract and tort

137. Id. at 505-06.
139. See DeRoburt v. Gannett Co., 558 F. Supp. 1223, 1226 n.4 (D. Haw. 1983) (in which the district court followed a "most significant relationship" approach and specifically cited § 6 of the Second Restatement); see also Jenkins v. Whittaker Corp., 785 F.2d 720, 724-25 (9th Cir.) (wrongful death action in which the court held that Peters created a presumption of lex fori, to be displaced only when another state had a greater interest in having its law applied), cert. denied, 107 S. Ct. 324 (1986).
cases, and then resolved two distinct choice of law issues differently. Saskatchewan law was applied in the suit against the pilot's survivors, since all relevant parties were from Saskatchewan. Idaho law, however, was applied in the suit against the manufacturer, a Kansas corporation, since, under one of the Restatement's presumptive reference, no jurisdiction had a more significant relationship to the case than did Idaho. The manufacturer, therefore, was left to bear the damages.

Two months after Johnson, the supreme court decided Estates of Braun v. Cactus Pete's, Inc., a dram shop case with a fact pattern identical to that in Bernhard v. Harrah's Club, except that the plaintiffs were, at the time of the accident, driving to work at a Nevada casino. The court reached a result opposite to that of the California Supreme Court in Bernhard, finding Nevada law applicable and dismissing the complaint. The court's application of sections 6 and 145 focused largely on the fact that the allegedly negligent conduct occurred entirely in Nevada. A dissenter argued for application of Idaho law, relying on the Bernhard rationale that the Nevada casino "advertises and caters in large part to residents of Idaho."

The Idaho Supreme Court adopted the Second Restatement for use in contract cases in 1968, even before the ALI officially approved it. When the court was called upon a decade later to resolve a conflict of laws in a case involving interpretation of insurance contracts, it again

141. Id. at 399-400, 700 P.2d at 21-22.
142. Id. at 401, 700 P.2d at 23.
143. Restatement (Second) of Conflict of Laws § 175 (1969). The Restatement provides:

In an action for wrongful death, the local law of the state where the injury occurred determines the rights and liabilities of the parties unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 to the occurrence and the parties, in which event the local law of the other state will be applied.

146. 16 Cal. 3d 313, 546 P.2d 719, 128 Cal. Rptr. 215 (1976); see supra notes 65-73 and accompanying text.
147. "[T]he place where the conduct causing the injury occurred" is listed as one of four "[c]ontacts to be taken into account in applying the principles of § 6," according to Restatement (Second) of Conflict of Laws § 145 (1969). This contact pointed to application of Nevada law, as did "the place where the relationship, if any, between the parties is centered." A third factor, "the place where the injury occurred," pointed to Idaho law, while a fourth, the domiciles of the parties, was mixed.
relied upon section 188 of the Second Restatement.\textsuperscript{150} A recent federal case has applied section 187(2) of the Second Restatement in holding the parties' choice of Illinois law inapplicable.\textsuperscript{151}

\textbf{Illinois}

Illinois adheres to the most significant relationship test of the Second Restatement. The first case to adopt the Second Restatement in tort was \textit{Ingersoll v. Klein},\textsuperscript{152} a wrongful death action in which all parties were from Illinois but the death occurred by drowning in the Mississippi River, allegedly in Iowa. The plaintiff's complaint relied on defendant's violation of two provisions of the Iowa Motor Vehicle Code,\textsuperscript{153} a statute that would not have been applicable if Illinois law were applied. The Illinois Supreme Court rejected the place of wrong rule and, after citing the most recent draft of the Second Restatement,\textsuperscript{154} announced that it was adopting a most significant contacts approach to the choice of law.\textsuperscript{155} Illinois law was applied and the suit was dismissed. \textit{Ingersoll} has been followed in several recent Illinois Appellate Court cases.\textsuperscript{156} Federal courts, too, apply the Second Restatement in

\begin{itemize}
\item \textsuperscript{151} See Industrial Idemn. Ins. Co. v. United States, 757 F.2d 982, 987 (9th Cir. 1985).
\item \textsuperscript{152} 46 Ill. 2d 42, 262 N.E.2d 593 (1970).
\item \textsuperscript{153} Id. at 43, 262 N.E.2d at 594 (applying IOWA CODE ANN. § 321.493-94 (1985), (repealed 1984)).
\item \textsuperscript{154} RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 379 (Tent. Draft No. 9, 1964) (now § 145).
\item \textsuperscript{155} Ingersoll, 46 Ill. 2d at 48, 262 N.E.2d at 596. At another point in the opinion, the court appeared to espouse a more forum-preferential approach than that advocated by the Second Restatement. The court stated that "the local law of the state where the injury occurred should determine the rights and liabilities of the parties, unless Illinois has a more significant relationship with the occurrence and with the parties, in which case, the law of Illinois should apply." Id. at 45, 262 N.E.2d at 595 (emphasis added). By contrast, the Second Restatement provides that "[i]n an action for wrongful death, the local law of the state where the injury occurred determines the rights and liabilities of the parties unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 to the occurrence and the parties, in which event the local law of the other state will be applied." RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 175 (1969) (emphasis added). Read in context, however, the Ingersoll statement appears to have reference only to the facts of that case, i.e., that Iowa law would apply because Iowa was the place of injury, unless Illinois, the only other interested state, had a more significant relationship to the parties and the occurrence. In any event, subsequent cases have not adopted a forum-preferential approach, and the Illinois courts' application of the Second Restatement in tort has been consistent with that of other states.
\end{itemize}
tort cases.\textsuperscript{157}

The Illinois Supreme Court has not had occasion to hear a conflicts case involving a contract since before the dawn of the choice of law revolution.\textsuperscript{158} The appellate level courts, however, have read Ingersoll as approving the extension of the Second Restatement approach beyond the tort area.\textsuperscript{159}

Federal courts have taken a variety of approaches toward contract cases. Several courts have held that Illinois applies the Second Restatement in contract cases.\textsuperscript{160} But two courts have rejected this approach.\textsuperscript{161} Two other decisions note that the same law is selected under either rule,\textsuperscript{162} and yet another court avoids the issue by determining that the law of each jurisdiction produces the same result.\textsuperscript{163} Until recently, the most frequent approach had been to apply the place of making rule when questions of execution were at issue, and when questions of performance were.


\textsuperscript{158} The last contract case was Oakes v. Chicago Fire Brick Co., 388 Ill. 474, 477-78, 58 N.E.2d 460, 461-62 (1944), a typically rigid place of making/place of performance decision.


were litigated, the usual approach had been to apply the place of making rule if performance was to occur in only one state but the Second Restatement was to be applied if performance was to take place in more than one state. Federal court decisions will likely follow the lead of recent opinions from the Illinois Appellate Court and gravitate toward an application of the Second Restatement in all cases.

Indiana

The Indiana Supreme Court has not entertained a conflicts case in forty years. Forty years ago, not surprisingly, Indiana law provided that tort cases were governed by the law of the place of the injury. Later Indiana Court of Appeals decisions also used the traditional rule. There has been only one exception. Federal courts sitting in diversity ordinarily apply lex loci delicti as well.

In contract cases, however, the story is decidedly different. In the

---


165. See supra note 159 and accompanying text.


168. Witherspoon v. Salm, 142 Ind. App. 655, 670, 237 N.E.2d 116, 124 (1968). Witherspoon, a guest statute case, prescribed an interest analysis approach. The decision, however, was later reversed by a decision that rendered the choice of law question unnecessary to resolve. See Witherspoon v. Salm, 251 Ind. 575, 243 N.E.2d 876 (1969). Later cases have not followed the appellate court’s choice of law decision.

now classic case of *W. H. Barber Co. v. Hughes*, Indiana became the first state in the nation to depart conclusively from traditional choice of law rules. Relying exclusively on scholarly writings in the field, the Indiana Supreme Court decided to apply a most significant contacts approach to the contract dispute before it. In that case, the Barber Company of Illinois, sold petroleum products to the Hughes Brothers, an Indiana partnership. When the Hughes' fell behind on their account, they agreed to execute a promissory note. The note was prepared in Illinois after negotiations there and was mailed by the Barber Company to the Hughes Brothers in Elkhart, Indiana. The note was signed by both Hughes brothers and deposited in the mail in Indiana, no further signatures being required for its completion. The note contained a cognovit, or confession of judgment, clause, whereby, if the debtor did not make scheduled payments, the creditor could obtain a judgment in the Illinois courts without serving the Hughes' with process in Indiana. The Hughes' again fell behind on payments, and this time the Barber Company obtained an Illinois judgment against them in the amount of $1800. The Barber Company then sought to enforce that judgment against the Hughes' in Indiana, relying upon the full faith and credit clause of the United States Constitution.

Under the place of making rule, the legal effect of the Barber-Hughes promissory note would have been governed by the law of Indiana, since the last act needed to make the contract binding was the signature of the Hughes brothers in Elkhart. Indiana law forbade the use of confession of judgment clauses and, in fact, made it a criminal offense to attempt to recover in Indiana upon a judgment obtained elsewhere through a confession of judgment clause. After first putting forth an argument that Illinois was, in fact, the place of making, the court examined the contact points to find Illinois law controlling under its new

170. 223 Ind. 570, 63 N.E.2d 417 (1945).
172. The court formulated its rule as follows: "The court will consider all acts of the parties touching the transaction in relation to the several states involved and will apply as the law governing the transaction the law of that state with which the facts are in most intimate contact." *Barber*, 223 Ind. at 586, 63 N.E.2d at 423.
173. U.S. Const. art. IV, § 1.
174. See *Barber*, 223 Ind. at 576, 63 N.E.2d at 419 (quoting IND. CODE § 2-2904; (current version at § 34-2-25-1) (West 1976); citing IND. CODE § 2-2906 (current version at § 34-2-26-1 (West 1976))).
175. The court stated that the promissory note could be viewed as unaccepted, and therefore inoperative, until received by the creditor in Illinois. *Barber*, 223 Ind. at 584-85, 63 N.E.2d at 422. It refused, however, to rest on this analysis.
theory. Under Illinois law, the cognovit clause was valid as written. Thus, the judgment obtained in Illinois was entitled to full faith and credit in Indiana.

Indiana Court of Appeals decisions occasionally confuse the Barber approach with that set out in section 188 of the Second Restatement, but the courts have generally utilized a contact-counting or center of gravity approach more in line with Barber. Federal courts, too, have sometimes treated the Second Restatement and Barber as one in the same. However, until such time as the Second Restatement is actually used, rather than merely cited, Indiana is best characterized as a center of gravity state in contract cases.

Iowa

The Iowa approach in tort cases has been somewhat inconsistent and sporadic. The Iowa Supreme Court abrogated the place of injury rule in Fuerste v. Bemis, but it was unclear in that case what method of conflict resolution the court was adopting. In Fuerste, a guest statute case, the court purported to apply the most significant relationship

176. The court stated:

Looking for the contact points in the present case, we observe first that the parties were at all times engaged in purely business transactions. They transacted this business almost exclusively in Illinois. The accumulated indebtedness on September 30, 1940, arose solely from Illinois transactions. The place of their conferences to arrive at a settlement was in Illinois. The note was payable in Illinois. It was on an Illinois form. It was prepared in Illinois. It was valid in that state and was there to be performed. It was actually intended that Illinois law control, as expressly found by the court. On the other hand the only contact points with Indiana were the residence of the debtors, their signing of the note in Indiana and their placing it in the mail in Indiana.

Id. at 587, 63 N.E.2d at 423.


179. 156 N.W.2d 831 (Iowa 1968).
rule, but actually utilized an interest analysis approach. The court found a "spurious conflict" requiring application of the Iowa Guest Statute to bar a suit between Iowa residents for an automobile accident which occurred just across the Wisconsin border during a trip between two Iowa cities. Five years later, the court made brief reference to the Second Restatement in a conversion case. The only other modern supreme court cases in tort have involved questions of marital rights, with the court each time applying the law of the place of marital domicile rather than the place of injury. The court has cited to the Second Restatement in two of these decisions.

The Iowa Supreme Court has been more certain in its approach to contract cases. In *Joseph L. Wilmotte & Co. v. Rosenman Bros.*, the court quoted extensively from sections 218, 188 and 6 of the Second Restatement to find New York law applicable to an arbitration agreement. Again, in *Cole v. State Automobile & Casualty Underwriters*, the court used section 188, to find Minnesota law applicable to an insurance contract.

Given the Iowa Supreme Court's clear commitment to the principles of the Second Restatement in contract cases, there is little doubt that it will utilize the same approach in tort cases when a suitable opportunity presents itself.

**Kansas**

The Kansas Supreme Court reaffirmed its adherence to the place of injury rule in *Ling v. Jan's Liquors*, a 1985 dram shop case. Ling, a Kansas resident, lost both legs when she was struck by a passing vehicle while attending her stalled car on a Kansas road. The driver of the car was a highly intoxicated 19-year-old Kansas resident who had been...

180. *Id.* at 833.
182. *Fuerste*, 156 N.W.2d at 834 (applying IOWA CODE § 321.494 (repealed 1984)).
185. *Flogel*, 133 N.W.2d at 908; *see also* Fabricius v. Horgen, 257 Iowa 268, 275-76, 132 N.E.2d 410, 414 (1959) (citing Second Restatement in support of applying formulas, rather than lex loci delicti, to issues of capacity to sue and damages recoverable).
186. 258 N.W.2d 317, 326 (Iowa 1977).
served liquor illegally by the defendant tavern in Missouri. When Ling sued, the defendant moved to dismiss for failure to state a claim since Kansas, the place of injury, had no dram shop law. The plaintiff argued for application of Missouri's common law dram shop liability, but the Kansas Supreme Court refused, stating that lex loci delicti governed. The court specifically rejected an interest analysis approach, which arguably might have called for application of Missouri common law.\footnote{189. See id. at 634, 703 P.2d at 735.}

The latest conflicts case in tort prior to Ling took place in 1965, when the Kansas Supreme Court determined that Missouri's limit on recovery for wrongful death would govern an action between Kansas parties for an auto accident in Missouri.\footnote{190. See McDaniel v. Sinn, 194 Kan. 625, 629, 400 P.2d 1018, 1021 (1965).} Various federal court decisions in the years preceding Ling had also applied the place of injury rule.\footnote{191. See Hawley v. Beech Aircraft Corp., 625 F.2d 991, 993 (10th Cir. 1980); Miller v. Lear Siegler, Inc., 525 F. Supp. 46, 56 (D. Kan. 1981); Woods v. Homes and Structures, Inc., 489 F. Supp. 1270, 1297-98 (D. Kan. 1980).}

Apparently, Kansas continues to follow lex loci contractus in contract cases. This can be surmised from the recent Kansas Supreme Court decision of Brown v. Kleen Kut Manufacturing Co.\footnote{192. 238 Kan. 642, 714 P.2d 942 (1986).} In Brown, a sixteen-year-old restaurant cook was injured by a meat grinder manufactured by an Ohio corporation. The manufacturing corporation had dissolved years prior to the accident and had sold all of its assets to another Ohio corporation. Later, the successor corporation merged with another company. A second merger subsequently took place. The plaintiff sued all four corporations. The court held that the liability of both the predecessor and successor corporations would be determined according to the law of Ohio, where the contract to transfer the assets of the dissolved corporation was executed.\footnote{193. Id. at 646, 714 P.2d at 945. For recent federal cases applying lex loci contractus, see First Nat. Bank v. Hough, 643 F.2d 705, 706 (10th Cir. 1981) and Dow Chem. Corp. v. Weevil-Cide Co., 630 F. Supp. 125, 127 (D. Kan. 1986).}

Kentucky

The Kentucky Supreme Court has adopted a simple and unique approach to choice of law problems in tort: it simply applies Kentucky law.

The Kentucky experience began with a rejection of lex loci delicti and an adoption of the Second Restatement in Wessling v. Paris,\footnote{194. 417 S.W.2d 259, 259-61 (Ky. 1967).} where
Kentucky's court of last resort avoided the Indiana guest statute by applying Kentucky law in a suit between Kentucky residents over a car accident taking place across the Ohio River in Indiana.

A year later, in another guest statute case, *Arnett v. Thompson*, the court had a change of mind. It rejected the Second Restatement and opted instead for a lex fori approach, applying Kentucky law to any transaction or occurrence touching upon Kentucky in any way. The decision in *Arnett* to abandon the Second Restatement was clearly result-oriented. The suit concerned a car accident in Kentucky between Ohio spouses. Application of the Second Restatement would have required dismissal, under either the Ohio guest statute or the Ohio rule of spousal immunity. Only a lex loci delicti or a lex fori approach would have resulted in Kentucky law being applied and the suit being allowed to proceed.

*Arnett* was followed in *Foster v. Leggett*, another guest statute case, in which an Ohio plaintiff was allowed to recover damages from a Kentucky defendant for an auto accident occurring in Ohio, even though Ohio had a guest statute. Under lex fori, Kentucky's status as defendant's place of domicile and plaintiff's place of employment, combined with the fact that the trip began and was to have ended in Kentucky, was enough to warrant application of Kentucky law. The court appeared to reaffirm its commitment to the lex fori approach. There have been

195. 433 S.W.2d 109 (Ky. 1968).
196. The court explained its approach in the following paragraph:

Upon further study and reflection the court has decided that the conflicts question should not be determined on the basis of a weighing of interests, but simply on the basis of whether Kentucky has enough contacts to justify applying Kentucky law. Under that view if the accident occurs in Kentucky (as in the instant case) there is enough contact from that fact alone to justify applying Kentucky law. Likewise, if the parties are residents of Kentucky and the only relationship of the case to another state is that the accident happened there (as in *Wessling*), there is enough contact with Kentucky to justify applying our law. The fact that we will apply Kentucky law where Kentucky people have an accident in Ohio or Indiana does not require that we apply Ohio or Indiana law where people of one of those states have an accident here, because the basis of the application is not a weighing of contacts but simply the existence of enough contacts with Kentucky to warrant applying our law.

433 S.W.2d at 113.
197. 484 S.W.2d 827 (Ky. 1972).
198. Id. at 829.
199. The court stated: "We are now reaffirming our position taken in *Wessling v. Paris* . . . that if there are significant contacts—not necessarily the most significant contacts—with Kentucky, the Kentucky law should be applied." Id. at 829. The court's citation here to *Wessling* is perplexing; it was not *Wessling* but *Arnett* that adopted the lex fori approach. Two astonished dissenters were "at a loss to understand the statement in the majority opinion that this court is now reaffirming the position it took in the Wessling case." Id. at 830 (Reed, J., dissenting).
no more recent tort conflicts cases in the Kentucky state courts. A Sixth Circuit panel, however, correctly remarked that "Kentucky courts have apparently applied Kentucky substantive law whenever possible."200

Interestingly, the Kentucky courts have not yet extended their unique lex fori approach beyond the realm of personal injury torts. In 1977, the Kentucky Supreme Court adopted the Second Restatement in an insurance contract case.201 Five years later, the court paid lip service to its prior case and then applied a contact-counting approach to find an insurance policy governed by Kentucky law even though the policy stated that it was to be governed by Delaware law, the place of delivery.202 The court attached no significance whatsoever to the choice of law clause.

Due to its express adoption of the Second Restatement in 1977, Kentucky is properly viewed as a most significant relationship state with regard to contracts. It remains to be seen whether future contract cases will find the Kentucky courts applying the Second Restatement or some variant of a contacts analysis, or whether, instead, the courts will decide contract cases as they have tort cases, by applying lex fori to the constitutional limits.

Louisiana

The Louisiana Supreme Court adopted interest analysis as its approach to tort cases in Jagers v. Royal Indemnity Co.,203 thereby allowing a Louisiana plaintiff to sue her adult son for a car accident occurring in Mississippi, even though the latter state forbade suits between family members. The Jagers court specifically overruled an earlier lex loci delicti decision involving the Arkansas guest statute.204 Jagers was a false conflict, as was the next conflicts decision, handed down just six weeks later.205

The Louisiana Supreme Court has not yet had occasion to resolve a true conflict. In 1974, however, an appellate court applied the Second Restatement to find Louisiana law applicable and plaintiff's suit barred

203. 276 So. 2d 309 (La. 1973).
205. See Romero v. State Farm Mut. Auto. Ins. Co., 277 So. 2d 649, 651 (La. 1973); see also Sullivan v. Hardware Mut. Cas. Co., 278 So. 2d 30, 32 (La. 1973) (This was a guest statute case in which the trial court, before Jagers, had applied Texas law to deny recovery. The supreme court remanded for further findings of fact in light of Jagers.).
in light of her earlier recovery under a worker's compensation law; the Second Restatement had been consulted only after the court had first determined that Louisiana and Arkansas were both concerned jurisdictions. In 1984, however, an appellate court held that true conflicts were to be resolved by reference to the principles of the Second Restatement. Another appellate court held likewise in 1986. Moreover, a number of federal courts in the years following Jagers have found refuge in the Second Restatement when confronted with true conflict cases.

The Louisiana approach in contract cases parallels the approach advocated by the appellate and federal courts in tort actions. Here, there have been no Louisiana Supreme Court decisions since Jagers, but a number of appellate panels have interpreted Jagers as reaching beyond tort. The leading case is Sutton v. Langley, an insurance case involving an attempt by a Texan to recover for injuries caused by an uninsured motorist in Louisiana. The court opined that Jagers was a refutation of

---

207. See id. at 898.

> Interest analysis is a two-step process. We must first determine whether a true or false conflict exists. If a false conflict exists, the law of the state that has the exclusive interest is applied and the second step is unnecessary. If a true conflict exists, the law of the state with the most significant contacts is applied.

*Id.* at 194. Lee was a products liability suit by a Louisiana resident against a Georgia manufacturer. Georgia allowed recovery for punitive damages while Louisiana did not. The court determined that a true conflict existed because Georgia had a policy of deterring domestic manufacturers from making defective products and Louisiana had an interest “in protecting the integrity of its judicial system, rather than domestic defendants, from what it might consider inherently speculative awards.” *Id.* at 194-95 (quoting Ardoyno v. Kyzar, 426 F. Supp. 78, 83 (E.D. La. 1976)). The court then applied §§ 145 and 6 of the Second Restatement and found Louisiana law applicable, since Georgia’s only connection with the case was the fact that the defective manufacturing occurred there. *Id.* at 195-96.

209. See Brown v. DSI Transports, Inc., 496 So. 2d 478, 481 (La. Ct. App. 1986). In Brown, the court found a true conflict between Alabama’s contributory negligence rule and Louisiana’s comparative negligence rule. Defendant was engaged in business in Alabama and plaintiff was a Louisiana. Thus, the purposes behind each state’s law would have been served by its application on these facts. The court applied Louisiana law in reliance on § 145 and § 6 of the Second Restatement.


211. A pre-Jagers decision, Deane v. McGee, 261 La. 686, 260 So. 2d 669 (1972), announced the general rule that “the nature, validity and interpretation of an insurance contract is governed by the law of the place where made.” *Id.* at 696, 260 So. 2d at 673. The court, however, acknowledged that its choice of law decision did not affect the result in the case. *Id.* at 697, 260 So. 2d at 673.

lex loci contractus as well as lex loci delicti. After weighing the governmental interests relevant to the dispute, the court applied Louisiana law and granted coverage. A similar decision was reached in Wilson v. State Farm Insurance Co., again after a weighing of governmental interests. Three other Louisiana appellate decisions have also applied interest analysis in contract cases. Federal courts, too, generally have applied the Jagers approach in contact cases.

Maine

The Maine Supreme Judicial Court has expressly adopted the Second Restatement approach for resolution of choice of law issues in both tort and contract cases. In a guest statute case, Beaulieu v. Beaulieu, the court, after discarding lex loci delicti, appeared to adopt an interest analysis approach. The court applied Maine law rather than the Massachusetts guest statute because both driver and passenger were Maine residents, and Massachusetts, because it was merely the situs of the accident, had "no real concern in the application of its rule of gross negligence to the guest-driver relationship of the parties to this litigation." The court, however, also relied on a comment to what is now section 145 of the Second Restatement, calling for application of the law of the state of common domicile in all guest statute cases.

213. Id. at 327.
214. Id. at 328.
218. 265 A.2d 610 (Me. 1970).
219. Id. at 614-15.
220. Restatement (Second) of Conflict of Laws § 145 comment d (1969) states: [T]he circumstances under which a guest passenger has a right of action against the driver of an automobile for injuries suffered as a result of the latter's negligence may be determined by the local law of their common domicile, if at least this is the state from which they departed on their trip and that to which they intended to return, rather than by the local law of the state where the injury occurred.
In *Adams v. Buffalo Forge Co.*, the Maine high court made it clear that it would apply the Second Restatement to all conflict cases sounding in tort. In *Adams*, a factory worker was injured when a drill press accidentally activated while the worker was changing drill bits. His suit against the manufacturer of the drill press, a New York company, failed to state a cause of action under Maine law due to the doctrine of privity. The court applied sections 145 and 146, and found the latter section’s presumptive reference to the place of injury, Maine, controlling.

Finally, in *Baybutt Construction Corp. v. Commercial Union Insurance Co.*, the supreme judicial court specifically extended its previous tort approach to an insurance contract case, applying sections 188 and 193 of the Second Restatement, and following the latter section’s presumptive reference to application of the law of the state where the principal risk is located.

The First Circuit followed *Beaulieu* and *Adams* in *Mason v. Southern New England Conference Association of Seventh-Day Adventists*, a case in which a Maine plaintiff was injured in a Massachusetts parochial school building when a motion picture screen fell on her. Applying sections 6, 145, and 146 of the Second Restatement, the court resolved a conflict in favor of Massachusetts’ charitable immunity statute, which limited plaintiff’s recovery to $20,000.

---

221. 443 A.2d 932 (Me. 1982).
222. *Id.* at 934.
223. *Id.* at 934-35. Section 146 of the Second Restatement provides:

In an action for a personal injury, the local law of the state where the injury occurred determines the rights and liabilities of the parties, unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 to the occurrence and the parties, in which event the local law of the other state will be applied.

224. 455 A.2d 914, 918 (Me. 1983).
225. Section 193 of the Second Restatement provides:

The validity of a contract of fire, surety or casualty insurance and the rights created thereby are determined by the local law of the state which the parties understood was to be the principal location of the insured risk during the term of the policy, unless with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 to the transaction and the parties, in which event the local law of the other state will be applied.

227. 696 F.2d at 136 (applying MASS. GEN. LAWS ANN. ch. 231, § 85K (West Supp. 1982)); see also Burley v. General Motors Corp., 650 F. Supp. 90, 92 (D. Me. 1986); Kenerson
These cases demonstrate that the state of Maine is serious in its commitment to the Second Restatement approach. Unlike many other courts, Maine courts actually apply the Second Restatement as it was intended to be used, utilizing the presumptive references when possible and displacing the law so selected only when another state has a more significant relationship to the parties and the transaction.

Maryland

The Maryland Supreme Court has had two recent opportunities to discard traditional choice of law concepts. Each time, the court has steadfastly refused to do so.

In *Hauch v. Connor*, the court reaffirmed its adherence to the place of injury rule in tort cases. In that case, Maryland workers sued a co-employee for negligence in connection with an automobile accident that happened in Delaware. The plaintiffs asked the court to adopt section 145 of the Second Restatement and apply Maryland tort law. The court expressly rejected this invitation, instead adhering to lex loci delicti for reasons of stare decisis, predictability, and recognition of "the legitimate interests which the foreign state has in the incidents of the act giving rise to injury." The court found, however, that the question of whether injured workers could sue a co-employee was a matter governed by the worker's compensation statute of the state where the workers resided. Thus, despite the fact that Delaware tort law applied, Maryland's worker's compensation laws, which permitted suits against a co-employee, took precedence. Because the case was characterized as one involving the implementation of Maryland worker's compensation law, plaintiffs' suit was allowed to proceed.

Two years later, the Maryland Supreme Court applied the traditional place of making rule in a contract dispute. Again, however, the court found a way to avoid the harshness of its selected choice of law rule, this time by invoking Maryland public policy. The court refused to enforce a provision in an industrial painting contract, valid under the law of Pennsylvania, where the contract was made, but invalid under Maryland law, in which a corporate contractor agreed to indemnify its sub-

---


228. 295 Md. 120, 125, 453 A.2d 1207, 1210 (1983).

229. Id. at 125, 453 A.2d at 1210.

230. Bethlehem Steel Corp. v. G.C. Zarnas & Co., 304 Md. 183, 498 A.2d 605 (1985). The court stated that "[i]n deciding questions of the validity and construction of contracts, a Maryland court ordinarily looks to the law of the place of making of the contract (lex loci contractus)." Id. at 188, 498 A.2d at 607.
contractor for amounts which the subcontractor was forced to pay to third parties as damages resulting solely from the subcontractor's negligent acts.

These two cases indicate the ease with which the traditional conflict of law rules can be circumvented. Recharacterization from tort to worker's compensation and invocation of a public policy exception provided ready means for avoiding the severity of the traditional rules. At the same time, the fact that the court chose to use escape devices rather than adopt a modern choice of law theory indicates that strong support for the First Restatement approach still exists on the Maryland Supreme Court.

Other Maryland courts have also applied lex loci delicti in conflicts cases. The Maryland Court of Special Appeals has held that the District of Columbia's no-fault automobile insurance law governs the rights of parties involved in car accidents occurring in the District, even if all parties involved are Maryland residents. In addition, federal courts in Maryland have, on several occasions, noted the state's continued adherence to the place of injury rule in tort cases.

Massachusetts

In the last ten years, the Massachusetts courts, like many others, have slowly gravitated away from the traditional choice of law rules toward the system described in the Second Restatement.

The first sign of departure from the traditional rule in tort cases came in Pevoski v. Pevoski, where the Massachusetts Supreme Judicial Court, even while reaffirming lex loci delicti for use in tort cases generally, carved an exception to that rule whereby the law of the state of the marital domicile would govern issues of interspousal immunity. The First Restatement was again denied application a year later, in Saharceski v. Marcure, where the court held that the question of an employee's right to sue a coemployee in tort for injuries occurring in the

234. "In this Commonwealth, lex loci delicti has been firmly established as the general tort conflicts rule. This rule has provided, and will continue to provide, a rational and just procedure for selecting the law governing the vast majority of issues in multi-State tort suits." Id. at 359, 358 N.E.2d at 417. In fact, the court has not relied upon the lex loci delicti rule since.
235. Id. at 361, 358 N.E.2d at 418.
course of employment would be governed by the law of the employees' common domicile rather than the law of the place of injury.237

In *Cohen v. McDonnell Douglas Corp.*,238 the break with the traditional rule became even wider. There, the court referred to the place of injury rule, but ultimately quoted from the presumptive reference in section 146 of the Second Restatement and determined that Massachusetts had the greatest interest in having its law applied to plaintiff's claim for breach of warranty.239 The court denied recovery.

While the Massachusetts Supreme Judicial Court has been less than resolute in its tort conflict decisions, the Massachusetts federal courts sitting in diversity have, without exception, read *Pevoski* and its progeny as mandating a resort to the Second Restatement for tort conflict resolution.240

Fortunately, in contract cases, the Massachusetts Supreme Judicial Court has been more explicit in its decisions. A pair of 1985 cases seem to indicate that the court has endorsed the Second Restatement approach for contract issues.

In the first of these cases, *Bushkin Associates, Inc. v. Raytheon Co.*,241 the court indicated its rejection of the place of making rule, but then stated that it had resolved "not to tie Massachusetts conflict law to any specific choice-of-law doctrine, but seek instead a functional choice of law approach that responds to the interests of the parties, the States involved, and the interstate system as a whole."242 However, the court went on to quote extensively from sections 188 and 6 and, in fact, to apply those provisions in finding Massachusetts law applicable to an oral contract negotiated over the telephone and across state lines, thereby upholding the agreement over a Statute of Frauds defense.243
In the second case, *Travenol Laboratories, Inc. v. Zotal, Ltd.*, the court stated flatly that it had, in its prior decision, "adopted the general principles advanced in the Restatement (Second) of Conflict of Laws (1971) with respect to the resolution of conflicts problems involving contracts." It then utilized the presumptive reference of section 191, and found that Massachusetts, as the place of delivery, was the state of the applicable law in an international sale of goods case.

As a result of its two recent forays into the Second Restatement, the Massachusetts approach in contract disputes is now well settled. Although the matter is not free from doubt, the supreme judicial court's commitment to the Second Restatement in contract cases will likely influence its decisions in upcoming tort cases as well.

**Michigan**

Michigan, traditionally a lex loci delicti state, departed from that rule in the 1982 companion cases of *Sexton v. Ryder Truck Rental, Inc.*, and *Storie v. Southfield Leasing, Inc.* The facts of the two cases are parallel. In *Sexton*, the Michigan plaintiff was a passenger in a leased truck which overturned in Virginia. Rather than suing the driver, a co-employee, the injured plaintiff sued the lessor, a Florida corporation doing business in Michigan. Under the Michigan motor vehicle owner's liability statute, the owner of a motor vehicle was liable for any injury caused by the negligence of one to whom the owner had entrusted the vehicle. Virginia law imposed no such owner's liability. In *Storie*, plaintiff's Michigan spouse was a passenger in an airplane piloted by the president of the corporation which employed him. The plane, which had been leased from a Michigan corporation, crashed in Ohio, killing both pilot and passenger. The plaintiff instituted a wrongful death action against the lessor, relying on Michigan's aircraft owner's liability statute.

---

1091-92 (1st Cir. 1986) (another Statute of Frauds case, although here, the court quoted § 6 and § 188 of the Second Restatement, but applied Texas law on a contacts basis).

244. 394 Mass. 95, 474 N.E.2d 1070 (1985).

245. Id. at 97, 474 N.E.2d at 1073.


248. Id. at 414, 320 N.W.2d at 845 (applying MICH. COMP. LAWS ANN. § 257.401 (West 1977)).

249. Id. at 418, 320 N.W.2d at 846 (applying MICH. COMP. LAWS ANN. § 259.180a (West 1977)).
which made an aircraft owner liable for injuries caused by the negligence of the pilot. Ohio imposed no such owner’s liability.

The Michigan Supreme Court allowed recovery in each case, rejecting strict adherence to lex loci delicti and adopting instead a lex fori approach. Five of the seven justices voted to allow recovery, but there was no majority opinion. Justice Williams, in an opinion joined by Justices Moody and Levin, stated that Michigan courts would apply Michigan law in any case in which all parties were from Michigan, regardless of where the occurrence giving rise to suit took place. Justice Kavanagh wrote separately, joined by Justices Levin and Fitzgerald, in an opinion that appeared to express no particular disagreement with Justice Williams.

It was left to Justice Levin, in a third opinion signed only by himself, to indicate the apparent disagreement. Justice Levin, making clear his preference for Kavanagh’s approach, proceeded to rewrite the latter’s opinion in such a way as to eliminate the requirement that all parties be from Michigan and to substitute a forum-favoring brand of interest analysis in place of Justice Williams’ lex fori approach. Finally, in a parting shot, Justice Levin emphasized that the consensus of the court was that the new approach would be limited to personal injury and property damage cases, and that lex loci delicti would continue to bind lower courts in other areas of the law.

In the 1987 case of Olmstead v. Anderson, it became clear that application of the rule of lex fori would not be confined to cases in which all parties were Michigian residents. In short, Justice Levin’s opinion in

250. Id. at 433, 320 N.W.2d at 854. The court, however, qualified its holding, stating: “We reach this conclusion on the facts and reasoning herein developed. We do not here adopt the law of dominant contacts or any other particular methodology, although any such reasoning may, of course, be argued where persuasive and appropriate.” Id.

251. In his brief concurrence, Justice Kavanagh expressed his agreement with the plurality’s opinion that lex loci delicti should be discarded. In a cryptic conclusion, he continued: The power of a state to effect legal consequences is not limited to occurrences within the state if it has control over the status which gives rise to those consequences. The status of ownership giving rise to the legal consequence of liability has been regulated in Michigan by [the owner’s liability statutes] and so the occurrence of the accident beyond Michigan’s boundaries is not controlling under these Michigan laws. Id. at 440-41, 320 N.W.2d at 857 (Kavanagh, J., concurring) (citations omitted).

252. Justice Levin wrote: I . . . agree with Justice Kavanagh that we should go the distance and declare that Michigan law will apply in all personal injury and property damage actions without regard to whether the plaintiffs and defendants are all Michigan persons unless there is compelling reason for applying the law of some other jurisdiction. Id. at 442, 320 N.W.2d at 858 (Levin, J., concurring).

253. Id.

Sexton, although signed only by the writer, was the opinion that ultimately prevailed.

The facts of Olmstead were as follows: Two residents of Minnesota and one resident of Wisconsin went on a camping trip together in Michigan's Upper Peninsula. En route home, the three campers were involved in a head-on automobile accident in which all three were killed. The driver of the other vehicle, a Michigan resident, was also killed. The accident occurred in Wisconsin. Where the legal representative of the two deceased Minnesotans' estates brought an action against the administrator of the Michigan's resident estate, they were met with the defense of Wisconsin's $25,000 limit on recovery for wrongful death. Neither Minnesota nor Michigan had any such limitation on a plaintiff's tort recovery.

The Michigan Supreme Court, faced with a case in which only one party was from Michigan, nevertheless interpreted Sexton as calling for the application of lex fori, rather than lex loci delicti, on these facts. Furthermore, although Sexton contemplated occasions where forum law would be displaced if another state had a greater interest in having its law applied than did Michigan, this was not such a case given the fact that Minnesota's law, like Michigan's, permitted unlimited recovery for wrongful death. Michigan law was therefore applied.\textsuperscript{255}

In contract cases, Michigan continues to follow the traditional place of making and place of performance rules. The most recent supreme court cases are from the 1940s,\textsuperscript{256} but a 1970 decision of the Michigan Court of Appeals attests to the continued vitality of the traditional rules in contract cases.\textsuperscript{257}

Minnesota

The Minnesota Supreme Court has been a consistent advocate of

\textsuperscript{255} The court stated:
In this case, plaintiff was not a Michigan resident. However, that fact does not affect the conclusion reached in Sexton that the chief conceptual underpinnings of lex loci delicti—certainty and predictability—are no longer viable. The court arrived at that conclusion without reference to the parties' citizenship. Therefore, to apply lex loci delicti in this case would advance those rationales no more than it would have in Sexton.

\textit{Id.}


\textsuperscript{257} See Waldorf v. KMS Indus., Inc., 25 Mich. App. 20, 23, 181 N.W.2d 85, 87 (1970) ("The general rule is that contractual rights are governed by the law of the state in which the contract was executed").
Leflar's choice-influencing considerations since the classic guest statute case of *Milkovich v. Saari.*\(^{258}\) In that case, two residents of Thunder Bay, Ontario, drove across the border to Minnesota for a day of entertainment. A one-car accident occurred and plaintiff passenger sued for injuries sustained. Defendant asserted the Ontario guest statute as a defense, but the supreme court held the guest statute inapplicable. After extensive reliance on *Kell v. Henderson*\(^{259}\) and *Clark v. Clark*\(^{260}\) two guest statute cases with identical fact patterns, the court indicated a "preference for the better-law approach" advocated by Professor Leflar.\(^{261}\) Applying the five Leflar factors, the court found only two to be important, and each pointed toward application of Minnesota law: Minnesota had an interest as a "justice-administering state" that its "courts not be called upon to determine issues under rules which, however, [sic] acceptable they may be in other states, are inconsistent with our own concept of fairness and equity"; and Minnesota common-law liability was a better rule of law than the Ontario guest statute.\(^{262}\) The guest-host suit was, therefore, allowed to proceed.

The Minnesota Supreme Court's next opportunity to apply the Leflar factors in a tort case came in *Bigelow v. Halloran.*\(^{263}\) In that case, the court was faced with the question of whether an Iowa plaintiff's cause of action against a Minnesota defendant for an intentional shooting on the plaintiff's Iowa farm would survive the death of the defendant, who committed suicide the same day. Again, the court held that "only the last two elements of Professor Leflar's five-point methodology are relevant to tort cases."\(^{264}\) The court found no important governmental interests of Minnesota to be advanced. It further found that Iowa's survival statute, because of its compensatory nature, was a better law than Minnesota's statutory bar of survival in intentional tort cases. A plaintiff's verdict was affirmed.

The latest invocation of Leflar's model in tort cases took place in *In re Discipline of Hoffman,*\(^{265}\) where the supreme court heard a client's

258. 295 Minn. 155, 203 N.W.2d 408 (1973).
261. *Milkovich,* 295 Minn. at 164, 203 N.W.2d at 413.
262. As for the other three choice-influencing considerations, the need for predictability of result had no application to a wholly unforeseen tort incident, maintenance of interstate and international order was not threatened so long as the state whose law was selected had a substantial connection with the case, and simplification of the judicial task was inapposite where applying either forum law or foreign law was equally easy. *Id.* at 170, 203 N.W.2d at 416-17.
263. 313 N.W.2d 10 (Minn. 1981).
264. *Id.* at 12.
265. 379 N.W.2d 514, 517 (Minn. 1986).
attack on an attorney’s fee. Both attorney and client were Minnesota residents. The client had been injured on the job while working in Alaska and had received an award under that state’s workers’ compensation laws. A provision of the Alaska workers’ compensation statute prohibited an attorney representing an injured employee from collecting a fee without the prior approval of the state workers’ compensation board. The attorney’s fee in this case was not submitted for prior approval. Relying on the Leflar factors, the court held the fee illegal under the applicable Alaska law.

The Minnesota courts have repeatedly applied the Leflar approach to insurance contract disputes. The first case was *Hague v. Allstate Insurance Co.*, where the laws of Minnesota and Wisconsin differed on the legality of stacking multiple insurance policies owned by the same insured so as to allow increased coverage. The supreme court chose to apply Minnesota law, which was the better law because it allowed stacking. Shortly thereafter came *Hime v. State Farm Fire & Casualty Co.* The court cited advancement of Minnesota’s governmental interest as forum in support of a decision to strike a clause in an insurance contract, valid under the law of Florida where the policy was issued, which excluded recovery in cases of intra-family liability. Later, in another stacking case, *Hoeschen v. South Carolina Insurance Co.*, the court of appeals again chose Minnesota law as the better law because it allowed stacking. The most recent contract case in the supreme court involved the initial permission rule, whereby insurance coverage continues even when the borrower of a motor vehicle exceeds the scope of the permission given by the owner. Minnesota law, which allowed recovery under the initial permission rule, was applied here as well.

The Minnesota experience demonstrates several significant facts concerning the Leflar approach. First, it is extremely pliant, often allowing a court to reach a result not attainable under any other commonly accepted modern theory. *Milkovich* is a good example. Both the Second Restatement and interest analysis clearly favor application of the law of the state of common domicile in guest statute cases. Judge Fuld’s rules and Cavers’ principles of preference apply the same rule. The Minnesota court, however, used the Leflar system and reached a different result.

266. 289 N.W.2d 43, 46-49 (Minn. 1978), aff’d, 449 U.S. 302 (1981). This is the well-known case in which the United States Supreme Court gave a liberal reading to the forum’s constitutional authority to apply its own law in conflicts cases.

267. 284 N.W.2d 829, 833-34 (Minn. 1979), cert. denied, 444 U.S. 1032 (1980).

268. 349 N.W.2d 833 (Minn. Ct. App. 1984), aff’d, 378 N.W.2d 796 (Minn. 1985).

Second, the Leflar approach is extremely forum-favoring. In fact, the fourth Leflar factor, advancement of the forum's government interest, is blatantly proforum. This point takes on added importance when it is observed that only two of the five Leflar factors are even given consideration by the Minnesota Supreme Court in tort cases, an approach not at all at odds with that taken in other Leflar states. In this context, it is obvious that a litigant arguing for application of a foreign law has little chance of success unless he can demonstrate, as in the Bigelow case, that the forum's governmental interests are not affected and that the foreign law is the decidedly superior one.

Finally, the Leflar approach is distinctly proplaintiff: the plaintiff prevailed in each of the Minnesota cases discussed above. This, too, is consistent with the results in other Leflar states. Whatever one's opinion of the Leflar system may be, it certainly has found favor with the Minnesota Supreme Court. The court can be expected to continue to use this approach in future cases.

Mississippi

Mississippi is strictly a Second Restatement state. The leading tort case is Mitchell v. Craft, a wrongful death suit between two Mississippi residents over a car accident occurring in Louisiana. The question for decision was whether Louisiana's rule of contributory negligence would completely bar the plaintiff's recovery. The Mississippi Supreme Court refused to apply the law of Louisiana merely because the accident took place there. Instead, it applied Mississippi's rule of comparative fault, citing at length to sections 175, 145, 164, and 6 of the Second Restatement. In an alternative holding, the court also found Mississippi law applicable under the five-factor approach advocated by Professor Leflar. Only the final two factors, advancement of the forum's governmental interest and application of the better rule of law, were deemed relevant in automobile collision cases such as this, and both pointed to Mississippi law.

Although an interim case, Vick v. Cochran, appeared to espouse a center of gravity approach, the supreme court settled the matter in

---

270. 211 So. 2d 509 (Miss. 1968).
271. Id. at 515-16.
272. Id. at 514. Precisely the same facts were presented in Fells v. Bowman, 274 So. 2d 109 (Miss. 1973), the court again holding that Mississippi comparative fault would govern in a suit between Mississippi residents over an accident in Louisiana.
273. 316 So. 2d 242 (Miss. 1975). Vick involved an accident between Alabama residents in Mississippi. In holding that the Alabama guest statute applied to the case, the court stated that "the 'center of gravity or of most substantial relationships' unquestionably is in Ala-
Spragins v. Louise Plantation, Inc.,\textsuperscript{274} when it stated that it had adopted "the center of gravity doctrine or the most significant relationship test," and that "in order to determine the most significant relationships, this court has looked to Restatement (Second) of Conflict of Laws for guidance."\textsuperscript{275} Spragins involved a contract to sell real estate, but the court's broad language indicates that it will apply the Second Restatement in all cases.

If more confirmation of Mississippi's adherence to the Second Restatement was needed, it came in Boardman v. United Services Automobile Association,\textsuperscript{276} where, while still referring to its method as a center of gravity approach, the court, in response to a certified question from the Fifth Circuit,\textsuperscript{277} announced no less than three times that Mitchell v. Craft had endorsed the Second Restatement approach to conflict of laws.\textsuperscript{278} The court then found Nebraska law applicable in a dispute over interpretation of an insurance contract, after citation to sections 6, 188, and 193.

The Mississippi federal courts sitting in diversity have repeatedly applied the Second Restatement to choice of law issues.\textsuperscript{279}

Boardman illustrates the Mississippi Supreme Court's commitment to the Second Restatement approach in all areas of substantive law. Though occasionally labeled a center of gravity approach, the Mississippi standard is clearly the Second Restatement. Beyond question, that standard will be at the heart of future conflicts decision in Mississippi.

Missouri

The Missouri Supreme Court expressly adopted the Second Restatement in Kennedy v. Dixon.\textsuperscript{280} In that case, Missouri residents were involved in a tragic car accident on an interstate freeway in Indiana while on their way home from a vacation in New York. The driver of the
vehicle was killed in the accident. The plaintiff, who had been riding in the back seat was injured, and sued the driver's estate for damages. The estate pleaded the Indiana guest statute281 in defense. After a discussion of various choice of law authorities, and a review of Schwartz v. Schwartz,282 the Arizona case which was the first to adopt the Second Restatement in tort a year earlier, the Missouri Supreme Court announced that it was adopting section 145 of the Second Restatement and that it would use Missouri law on these facts.283 The Indiana guest statute was not applied.

The court most recently applied section 145 of the Second Restatement in Elmore v. Owens-Illinois, Inc.,284 a suit by a worker against his employer for illness created by long-term exposure to asbestos in the workplace. The court applied the law of the state of employment rather than the state of the plaintiff's domicile. All recent conflicts decisions of the Missouri Court of Appeals have featured section 145 of the Second Restatement,285 as have the decisions of the federal courts sitting in diversity.286

281. Ind. Code § 47-1021 (current version at § 9-3-3-1 (West 1976)).
282. 103 Ariz. 562, 447 P.2d 254 (1968); see supra note 48 and accompanying text.
283. Kennedy, 439 S.W.2d at 184-85.
284. 673 S.W.2d 434, 436-37 (Mo. 1984).
285. See Nelson v. Hall, 684 S.W.2d 350, 352-53 (Mo. Ct. App. 1984); Carver v. Schafer, 647 S.W.2d 570, 576 n.6 (Mo. Ct. App. 1983); Huff v. LaSier, 571 S.W.2d 654, 655 (Mo. Ct. App. 1978); Byrn v. American Universal Ins. Co., 548 S.W.2d 186, 188-89 (Mo. Ct. App. 1977). But see Hicks v. Graves Truck Lines, Inc., 707 S.W.2d 439, 445 (Mo. Ct. App. 1986) (court of appeals indicated "that the doctrine of comparative impairment should be adopted to resolve choice of law cases in which the facts indicate significant contacts with Missouri and another state under the Restatement § 145 test and in which both states have legitimate state interests in the law choice.")

In Hicks, the court held that Missouri's system of pure comparative fault would be applied to allow a Missouri plaintiff to recover against a Kansas defendant for injuries sustained in a car-truck accident in Kansas, even though a jury found that the plaintiff was 60% at fault and therefore ineligible for recovery under the comparative fault law of Kansas. The court recognized the Missouri Supreme Court's adoption of the Second Restatement, but found that Kennedy v. Dixon, 439 S.W.2d 173 (Mo. 1969), was not a true choice of law case and, therefore, was not controlling authority in the the context of a true conflict. Hicks, 707 S.W.2d at 443.

In *Miller v. Home Insurance Co.*, the Missouri Supreme Court was presented with an opportunity to apply section 188 of the Second Restatement to a dispute over the interpretation of an insurance contract, but specifically declined to do so. Again, in *State Farm Mutual Automobile Insurance Co. v. MFA Mutual Insurance Co.*, the court indicated that the law of the place where the policies were issued would govern in an insurance case. A federal district court concluded flatly that "Missouri law employs lex loci contractus analysis to determine which law applies in insurance contract suits." 

Significantly, however, in both *Miller* and *State Farm*, the supreme court issued alternative holdings under the Second Restatement. Even more significantly, in neither case did the court criticize the persistent use of section 188 in the court of appeals. In a flurry of cases, numbering at least eight, the court of appeals has held that choice of law issues in contract will be determined with reference to section 188 and the Second Restatement. All but two of these cases postdate *Miller*, giving evidence that the Second Restatement is alive and thriving in Missouri in contract as well as in tort.

**Montana**

There are only two modern conflicts decisions in Montana, and one of those cases was resolved by statute. That case was *Kemp v. Allstate Insurance Co.* A Vermont plaintiff who was insured under policies issued in Vermont and New York was killed on an interstate highway in Montana while riding as a passenger in a car driven by another Vermont resident. The accident was caused by a Montana resident in another vehicle. The Montana Supreme Court held that insurance issues would be governed by a Montana statute requiring application of the law of the

---

287. 605 S.W.2d 778, 780 (Mo. 1980).
288. 671 S.W.2d 276, 277 n.2 (Mo. 1984).
290. See *Miller*, 605 S.W.2d at 780; *State Farm*, 671 S.W.2d at 277-78.
293. MONT. CODE ANN. § 28-3-102 (1985).
place of performance in all contract disputes. The court determined that the place of performance was Montana, where the insurance benefits would be paid. The court then noted the convergence of the statutory choice of law rule and the traditional rule requiring resort to the law of the place of making or the place of performance. The language used by the court seems to indicate a preference for the traditional rule.\textsuperscript{294} The result of applying the statutory directive was favorable to plaintiff's estate, since Montana allowed for stacking of the uninsured motorist benefits awarded under the two insurance policies.

The other choice of law case to reach the Montana Supreme Court in the modern era was \textit{In re Estate of Murnion},\textsuperscript{295} where the court applied sections 283 and 6 of the Second Restatement to uphold the legality of a common law marriage in Montana not recognized in the State of Washington where the couple first resided. Recognition of the validity of the marriage allowed the surviving spouse to obtain workers' compensation benefits when the other died, and also to participate in a wrongful death award. The opinion was highly result-oriented and should not be taken as a general endorsement of the Second Restatement for resolution of conflict cases.

Finally, there is some support for application of lex loci delicti in tort cases as a result of \textit{Haker v. Southwestern Railway Co.},\textsuperscript{296} a wrongful death action instituted by the spouse of a Montana resident killed in a private airplane crash in Montana. Some of the named defendants were from Arizona. The court did not discuss the relevance of the interstate connections, but simply applied Montana law to all aspects of the case. Given the fact that Montana clearly had the closest relationship to the case, the court's choice of law was not surprising.

These cases provide scant evidence for assessing the current state of Montana conflicts law. \textit{Kemp} makes clear that the Montana courts will apply the traditional rules in contract cases, looking to the place of making or place of performance. Dicta in \textit{Kemp} also seems to indicate that in 1979 the Montana Supreme Court was satisfied with this result as a matter of judicial policy. Absent any evidence of intention to adopt a mod-

\begin{itemize}
\item \textsuperscript{294} The court stated:
\begin{quote}
This ruling is in harmony with the long-standing rule that the law of place of performance of an insurance contract controls as to its legal construction and effect, but the law of the place where the contract was made governs on questions of execution and validity, unless the terms of the contract provide otherwise, or circumstances indicate a different intention.
\end{quote}
\end{itemize}

\textit{Kemp}, 183 Mont. at 533, 601 P.2d at 24.

\textsuperscript{295} 686 P.2d 893 (Mont. 1984).

\textsuperscript{296} 176 Mont. 364, 578 P.2d 724 (1978).
ern choice of law methodology, it can be assumed that the Montana courts will apply lex loci delicti in tort as well.

Nebraska

The Supreme Court of Nebraska appears to have adopted the Second Restatement for use in both tort and contract, but the issue is not free from doubt. In a 1977 case, *Crossley v. Pacific Employers Insurance Co.*, the court applied the Colorado Auto Accident Reparations Act, a no-fault law precluding recovery against an insured driver except in case of serious injury or death, to a Nebraska resident’s claim against a Colorado resident insured for an accident in Colorado. The court first reiterated the traditional place of injury rule, which it had applied unhesitatingly in two earlier automobile accident cases. The court added, however, that the result would have been the same “under virtually any rationale of the current principles of conflict of laws which apply to actions for personal injuries.” Specifically, the court quoted from section 146 of the Second Restatement, a presumptive reference to the place of injury rule.

*Harper v. Silva,* a 1987 decision, appeared to go somewhat farther along the route to application of the Second Restatement. The plaintiff in a medical malpractice case sought recovery from a Nebraska state-administered fund designed to compensate malpractice victims. Plaintiff was a Kansas resident, and his injuries were incurred in Kansas. The defendant physician was licensed to practice in both Kansas and Ne-

298. COLO. REV. STAT. § 10-4-701 to -723 (1974).
299. “This court has consistently held that in an action for personal injuries or death resulting from an automobile accident, the law of the place where the accident occurred will be applied, and that law governs not only the amount of recovery but also the right to recover.” *Crossley*, 198 Neb. at 30, 251 N.W.2d at 386. The two prior lex loci delicti cases were Peterson v. Dean, 186 Neb. 716, 719, 186 N.W.2d 107, 109 (1971) (applying Iowa guest statute in suit between Nebraskans) and Lorenzen v. Continental Baking Co., 180 Neb. 23, 31, 141 N.W.2d 163, 168 (1966) (applying Iowa law of damages to a wrongful death suit brought by a Nebraska resident after an accident in Iowa).
300. *Crossley*, 198 Neb. at 30, 251 N.W.2d at 386.
301. *Id.* at 30, 251 N.W.2d at 386. The court gave § 146 a rather niggardly construction, however, stating that “in virtually all instances where the conduct and the injury occur in the same state, that state has the dominant interest in regulating that conduct and in determining whether it is tortious in character, and whether the interest affected is entitled to legal protection.” *Id.* The myriad guest statute and spousal immunity cases decided since the promulgation of the Second Restatement attest to the inaccuracy of this interpretation. In fact, perhaps the universal rule in all modern choice of law methods is that the law of the place of wrongful conduct and injury will not govern where the parties share a common domicile in another jurisdiction.
Nebraska. Unsurprisingly, the supreme court denied recovery, applying Kansas law. However, the court did not rely on lex loci delicti. Instead, it cited section 146 of the Second Restatement.\(^3\) The court said Nebraska "appears to follow" the Second Restatement,\(^4\) citing only Crossley case. Two federal district court decisions handed down in the interim between Crossley and Harper reached different conclusions regarding Nebraska choice of law in tort cases. A 1978 case held that "Nebraska still follows the concept of lex loci delicti in the area of tort law."\(^5\) A 1983 case, however, noting that "the clear trend of the court has been to adopt the Restatement (Second) of Conflict of Laws approach to the choice of law problem," applied sections 147 and 6 of the Second Restatement in a conversion case.\(^6\) The evidence is not clear as to what the Nebraska Supreme Court will do next in tort. Because the court has not yet actually applied the Second Restatement, Nebraska is, for now, properly classified as a lex loci delicti jurisdiction. Probably it will apply the Second Restatement.

In a 1978 usury case,\(^7\) the supreme court had no hesitation in applying section 203 of the Second Restatement\(^8\) in order to uphold the validity of a contractual interest rate which was usurious under the law of Minnesota, where the last act necessary to make the contract binding had been taken. Since one of the parties to the contract was a Nebraska resident, and since the other party had an office in Nebraska, the contract had a substantial relationship to that state and the interest rate chosen by the parties was given effect. In the course of its decision, the court also quoted from section 188 of the Second Restatement and indicated its approval of modern choice of law methodology. The opinion strongly indicates that the Nebraska courts may apply the Second Restatement to other facets of contract law in the future.

\(^{303}\) Id. at 647-48, 399 N.W.2d at 828.  
\(^{304}\) Id. at 647, 399 N.W.2d at 828.  
\(^{308}\) Section 203 of the Second Restatement provides: The validity of a contract will be sustained against the charge of usury if it provides for a rate of interest that is permissible in a state to which the contract has a substantial relationship and is not greatly in excess of the rate permitted by the general usury law of the state of the otherwise applicable law under the rule of § 188.  

CHOICE OF LAW

Nevada

It has been two decades since the last Nevada Supreme Court decision dealing with a conflict of laws in tort. Its last decision was Braddock v. Braddock,309 a 1975 case involving a contract dispute. In that case, the court judged the validity of an ante-nuptial agreement according to the law of Ohio because the agreement was executed and to be performed there.310 Similarly, in a prior case, the court held that the modifiability of a separation agreement would be determined according to the law of New York, where the agreement was executed and under whose law the parties had stipulated the contract was to be construed.311 In neither case was the law of the marital domicile given consideration. In three recent cases, the supreme court has given effect to contractual choice of law clauses without hinting at a more general departure from lex loci contractus.312 The court has also indicated that it will follow the traditional rule that issues concerning the performance of a contract are to be governed by the law of the state where such performance is to take place.313

As mentioned above, the precedents in tort conflicts are quite dated. The most recent Nevada Supreme Court case is Tab Construction Co. v. Eighth Judicial District Court,314 a 1967 case presenting the question of the permissibility of common law tort recovery by an injured construction worker who had previously received workers’ compensation benefits. The court applied Nevada law, which prohibited such recovery, even though the plaintiff employee was from Arizona. Rather than relying on Nevada’s status as the place of injury, the court identified Nevada’s governmental interest in the application of its own workers’ compensation scheme.315 Earlier cases had applied lex loci delicti unhesitatingly.316

309. 91 Nev. 735, 542 P.2d 1060 (1975).
310. Id. at 738, 542 P.2d at 1062.
315. The court stated:
The interest of Nevada in the instant case does not derive solely from the occurrence of the injury within its borders. Significant is the fact that it is the state of the forum. If the forum state is concerned, it will not favor the application of a rule repugnant to its own policies, and the law of the forum will presumptively apply, unless it becomes clear that non-forum incidents are of greater significance.
316. See Karlsen v. Jack, 80 Nev. 201, 204, 391 P.2d 319, 320 (1964); Campbell v. Baskin,
Despite the equivocal language in *Tab Construction Co.*, the federal courts sitting in diversity have continued to apply the place of injury rule in tort cases. The only two courts not to apply the rule applied section 150(2) of the Second Restatement to determine that the law governing in libel actions should be the law of the plaintiff's domicile, a result certainly not inconsistent with the place of injury rule.

Thus, only once has a Nevada court expressed hesitation in applying the rules of the First Restatement, and even in that case the court ultimately applied the law of the place of injury. Nevada, therefore, remains a First Restatement jurisdiction.

**New Hampshire**

The tiny state of New Hampshire has had a surprisingly broad experience with conflict of laws disputes. The New Hampshire Supreme Court was at the vanguard of modern choice of law in the nineteen-sixties. It first applied the law of the state of marital domicile, rather than the law of the place of injury, in interspousal immunity suits. Then in *Clark v. Clark*, it completely abandoned the traditional rule in favor of then untested methodology: Leflar's choice-influencing considerations.

*Clark v. Clark* presented the issue of whether the Vermont guest statute would apply to bar recovery by a New Hampshire resident, in a negligence suit, against her spouse for an automobile accident occurring in Vermont. The New Hampshire Supreme Court concluded that it would not. The opinion relied exclusively on the five-factor Leflar test,

---


> 318. Section 150(2) of the Second Restatement provides: "When a natural person claims that he has been defamed by an aggregate communication, the state of the most significant relationship will usually be the state where the person was domiciled at the time, if the matter complained of was published in that state." *RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 150(2) (1969).*


> 320. See * supra * notes 312-13 and accompanying text.


> 323. VT. STAT. ANN. tit. 23, § 1491 (repealed 1969).
and particularly on the last two factors, advancement of the forum's governmental interests and application of the better rule of law. As to these two, the court determined that it had a strong governmental interest in applying the New Hampshire rules of tort recovery to New Hampshire residents, and that New Hampshire common law liability was a better rule of law than the Vermont guest statute. New Hampshire law was applied and the suit was allowed to proceed.

The New Hampshire Supreme Court has consistently followed the Clark mandate in tort conflicts over the last two decades. Several facts concerning these cases are immediately apparent. First, the court has never given any consideration to the first three Leflar factors, but instead has either relied exclusively on the fourth and fifth factors, or simply selected what it thought to be the better rule of law. Second, in all but two of these cases, the court held that New Hampshire had the better law. Finally, it has applied New Hampshire law in all but one case, LaBounty v. American Insurance Co.

The New Hampshire Supreme Court has not yet applied the Leflar approach in a contract case. Originally, New Hampshire followed the lex loci contractus rule, but it abandoned this approach in the 1968 case of Consolidated Mutual Insurance Co. v. Radio Foods Corp. without ever referring to its seminal decision in Clark or to the Leflar choice-influencing considerations. Instead, the court utilized the Second Re-

326. In LaBounty v. American Ins. Co., 122 N.H. 738, 743-44, 451 A.2d 161, 164 (1982), the court did not decide whether the former New Hampshire law, which had allowed an employee to bring a tort action against a co-worker, was a better law than the laws of Massachusetts and Maine, which prohibited such suits. Rather, by the time the court decided the case, the New Hampshire law had been changed so as to disallow such suits. Accordingly, the court disallowed the suit. In Maguire v. Exeter & Hampton Elec. Co., 114 N.H. 589, 592, 325 A.2d 778, 780 (1974), the court held that New Hampshire's limitation on dollar recovery in wrongful death actions was inferior to the law of Maine, which had no such limitation. It nevertheless felt constrained to apply New Hampshire law because Maine's only relationship to the case was that it was the residence of the deceased, an employee of a New Hampshire surveying firm, who was killed in an employment-related accident in New Hampshire, allegedly due to the negligence of a New Hampshire public utility.
statement, and particularly the presumptive reference in section 193 to the law of the state of the insured in insurance policy interpretation cases.

Despite its apparent adoption of the Second Restatement in *Consolidated Mutual*, the New Hampshire Supreme Court has often not followed that approach. Since 1968, at least five cases, all involving insurance contracts, appear to have been decided on the basis of lex loci contractus. Two cases have applied the most significant relationship test, but each time without reference to the Second Restatement. The only case actually to have applied the Second Restatement merely invoked the aid of section 187 to affirm a contractual choice of law stipulation entered into by the parties. A First Circuit panel attempting to make sense of the New Hampshire choice of law morass, has concluded that the later New Hampshire Supreme Court cases, in which lex loci contractus was applied, were in fact consistent with *Consolidated Mutual*. In each case, the state in which the contract was made was also the principal location of the insured, the contact point cited in *Consolidated Mutual* and section 193 of the Second Restatement as most significant in determining the applicable law. Accordingly, that case, as well as a later First Circuit case, applied the law of the state where the principle insured was located, citing *Consolidated Mutual* as authority.

This convergence of the two competing rules, when combined with the fact that the supreme court has at least twice since 1968 resolved a conflict in favor of a jurisdiction other than where the contract was made, leads to the conclusion that the New Hampshire Supreme Court will apply the Second Restatement, rather than lex loci contractus, in future contract cases. Plainly, it will continue to apply Leflar's choice-influencing considerations in tort cases.

330. *See supra* note 223.
334. *See supra* note 331.
New Jersey

New Jersey applies an interest analysis approach in tort cases. The leading case is Mellk v. Sarahson,338 a guest statute case involving New Jersey residents and a car accident in Ohio. A unanimous New Jersey Supreme Court decided not to apply the Ohio guest statute.339 The court adopted no particular choice of law method, but relied heavily on Babcock v. Jackson340 and took a very policy-oriented approach.341 Despite the emphasis on the public policy of the forum, the court seemed to indicate that it was not merely invoking an exception to lex loci delicti, but that it was, in fact, discarding it.342

Later New Jersey tort cases have demonstrated a definite interest analysis approach. Pfau v. Trent Aluminum Co.343 was an interesting guest statute case in which the plaintiff was a Connecticut resident, the defendant was from New Jersey, and the injury-causing accident occurred in Iowa. Of these three states, only Iowa had a guest statute.344 The plaintiff and the defendant, while not domiciliaries of Iowa, were attending college there at the time of the accident. The court began its analysis by discounting the fact of the parties’ temporary Iowa residence. It found that the governmental interests behind Iowa’s guest statute would not be served by application of the statute on the facts presented. Relying on a leading interest analysis case from California345 the court held that the law of the state where an automobile accident occurred would not be applied to displace the congruent laws of the respective jurisdictions where the parties resided. Since the parties resided in Con-

338. 49 N.J. 226, 229 A.2d 625 (1967).
339. OHIO REV. CODE ANN. § 4515.02 (1982).
341. The Mellk court stated:
The advantages of uniformity, certainty and predictability often attributed to the lex loci delicti approach must yield when an unvarying and mechanical application of this rule would cause a result which frustrates a strong policy of this State while not serving the policy of the state where the accident occurred.

Mellk, 49 N.J. at 234, 229 A.2d at 629.
342. The judicial doctrine of stare decisis has not prevented this court in the past from changing rules which we determined were no longer right and just, and does not preclude us here from adopting a choice of law principle in tort cases which we believe responsive to the purposes and policies of the law.
Id. at 234-35, 229 A.2d at 629.
344. IOWA CODE § 321.494 (repealed 1984).
345. Reich v. Purcell, 67 Cal. 2d 551, 432 P.2d 727, 63 Cal. Rptr. 31 (1967); see supra note 65 and accompanying text.
necticut and New Jersey, and neither of these states had a guest statute, the Iowa guest statute would not be applied.

The New Jersey Supreme Court has applied its form of interest analysis on three other occasions since Mellk. In Rose v. Port of New York Authority, the court demonstrated the manipulability of the rule. Plaintiff, a New Jersey resident, brought an action against the quasi-public body in charge of operating New York City's John F. Kennedy International Airport, claiming that he had been injured at the airport when he was struck by an automatic glass door that malfunctioned. The court managed to find New Jersey law applicable by characterizing the defendant, Port Authority of New York, as a "bi-state governmental agency in which this State has an interest no different than that of New York." In these circumstances, "[w]hether the misadventure took place at Kennedy Airport or at Newark Airport would seem of no significance; the situs of the event seems of little moment." Later, in Heavner v. Uniroyal, Inc., the court departed from precedent in holding that the forum's statute of limitations would no longer apply automatically if another jurisdiction had a greater interest in the case. Finally, in Veazey v. Doremus, the court held that Florida's rule of interspousal immunity barred a tort suit between a Florida husband and wife, even though the car accident on which the suit was based occurred in New Jersey, a nonimmunity state.

The New Jersey Superior Court has proven to be less adept at applying interest analysis than has the supreme court. In a curious interpretation of Mellk, the superior court, in Wuerffel v. Westinghouse Corp., held that New Jersey choice of law required a two-step analysis involving both governmental interest analysis and section 145 of the Second Restatement. The court cited no authority for its invocation of section 145. Five later cases also applied the two-step, contacts-interests approach, but none of these decisions cited the Second Restatement.

347. Id. at 140, 293 A.2d at 377.
348. Id.
350. Most courts hold that statute of limitations issues are procedural and therefore, absent a borrowing statute, are to be governed by the forum's own limitations periods. This rule cuts across theoretical choice of law lines. But see Dent v. Cunningham, 786 F.2d 173 (3d Cir. 1986) (citing Heavner and applying New Jersey's statute of limitations on the strength of an interest analysis approach).
351. 103 N.J. 244, 510 A.2d 1187 (1986).
New Jersey has so far declined to extend its interest analysis approach to contract cases. The supreme court adopted an eclectic approach in *State Farm Mutual Automobile Insurance Co. v. Estate of Simmons*;\(^{354}\) emphasizing a preference for the place of making but a willingness to consider other contacts and governmental interests as well.\(^{355}\) Left to interpret these criteria, the New Jersey Superior Court has generally applied the place of making rule.\(^{356}\) Federal courts sitting in diversity, have, however, on several occasions, displaced the place of making rule in favor of an interest analysis approach.\(^{357}\)

The New Jersey conflicts rule in contract cases escapes easy characterization. Depending upon how one interprets the supreme court’s decision in *State Farm*, it could be stated that New Jersey applies either lex loci contractus, interest analysis, the Second Restatement, or a center of gravity approach. Lex loci contractus probably would be a mischaracterization, since the supreme court is clearly prepared to depart from the place of making presumption in appropriate cases. Nor does interest


355. The court stated its new rule as follows:

[T]he law of the place of the contract ordinarily governs the choice of law because this rule will generally comport with the reasonable expectations of the parties concerning the principle situs of the insured risk during the term of the policy and will furnish needed certainty and consistency in the selection of the applicable law. At the same time, this choice-of-law rule should not be given controlling or dispositive effect. It should not be applied without a full comparison of the significant relationship of each state with the parties and the transaction. That assessment should encompass an evaluation of important state contacts as well as a consideration of the state policies affected by, and governmental interest in, the outcome of the controversy.

*Id.* at 37, 417 A.2d at 492-93 (citations omitted).


analysis seem to be the appropriate label, since the court is well accustomed to applying interest analysis in tort cases and has not expressly extended that method to contract cases. Finally, labeling New Jersey as a Second Restatement state is problematic because the supreme court has cited the Restatement only once, in *State Farm*, where it based its decision on other, more general, considerations. By process of elimination, New Jersey is best classified as a center of gravity state, with a presumption that the law of the place of making will govern.

New Mexico

New Mexico follows the traditional rules in both contract and tort. In both areas, the more recent decisions have come from the New Mexico Court of Appeals rather than from the New Mexico Supreme Court. The last tort case to reach the supreme court was *Zamora v. Smalley*,<sup>358</sup> in 1961. There, the court, citing section 378 of the First Restatement,<sup>359</sup> held that Colorado law governed the question of liability for an accident occurring in that state. The court of appeals reaffirmed the lex loci delicti rule in two more recent cases. In 1976, it held that a wrongful death suit between Missouri residents was governed by New Mexico law, which included a longer statute of limitations and no limit to recovery, since the airplane accident occurred in New Mexico.<sup>360</sup> In 1981, the court of appeals held Virginia's spousal immunity law barred a claim of fraud between New Mexico spouses since the spouses resided in Virginia at the time of the alleged fraud.<sup>361</sup>

The two most recent contract cases to reach the New Mexico Supreme Court arose in the 1960s. In each case, the court, without elab-

359. RESTATEMENT OF CONFLICT OF LAWS § 378 (1934) ("The law of the place of wrong determines whether a person has sustained a legal injury.").
oration, held that the contract was governed by the law of the state where it was made. The court of appeals followed this rule on at least two occasions. In 1971 the Tenth Circuit Court also applied the place of making rule in construing a group accident insurance policy. The Tenth Circuit added that it would not consider applying a modern choice of law approach since "New Mexico courts have never even intimated that they would adopt the 'substantial contacts' theory." Two other federal courts have also applied the place of making rule. The New Mexico courts, however, have made clear that the traditional exception for public policy considerations applies.

As stated by the Tenth Circuit, the New Mexico courts have shown no inclination at this point toward abandonment of the traditional rules of the First Restatement. The place of injury and place of making rules still govern here.

New York

New York conflict of laws jurisprudence has a long and storied history, beginning with early opinions of Judges Cardozo and Lehman, and culminating in the 1985 decision of Schultz v. Boy Scouts of America, Inc.

The classic case, and the one most often-cited in modern choice of law decisions, is Babcock v. Jackson, where the New York Court of Appeals held that Ontario's guest statute did not bar a suit between New Yorkers involved in an automobile accident while on a weekend trip to Canada.

A number of prior court of appeals decisions, however, molded the context from which Babcock emerged. Early on, Judge Cardozo, in

365. Id. at 1063.
368. See supra note 364 and accompanying text.
Loucks v. Standard Oil Co. of New York,\textsuperscript{371} defined a "public policy" exception to the lex loci delicti rule. In holding Massachusetts statutory limitations on recovery for wrongful death applicable to this suit between New York residents over an automobile accident in Massachusetts, the court, however, gave the public policy exception a limited scope.\textsuperscript{372}

Even before Babcock, lex loci delicti was not always applied. In Herzog v. Stern,\textsuperscript{373} an opinion by Judge Lehman, the court applied New York law to a New Yorker's cause of action against another New Yorker arising out of an automobile accident in Virginia. Under New York law the death of the wrongdoer extinguished the cause of action. Virginia, however, allowed the cause of action to survive the death of the tortfeasor. In Mertz v. Mertz,\textsuperscript{374} the court held that New York's spousal immunity statute barred a suit by one spouse against another even though the law in Connecticut, where the injury occurred, allowed interspousal suits. As in Herzog, Judge Lehman characterized the issue as one of whether the New York courts had the authority to remedy a recognized wrong. Quoting from the First Restatement,\textsuperscript{375} the court held that the forum alone could determine a particular defendant's amenability to suit.\textsuperscript{376} Finally, in Kilberg v. Northeast Airlines, Inc.,\textsuperscript{377} decided two years prior to Babcock, the court, held that the law of the forum determined the amount of damages recoverable for an airplane accident, occurring in Massachusetts, in which a New Yorker was killed. A separate opinion accused the majority of abandoning the traditional place of injury rule in choice of law.\textsuperscript{378}

\begin{itemize}
\item \textsuperscript{371} 224 N.Y. 99, 120 N.E. 198 (1918).
\item \textsuperscript{372} The court warned: The courts are not free to refuse to enforce a foreign right at the pleasure of the judges, to suit the individual notion of expediency or fairness. They do not close their doors, unless help would violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal. \textit{Id.} at 111, 120 N.E. at 202.
\item \textsuperscript{373} 264 N.Y. 379, 191 N.E. 23 (1934).
\item \textsuperscript{374} 271 N.Y. 466, 3 N.E.2d 597 (1936).
\item \textsuperscript{375} \textit{RESTATEMENT OF CONFLICT OF LAWS} § 608 (1934) ("If no form of action is provided by the law of a state for the enforcement of a particular foreign right, no action to enforce that right can be maintained in the State.").
\item \textsuperscript{376} Mertz, 271 N.Y. at 473-74, 3 N.E.2d at 599-600.
\item \textsuperscript{377} 9 N.Y.2d 34, 172 N.E.2d 526, 211 N.Y.S.2d 133 (1961).
\item \textsuperscript{378} Judge Froesser in his concurrence warned: The court is laying down a new rule of law whereby we disregard the Massachusetts limitation as to damages in a wrongful death action, thereby undermining the accepted pattern of conflict of law rules, in effect overruling numerous decisions of this court, and completely disregarding the overwhelming weight of authority in this country. \textit{Id.} at 46, 172 N.E.2d at 532, 211 N.Y.S. at 142.
\end{itemize}
As Kilberg and the other pre-Babcock decisions make clear, by 1963 the court of appeals had gone a long way toward repudiating the place of injury rule. In addition, the court, in Auten v. Auten, nearly a decade before Babcock, adopted a “center of gravity” approach to conflicts in contract cases. In fact, Judge Fuld in Babcock quoted extensively from his Auten opinion. Fuld viewed the “center of gravity” or “grouping of contacts” approach adopted in Babcock as consistent with both the Auten approach in contract cases and the new “most significant relationship” approach propounded in what became section 145 of the Second Restatement. In truth, Fuld’s Babcock opinion utilized straight interest analysis in choosing to apply New York common law liability to an accident involving New Yorkers. New York’s interest in compensating its injured plaintiff was not matched by any comparable interest of the province of Ontario, since both parties and defendant’s insurance carrier were New Yorkers.

The first conflicts case to reach the court of appeals after Babcock was Oltarsh v. Aetna Insurance Co. The court allowed a New York couple, injured in Puerto Rico, to bring a direct action against the tortfeasor’s insurer. Puerto Rico law allowed direct actions, although New York generally did not. The court cited Babcock, Auten and the Second Restatement in holding that Puerto Rico had “the most significant relationship and contacts with respect to the matter in dispute.”

The next conflicts case decided by the court of appeals was Dym v. Gordon, which presented a fact pattern similar to Babcock. Plaintiff and defendant, both New York domiciliaries attending summer classes at
the University of Colorado, were involved in an automobile accident in the defendant's car. The defendant was not liable for damages under the Colorado guest statute. The court conceded the inapplicability of the place of injury rule and analyzed the case under Babcock. It nevertheless decided to apply the Colorado guest statute.

The Dym court described its choice of law task as a two-part, policies-contacts inquiry. On each score, the court found Babcock distinguishable. With regard to state policies, the accident here was a two-car collision; a Kansas resident was also involved. Therefore, Colorado had an interest which Ontario lacked in Babcock, namely, assuring that the defendant's limited assets would not be so depleted by the guest-host suit that the innocent Kansas resident would have his recovery diminished.

On the contacts side of the equation, Colorado's connection with the litigants was significantly closer than Ontario's. In Babcock, the parties' trip began in New York and was to end thereafter a short, weekend excursion across the border. In Dym, by contrast, the accident occurred during a trip between two Colorado points, and the guest-host relationship arose in Colorado, where the parties first met. After determining that Colorado law was applied on a "contacts" basis, the Dym court severely criticized several other choice of law approaches, including lex loci delicti, governmental interest analysis, "better law" considerations, and the policy favoring compensation of New York tort victims. There were three dissenters, including Judge Fuld.

In the next case, Long v. Pan American World Airways, Inc., Pennsylvania plaintiffs brought suit against a New York airline, doing business nationwide, for an airplane accident occurring in Maryland. Maryland imposed greater limitations on the available recovery for wrongful death than Pennsylvania. The court decided unanimously to apply Pennsylvania law, allowing the greater recovery, in light of state's interest in vindicating the rights of its resident plaintiffs.

Macey v. Rozbicki was another application of Babcock in a guest statute case. The facts were the same as in Babcock except that the plain-

385. Id.
386. Id.
tiff and the defendant had been in Ontario for a week on vacation at the
time of the accident, and the excursion on which the injury-causing acci-
dent occurred began and was to end in Ontario. The court found this
case more akin to Babcock than to Dym, and allowed recovery under
New York law.

In the next few cases, occurring in the late 1960s, the court of ap-
peals’ approach took on even more of an interest analysis slant. In re
Estate of Crichton\(^3\) was the first of a trilogy of decisions, written by
Judge Keating, heavy-laden with interest analysis language. In that case,
the court held that since New York was the marital domicile, its com-
mon law determined a widow’s interest in personal property acquired
during marriage and left by her decedent husband in Louisiana. The
community property laws of Louisiana would not apply. Opposing par-
ties emphasized Louisiana’s significant contacts with the estate, espe-
cially its status as situs of the property. The court, however, analyzed
the case solely in terms of governmental interests,\(^3\) and found that
“New York, as the domicile of Martha and Powell Crichton, has not
only the dominant interest in the application of its law and policy but the
only interest.”\(^3\)

The second of Judge Keating’s three interest-analysis opinions was
Miller v. Miller.\(^3\) The court applied New York law, allowing unlimited
recovery for wrongful death, in lieu of Maine law, allowing only a limited
recovery. The plaintiff’s New York husband was killed in a car accident
in Maine while riding in a car driven by his brother and owned by his
sister-in-law. Both were Maine residents at the time of the accident. An
apparent true conflict proved to be a false conflict upon closer analysis.
Only three months after the accident, and before suit was filed, the owner
and driver moved to New York and established permanent residence. By
the time of the court of appeals’ decision, they had resided in New York


\(^3\) The court explained:

Contacts obtain significance only to the extent that they relate to the policies and
purposes sought to be vindicated by the conflicting laws. Once these contacts are
discovered and analyzed they will indicate (1) that there exists no true conflict of
laws, as in the case at bar and as in most choice of law cases, or (2) that a true
conflict exists, i.e., both jurisdictions have an interest in the application of their law.
In the former case, of course, the law of the jurisdiction having the only real interest
in the litigation will be applied. In the case of a true conflict, while our decisions
have normally resulted in application of forum law, we are not as yet prepared to
formulate what may be deemed a rule of general application but prefer rather to give
further consideration to the question as the cases arise.

\(^3\) at 135 n.8, 228 N.E.2d at 806 n.8, 281 N.Y.S.2d at 820 n.8 (citations omitted).

\(^3\) Id. at 134, 228 N.E.2d at 806, 281 N.Y.S.2d at 820.

\(^3\) 22 N.Y.2d 12, 237 N.E.2d 877, 290 N.Y.S.2d 734 (1968).
for six and one-half years. Maine, therefore, had no interest in protecting these defendants from high damages. Moreover, even to the extent that Maine had a "paternalistic interest in protecting its residents against liability while they were in Maine," this interest had clearly been repudiated by the Maine legislature. The legislature repealed the limitation on recovery statute three years prior to the court of appeals' decision.

The third of the Keating trilogy was Tooker v. Lopez, a guest statute case presenting the same fact pattern as Dym. In Tooker, two Michigan State University women, domiciliaries of New York, were killed when their car overturned on a Michigan highway. Michigan had a guest statute, but New York did not. The court applied New York law. In doing so it announced that it had misread the purposes of the Colorado guest statute in Dym when it had held that one such purpose was to preserve a fund for recovery of damages in favor of the innocent passengers of the other involved vehicles. In fact, the court stated this could not be a true purpose behind the guest statutes since all such statutes allow recovery upon a showing of gross negligence. "If the purpose of the statute is to protect the rights of the injured 'non-guest,' as opposed to the owner or the insurance carrier, we fail to perceive any rational basis for predicating that protection on the degree of negligence which the guest is able to establish." Tooker thus held that the true purpose behind guest statutes was to prevent the filing of fraudulent insurance claims, and that this purpose would not be served by application of the guest statute in this case since defendant's insurer was a New York carrier.

According to Tooker, the misreading of the purposes behind the guest statute in Dym led to a contorted decision in Macey because the Macey court avoided consideration of Ontario's purported "interest" in preserving defendant's insurance coverage. Because the Macey court felt constrained to avoid conflict with its decision in Dym, it emphasized "contacts" to the exclusion of truly affected governmental interests. As a result, "[s]ubstituted for a rational choice of law rule was a method of

394. The court cautioned that a post-accident change in domicile might be disregarded under certain circumstances in order to prevent a party from making the choice of law on his own. In this case, however, the move could not have been made for tactical litigation reasons because the defendants, by moving from Maine to New York, actually exposed themselves to greater liability. Id. at 22, 237 N.E.2d at 882-83, 290 N.Y.S.2d at 742.
395. Id. at 21-22, 237 N.E.2d at 882, 290 N.Y.S.2d at 742.
397. MICH. COMP. LAWS ANN. § 257.401 (West 1977).
398. Tooker, 24 N.Y.2d at 575, 249 N.E.2d at 397, 301 N.Y.S.2d at 524.
399. Id.
decision based on contact counting—a method open to the same criticism of unreasonableness as the earlier lex loci delictus rule.\textsuperscript{400} \textit{Tooker} thus re-established for guest statute cases the interest analysis, which was temporarily and unintentionally abandoned in \textit{Macey}.

There were three separate opinions in \textit{Tooker}. Dissenting Judge Breitel, joined by two others, argued for application of the “center of relationship” test utilized in \textit{Dym}.\textsuperscript{401} This test mandated application of Michigan law. Judge Burke, author of the \textit{Dym} decision, was an advocate of a “grouping of contacts” approach under which it was “quite obvious that the Michigan guest statute would be sustained.” Nevertheless he concurred in the application of New York law because he felt bound by the stare decisis effect of the post-\textit{Macey} opinions promoting the interest analysis approach.\textsuperscript{402}

Finally, Chief Judge Fuld, convinced that the court’s opinions in guest statute cases had been inconsistent in both approach and result, determined in his concurrence to “proceed to the next stage in the evolution of the law—the formulation of a few rules of general applicability, promising a fair level of predictability.”\textsuperscript{403} He propounded three broad rules for application in guest statute cases. In general, these rules provide: first, that the law of common domicile will be preferred to the law of the place of injury; second, that the law of the jurisdiction where the injury occurred will be applied if either party is domiciled there and that party’s legal position would be advanced by application of that law; and third, that the law of the place of injury will generally govern in situations where the parties do not share the same domicile with one another and the second rule is otherwise inapplicable. Application of the first rule to the facts of \textit{Tooker} called for resort to New York law.

Three years later, in \textit{Neumeier v. Keuhner},\textsuperscript{404} a majority of the court of appeals adopted Judge Fuld’s rules. In \textit{Neumeier}, a New Yorker drove to Ontario and there picked up a friend for a trip to another point in Ontario. Both driver and passenger were killed when their car was hit by a train belonging to the Canadian National Railway Company. The passenger’s widow brought an action for wrongful death against both the Canadian National Railway Company and the New York host-driver’s estate. The estate argued that the Ontario guest statute barred recovery from the driver’s estate. The court applied the foreign guest statute. In

\textsuperscript{400} Id. at 576, 249 N.E.2d at 398, 301 N.Y.S.2d at 524.
\textsuperscript{401} Id. at 594-95, 249 N.E.2d at 409-10, 301 N.Y.S.2d at 540-41 (Breitel, J., dissenting).
\textsuperscript{402} Id. at 590-91, 249 N.E.2d at 407, 301 N.Y.S.2d at 537 (Burke, J., concurring).
\textsuperscript{403} Id. at 584, 249 N.E.2d at 403, 301 N.Y.S.2d at 532 (Fuld, C.J., concurring).
\textsuperscript{404} 31 N.Y.2d 121, 286 N.E.2d 454, 335 N.Y.S.2d 64 (1972).
doing so, Chief Judge Fuld once again expressed a need for readily available rules for the governance of guest statute cases. Here the third Tooker rule called for application of the law of the place of injury, Ontario.

Years of inactivity, insofar as the court of appeals is concerned, followed the decision in Neumeier. The next tort case did not arise until 1978 when, in Cousins v. Instrument Flyers, Inc., the court avoided the conflicts issue entirely by holding that the plaintiff waived any opportunity to raise a choice of law issue by waiting until all of the proof was in and the jury was about to be charged before suggesting application of a foreign law. In dictum, however, the court stated that "lex loci delicti remains the general rule in tort cases to be displaced only in extraordinary circumstances." Finally, in 1985, the court of appeals decided Schultz v. Boy Scouts of America, Inc., its first choice of law decision since Neumeier twelve years earlier. Schultz was a complicated case because there were two defendants from different jurisdictions and the court's choice of law approach required separate analyses for each defendant. The plaintiff was the father of two boys, aged eleven and thirteen. The boys attended a Catholic school in their home state of New Jersey. The first defendant, Brothers of the Poor of St. Francis, Inc., supplied teachers for the Catholic school. One teacher was Edmund Coakeley. Mr. Coakeley had also been appointed a scoutmaster by the second defendant, the Boy Scouts of America. The plaintiff's children attended Mr. Coakeley's classes at school and were also members of his Boy Scout troop. The complaint alleged that Mr. Coakeley had sexually abused the boys both at school in New Jersey and at a Boy Scout camping retreat in upper New York. The complaint further alleged that the younger of the two boys suffered such psychological distress as a result of Mr. Coakeley's advances that he was

405. The single all-encompassing rule which called, inexorably, for selection of the law of place of injury was discarded, and wisely, because it was too broad to prove satisfactory in application. There is, however, no reason why choice-of-law rules, more narrow than those previously devised, should not be successfully developed, in order to assure a greater degree of predictability and uniformity, on the basis of our present knowledge and experience. "The time has come," I wrote in Tooker "to endeavor to minimize what some have characterized as an ad hoc case-by-case approach by laying down guidelines, as well as we can, for the solution of guest-host conflicts problems." Babcock and its progeny enable us to formulate a set of basic principles that may be profitably utilized, for they have helped us uncover the underlying values and policies which are operative in this area of the law.

Id. at 127, 286 N.E.2d at 457, 335 N.Y.S.2d at 69 (citations omitted).
407. Id. at 699, 376 N.E.2d at 915, 405 N.Y.S.2d at 442.
driven to commit suicide. The complaint sought damages from each defendant corporation on the ground that each was negligent in allowing Mr. Coakeley to educate and train young people.

The case presented a conflict because the plaintiff was from New Jersey, the defendant Boy Scouts of America was headquartered in New Jersey, the defendant Brothers of the Poor was located in Ohio, and the tort occurred in New Jersey and New York. New Jersey recognized a doctrine of charitable immunity which entirely barred plaintiff from recovering against either defendant. Although Ohio also had a charitable immunity law, that law did not immunize organizations who had been negligent in hiring decisions. New York had no charitable immunity law.

The court applied Judge Fuld's rules, substituting each defendant for the host-driver and the plaintiff for the guest-passenger and held New Jersey law applicable to each claim. As to the defendant Boy Scouts, the facts presented a clear case for application of rule number one: the plaintiff and the defendant shared a New Jersey domicile and therefore that state's laws applied in the action. Since New Jersey had a charitable immunity law, this claim was dismissed.409 As to the Brothers of the Poor, rule number three was applicable. The place of injury with regard to this claim was New Jersey since that was where Mr. Coakeley taught school and that was also the home of the plaintiff’s children. New York had no interest in compensating New Jersey residents for injuries inflicted in New Jersey by an Ohio corporation. Ohio was uninterested because its immunity law did not extend to these facts. Therefore, the presumption of lex loci delicti was sustained and New Jersey law was applied once again.410 Finally, the public policy concerns of the forum were held inapplicable because the contacts with New York were too insignificant.411

409.  Id. at 199-201, 480 N.E.2d at 685-87, 491 N.Y.S.2d at 96-98.
410.  Id. at 201-02, 480 N.E.2d at 687, 491 N.Y.S.2d at 98.
The *Schultz* decision represents a rejection of the "contact-counting" approach of *Babcock* and a reaffirmation of the interest-analysis approach advocated by Judges Keating and Fuld. The *Neumeier* rules will be given broader application than originally foreseen, but situations will eventually arise where the rules do not neatly fit. In these cases, the court can be expected to employ a governmental interest-analysis approach, an approach which the court itself in *Schultz* found consistent with Judge Fuld's rules. Both the unfortunate "center of relationship" test, propounded in *Dym* and the *Cousins* place of injury dictum, have clearly been repudiated. So, too, has the "contact-counting" aspect of *Babcock*.

The preeminent New York conflicts decision in contract cases is *Auten v. Auten*, decided in 1954. In an opinion by Judge Fuld, the court of appeals unanimously held that the law of England, rather than that of New York, governed the question of whether institution of a separation action in England by one English spouse against another was a repudiation of a separation agreement formerly executed by the parties while in New York. The *Auten* court conceded the general applicability of the place of making and place of performance rules. Nevertheless, they decided that a more rational methodology required following the "center of gravity" or "grouping of contacts" test advocated in the early Indiana case of *Barber Co. v. Hughes*. According to Judge Fuld, "under this theory, the courts, instead of regarding as conclusive the parties' intention or the place of making or performance, lay emphasis rather upon the law of the place 'which has the most significant contacts with the matter in dispute.'" Using this analysis, the court found the connections with England to be overwhelming.

---

413. 223 Ind. 570, 63 N.E.2d 417 (1945). *See supra* notes 170-74 and accompanying text.
414. *Auten*, 308 N.Y. at 160, 124 N.E.2d at 101-02 (quoting *Rubin v. Irving Trust Co.*, 305 N.Y. 288, 305, 113 N.E.2d 424, 431 (1953)). *Rubin* held that an oral promise to make a will would be construed under the law of testator's domicile, New York, even though the promise was made in Florida.
415. It hardly needs stating that it is England which has all the truly significant contacts, while this state's sole nexus with the matter in dispute — entirely fortuitous, at that — is that it is the place where the agreement was made and where the trustee, to whom the moneys were in the first instance to be paid, had his office. The agreement effected a separation between British subjects, who had been married in England, had children there and lived there as a family for fourteen years. It involved a husband who, according to the papers before us had willfully deserted and abandoned his wife and children in England and was in the United States, when the agreement was signed, merely on a temporary visa. And it concerned an English wife who came to
The *Auten* center of gravity test has been remarkably durable. Its first application after *Auten* itself was in the 1961 case of *Haag v. Barnes*. The question in *Haag* was whether an agreement providing child support barred a later suit for additional child-support where the paying spouse had faithfully complied with the terms of the support agreement. Under Illinois law, where the agreement was executed and where the defendant resided, the defendant’s compliance with the separation agreement created a complete bar to any legal action for support. Under New York law, where plaintiff resided at the time of suit, the court could inquire whether the child was being adequately supported under the agreement. The court applied Illinois law, not merely because the agreement was executed in Illinois, but because that state had other significant contacts as well, and the parties stipulated in the contract that Illinois law would govern.

The center of gravity test took on a decidedly interest-analysis look in *Intercontinental Planning, Ltd. v. Daystrom, Inc.*, which concerned the enforceability of an oral agreement to pay a finder’s fee to a New York brokerage firm which had assisted a New Jersey corporation in the acquisition of a business. The agreement was unenforceable under the New York Statute of Frauds but enforceable under the New Jersey Statute of Frauds. The agreement was negotiated at a restaurant in New York City. The court held that the case presented a false conflict. New York's interest in applying the Statute of Frauds was an economic one: by ensuring that acquiring firms would not be exposed to unfounded claims for finder's fees, the statute encouraged these firms to use New York brokers, thereby contributing to the economic development of New York. New Jersey, by contrast, had no interest in the application of its law because the result would only be to make its own defendant corporation liable to pay a fee to a foreign plaintiff in a foreign court. As a result, New York's Statute of Frauds was applied.

There have been no conflict cases involving contracts in the New York Court of Appeals for many years. The court, however, has always

---

this country at that time because it was the only way she could see her husband to discuss their differences. The sole purpose of her trip to New York was to get defendant to agree to the support of his family, and she returned to England immediately after the agreement was executed.

*Id.* at 161-62, 124 N.E.2d at 102.


418. *Id.* at 382-84, 248 N.E.2d at 582-83, 300 N.Y.S.2d at 826-27.

419. *Id.* at 385, 248 N.E.2d at 584, 300 N.Y.S.2d at 828.
viewed its contract and tort approaches as consistent with one another. While it is difficult to envision the Neumeier rules extending to contract cases, there is nothing in the recent Schultz opinion that would indicate that the modern interest-analysis approach embraced by the court of appeals will not continue to apply in contract disputes as in tort. Indeed, recent federal cases indicate the continued applicability of interest analysis in contract.

North Carolina

North Carolina follows the place of injury rule in tort and the place of making rule in contract.

The leading case in tort is Shaw v. Lee, a Babcock-era case in which the North Carolina Supreme Court held that a suit brought by a North Carolina resident against the administrator of the estate of her deceased spouse over a car accident in Virginia was barred by Virginia's law of spousal immunity. The court reached this conclusion even though the state of the marital domicile, North Carolina, did not disapprove of such suits. The court viewed the suit as a simple case of the wife never having had a cause of action.

Two years later, in Petrea v. Ryder Tank Lines, the court again followed the place of injury rule. In Petrea, a truck and a car carrying North Carolina spouses were involved in an accident in West Virginia. The plaintiff sued the truck line, which filed a third-party action against the plaintiff's husband. The court held that Shaw barred the third-party action and rejected the truck line's invitation to adopt the center of gravity approach.

Another spousal immunity case presented a different fact situa-

---

420. In fact, the Babcock v. Jackson court quoted extensively from Auten and announced that it was applying in tort the same center of gravity approach created by the earlier case for contracts. See supra note 380 and accompanying text.


423. We have given thoughtful consideration to the cases and articles to which plaintiff, in her well prepared brief, called our attention. In our view it is not a question of the capacity of the spouse to sue but a question of whether the spouse ever had any cause of action.

Id. at 615, 129 S.E.2d at 292.


425. Id. at 231-32, 141 S.E.2d at 279-80.
This time, the accident occurred in North Carolina and the spouses were from Pennsylvania, a state recognizing spousal immunity. The court allowed the action to proceed because no spousal immunity existed where the accident took place and specifically rejected an opportunity to adopt section 145 of the Second Restatement.

Although most of the supreme court's recent conflict cases have dealt with spousal immunity, the court of appeals and the federal courts have applied the rule of lex loci delicti to a broad range of tort claims.

North Carolina courts have followed the traditional rules in contract cases as well. In *Fast v. Gulley*, the court held that the validity of a North Carolina resident's claim to certain shares of stock held by her in joint tenancy with her deceased father would be determined according to the tenancy laws of New Jersey, where the stock was issued and the

---


427. The court noted that "[[it is apparent that there has been an increase in the jurisdictions which reject the rule that this matter is to be determined by the law of the state where the injury occurs." *Id.* at 163, 229 S.E.2d at 162. It then quoted § 145 of the Second Restatement in its entirety but declined to apply it:

> In our opinion, for us to direct the trial courts of this State to determine the right of the nonresident wife to maintain an action for negligent injuries against her husband by considering these and other "contacts" and weighing them in each situation would be to "voyage into such an uncharted sea" as was envisioned by Justice Rodman in *Shaw v. Lee...* For the reasons which he there found persuasive against the same arguments now advanced to us by the defendant in this action, we do not deem it wise to embark upon such a voyage and leave behind the well established conflict of laws rules, laid down for the determination of this matter by our predecessors.

*Id.* at 164, 229 S.E.2d at 163.


430. 271 N.C. 208, 155 S.E.2d 507 (1967).
joint tenancy agreement was made.\textsuperscript{431} In \textit{Tennessee Carolina Transportation, Inc. v. Strick Corp.},\textsuperscript{432} the court applied the place of performance rule to a contract to supply tractor-trailers. The court held the contract would be construed according to the law of Illinois, the state where shipment was to be made, even though the contract was executed in Pennsylvania.

Other court of appeals cases confirm North Carolina's adherence to \textit{lex loci contractus}.\textsuperscript{433} A recent decision, however, carved an exception to this rule where it appeared that the parties intended North Carolina law to govern their contract, made in Maryland, even though there was no express choice of law clause in the contract.\textsuperscript{434}

In 1982, the North Carolina Supreme Court departed from the traditional rules in a warranty case governed by the Uniform Commercial Code. In \textit{Bernick v. Jurden},\textsuperscript{435} plaintiff hockey player was hit by a hockey stick during a college game in North Carolina. Among other injuries, the plaintiff lost three teeth and part of a fourth when the mouthpiece he was wearing crumbled. The plaintiff sued the manufacturer of the mouthguard as well as the opposing hockey player. The court held that North Carolina law governed the warranty claim against the manufacturer even though the plaintiff purchased the mouthguard in Massachusetts.\textsuperscript{436} The court stated that in warranty cases, UCC section 1-105\textsuperscript{437} was "intended to change the rigid conflict of laws rules" of \textit{lex loci contractus} and \textit{lex loci delicti}.\textsuperscript{438} The court reasoned that since the sale of the mouthguard bore "an appropriate relation" to the state of North Carolina, where the alleged product failure occurred, North Carolina law would be applied.\textsuperscript{439} The court did not question the continued vitality of the traditional rules in areas of the law not covered by the UCC.

\textsuperscript{431} The court stated: "In interpreting a contract made outside of this State our courts long ago established the principle that the law of the country where the contract is made is the rule by which the validity of it, its exposition, and consequences are to be determined." \textit{Id.} at 211, 155 S.E.2d at 509.

\textsuperscript{432} 283 N.C. 423, 430-31, 196 S.E.2d 711, 716 (1973).


\textsuperscript{435} 306 N.C. 435, 293 S.E.2d 405 (1982).

\textsuperscript{436} \textit{Id.} at 443, 293 S.E.2d at 411.

\textsuperscript{437} N.C. GEN. STAT. § 25-1-105 (1986).

\textsuperscript{438} 306 N.C. at 442, 293 S.E.2d at 410.

\textsuperscript{439} \textit{Id.} at 443, 293 S.E.2d at 411.
North Dakota

North Dakota has developed a unique approach to conflict of laws problems. The state has patterned its method of analysis after the grouping of contacts or center of gravity approach adopted by the New York Court of Appeals in Auten v. Auten\(^{440}\) and Babcock v. Jackson.\(^{441}\) Although this approach is essentially codified in the Second Restatement, the North Dakota Supreme Court has carefully avoided citation to, or reliance upon, the Restatement. Instead, the court has remained loyal to the amorphous contact-counting, interest-balancing analysis advocated by Judge Fuld in the early New York cases.

The supreme court, in Issendorf v. Olson,\(^{442}\) adopted a significant contacts approach independent from the popular most significant relationship test of section 6 of the Second Restatement. In Issendorf, two North Dakota residents were injured in an automobile accident in Minnesota. The passenger brought an action against the owner-operator for negligence. The jury entered a verdict in favor of the defendant based on contributory negligence, an absolute bar to recovery under North Dakota law. On appeal, the plaintiff objected to the trial court’s failure to give a proposed jury instruction on the Minnesota law of comparative negligence, a law which would not have barred recovery entirely. The supreme court affirmed, abandoning lex loci delicti and applying North Dakota law on the basis of a quantitative, contact-counting approach.\(^{443}\) The court adopted this “contacts” method for use in future cases.\(^{444}\)

The only other application of the significant contacts theory by the supreme court occurred in Mager v. Mager.\(^{445}\) In Mager, a Minnesota

---


\(^{442}\) 194 N.W.2d 750 (N.D. 1972).

\(^{443}\) Id. at 756. One prominent characteristic of the center of gravity approach is the tendency of the courts to list every conceivably relevant connection between the litigation and the state whose law will be selected:

Most of the interest factors point to the application of North Dakota law . . . . The plaintiff was a resident of North Dakota at the time of the accident; his loss of income and the medical bills he incurred all affect North Dakota’s economy; the vehicle in which he was riding at the time of the accident was registered andgaraged in North Dakota, was insured under North Dakota rates, and was driven by a North Dakota resident; the trip in which the accident occurred originated in North Dakota, was to terminate there, and therefore the host-guest relationship originated in North Dakota.

Id. at 755.

\(^{444}\) “We adopt with this case the significant-contacts approach as the choice of law and abandon the lex loci delicti doctrine.” Id. at 756.

\(^{445}\) 197 N.W.2d 626 (N.D. 1972).
woman filed suit against her spouse after they were involved in a car-train collision in Minnesota. After plaintiff's complaint was dismissed under the Minnesota spousal immunity law, she appealed, asking the supreme court to apply North Dakota law on the basis of her extended hospital stay in that state. The court refused. 446 Finally, in two 1984 cases, the supreme court reaffirmed, in dicta, its adherence to the significant contacts approach. 447

Formerly, North Dakota had a statute to resolve conflicts in contract cases. The statute 448 required application of the place of making and place of performance rules. In 1973, however, the legislature repealed this choice of law rule.

In 1986, the supreme court extended the Issendorf approach to contracts in Apollo Sprinkler Co. v. Fire Sprinkler Suppliers & Design, Inc., 449 an insurance case involving the interpretation of certain policy exclusions. Under Minnesota law, coverage would be excluded; under North Dakota law it would not. The court held Minnesota law applicable and denied coverage. 450

In so doing, the Apollo court reiterated North Dakota's adoption of the significant contacts approach in Issendorf. The court applied the Issendorf test because none of the parties objected, but purported to limit its application to the present case. 451 In an opinion marked by eclecticism and indirection, the court also cited section 188 of the Second Restatement and supplemented its analysis with a discussion of each of the Leflar factors. Nevertheless, the decision to apply North Dakota law was

446. The court reasoned that:
Applying the rule of most significant relationships, as we must do in the light of our decision in Issendorf, the State of Minnesota clearly would be the jurisdiction with most significant relationships. Both parties were domiciled in that State. The journey of the parties took place entirely within Minnesota. The alleged wrongful act and the injuries complained of which resulted therefrom took place in that State. The only thing that occurred in North Dakota was the hospitalization and treatment of the plaintiff in Fargo. Therefore, applying the significant-contacts rule in this case, we conclude that the trial court was correct in ruling that the plaintiff's claim was barred by the Minnesota doctrine of interspousal immunity still in force on the date of the accident.

Id. at 628.


449. 382 N.W.2d 386 (N.D. 1986).

450. Id. at 387.

451. "Because both parties to this appeal agree that the Issendorf approach is appropriate, we shall use it, without deciding whether it is necessary or appropriate in future contract cases." Id. at 389.
the result of a contacts-oriented approach, consistent with the court's past precedents.452

It appears, therefore, that North Dakota courts will continue to apply a significant contacts or center of gravity approach in both tort and contract cases.

Ohio

In a pair of decisions handed down in 1984, the Ohio Supreme Court made a wholesale shift in Ohio conflicts law. The court abandoned the traditional rules in both contract and tort, and instead adopted the Second Restatement. In the tort case, *Morgan v. Biro Manufacturing Co.*, a plaintiff Kentucky resident brought a products liability action against the Ohio manufacturer of a meat grinder. The plaintiff was injured on the job in Kentucky. The choice of law issue concerned whether the trial court should have applied a Kentucky statutory presumption that a product is not defective if the injury occurs more than five years after the initial sale of the product or more than eight years after its manufacture, as was the case here. Ohio law entertained no such presumption. The court, without considering the policies behind the respective laws, held Kentucky law applicable on the basis of the factors listed at section 145 of the Second Restatement. The decision to apply the statutory presumption was the result of pure contact-counting.

A contract case decided the same day was *Gries Sports Enterprises v. Modell*. The case involved a voting agreement between two shareholders of the Cleveland Browns, Inc., a professional football club and Delaware corporation. In 1965, the parties signed a voting agreement in

---

452. In light of the foregoing, North Dakota's contacts bearing upon the contractual relationship between Fire Sprinkler and MSI are "few and relatively insignificant as compared with those of" Minnesota, and this presents "an easy conflicts case." R. Leflar, 41 N.Y.U. L. Rev. 267, 289-90. We conclude that Minnesota is the State with the most significant contacts with the insurance policy at issue. *Id.* at 391.


454. *Id.* at 343, 474 N.E.2d at 288 (applying KY. REV. STAT. § 411.310 (Cum. Supp. 1986)).

455. Turning to the facts of this case, it is clear that the state of Kentucky has the most significant relationship to the parties and events herein. The courts below found that appellant's injury took place in Kentucky and that he was a resident thereof at the time of his accident. Further, appellant Morgan was employed at a supermarket in Kentucky, and received workers' compensation benefits under Kentucky law. Finally, the inspection of the meat grinder's condition was the responsibility and within the exclusive interest of the state of Kentucky. *Id.* at 342-43, 474 N.E.2d at 289.

Ohio. Delaware corporate law was changed in 1967 to limit the term of future voting agreements to no more than ten years. The parties modified the agreement in 1971, signing in Ohio. In 1982, Modell claimed that he was no longer bound by the voting agreement, since, under Delaware law, it had expired in 1981. The plaintiff contended that Ohio law applied, and, since Ohio did not limit the duration of shareholder voting agreements, the agreement remained in effect. The lower court applied Delaware law, but the Ohio Supreme Court reversed. The supreme court referred to section 188 of the Second Restatement, but once again engaged in a pure contact-counting analysis in reaching the decision that Ohio law applied.457

Another contract case reached the supreme court in 1985, but this one was decided under section 187(2) rather than section 188.458 In that case the parties included a provision in their contract by which the contractor agreed to indemnify the promisee for any injuries caused by the promisee's negligence. The parties also included a stipulation that Kentucky law would govern the contract. The court upheld the choice of law clause, despite the fact that the indemnification provision was void under Ohio law and contrary to state policy.459 The court stated that "Ohio clearly does not have a materially greater interest in the matter than does the chosen state, Kentucky."460 In its most recent contract case, Sekeses v. Arbaugh,461 the court again applied section 187(2), this time upholding a provision in a brokerage contract selecting New York Law to govern the contract. Although the law of Ohio would have applied in the absence of a contractual choice of law clause, that state did not have "a materially greater interest than New York in the outcome of the case."462

The Ohio Supreme Court has made clear its intention to follow the

457. In the case at bar, the place of contracting was Ohio, the place of negotiation was Ohio, the place of performance was Ohio, the location of subject matter of contract was Ohio, the place of incorporation was Delaware, and the place of business of the parties was Ohio. The conclusion is inescapable that Ohio "bears the most significant relationship to the contract." Id. at 287, 473 N.E.2d at 810 (quoting Schulke Radio Production v. Midwestern Broadcasting Co., 6 Ohio St. 3d 436, 438, 453 N.E.2d 683, 685-86 (1983)); see also Nationwide Mutual Ins. Co. v. Ferrin, 21 Ohio St. 3d 43, 45, 487 N.E.2d 568, 570 (1986) (citing § 188 but applying Florida law to an insurance contract on the basis of superior factual contacts).


459. Id. at 192, 473 N.E.2d at 789.

460. Id. at 191, 478 N.E.2d at 789.

461. 31 Ohio St.3d 24, 508 N.E.2d 941 (1987).

462. Id. at 25, N.E.2d at 942; see also Tele-Save Merchandising Co. v. Consumers Distributing Co., 814 F.2d 1120, 1122 (6th Cir. 1987) (also applying § 187(2) and upholding parties' choice of governing law).
Second Restatement. Unfortunately, in most of its decisions purporting to utilize the Second Restatement, the court has done nothing more than tally the relevant contacts between the litigation and each affected state. In its two decisions involving contractual choice of law provisions, the court performed more elegantly, but ultimately applied the age-old rule of intention validation. Hopefully, in future cases, the Ohio courts will pay more than lip service to the Second Restatement and will embark upon a more reasoned analysis.

Oklahoma

Oklahoma has made a clear break with the place of injury rule in tort cases, but has not yet departed from the place of making rule in contract actions.

The leading case in tort is *Brickner v. Gooden*, which involved the crash of a private airplane in Mexico. The owner-operator of the aircraft as well as all passengers were Oklahoma residents. Mexico law imposed severe limits on recovery for wrongful death, but Oklahoma law did not. Finding Oklahoma law applicable, the Oklahoma Supreme Court specifically overruled its prior *lex loci delicti* holdings concerning recovery for wrongful death, and expressly adopted section 145 of the Second Restatement.

In *White v. White*, the supreme court applied its new approach in a spousal immunity suit. Plaintiff, an Oklahoma resident, sued her spouse for injuries she suffered when their truck overturned on a Texas highway. The trial court applied the Texas spousal immunity law and dismissed the action. The supreme court reversed, instructing the trial court to apply on remand the most significant relationship test adopted six years earlier in *Brickner*. The only other tort case involving conflict of laws to reach the supreme court in recent years was *Flanders v. Crane Co.*, a negligence action brought by an Oklahoma resident who slipped and fell in a bathtub in a Nebraska motel room. The court held in a footnote that Nebraska had the most significant relationship to the occurrence and the parties, and that its substantive law was therefore to

---

464. "We hold, as a general principle, that the rights and liabilities of parties with respect to a particular issue in tort shall be determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties." *Id.* at 637. The court then listed the contact points at § 145 as the factors to evaluate in arriving at the state of the most significant relationship. *Id.*
466. *Id.* at 924-25.
467. 693 P.2d 602 (Okla. 1984).
be applied. Federal courts sitting in Oklahoma have applied the Second Restatement on at least two occasions.

*Telex Corp. v. Hamilton,* decided four years after *Brickner,* indicates the Oklahoma Supreme Court's continued reliance upon *lex loci contractus.* In that case, a Florida resident contracted with an Oklahoma corporation to provide information to aid the corporation in recovering lost accounts receivable. The corporation agreed to pay the Florida resident a percentage of the accounts collected through the arrangement. The contract was signed in Oklahoma and included a stipulation that Oklahoma law would govern all questions of contract interpretation. Apparently, the agreement was invalid under Florida law because the Florida resident did not register a fictitious name he used in recovering the lost accounts. The court had no difficulty finding Oklahoma law applicable, either under the choice of law clause or under *lex loci contractus.* The court, however, made no reference to *Brickner.*

The two most recent Oklahoma contract cases have been decided in *Collins Radio Co. v. Bell,* when it applied section 191 of the Second Restatement, rather than the place of making or performance rule, to a contract for the sale of certain radio transmitting equipment. The court found that the presumptive reference to the law of the place of delivery, Texas, was displaced by the law of Oklahoma, the state with a more significant relationship to the sales agreement. At the same time, the court was careful to limit its holding to UCC sales cases. In 1982 the court of appeals rec-

468. Id. at 605 n.1.
471. "Even in the absence of an agreement stating what law would apply, the general rule of law is that the law where the contract is made or entered into governs with respect to its nature, validity, and interpretation." Id. at 768.
473. *Restatement (Second) of Conflict of Laws* § 191 (1968) states: The validity of a contract for the sale of an interest in a chattel and the rights created thereby are determined, in the absence of an effective choice of law by the parties, by the local law of the state where under the terms of the contract the seller is to deliver the chattel unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 to the transaction and the parties, in which event the local law of the other state will be applied.
475. The Oklahoma Supreme Court noted that: Oklahoma has determined in the area of torts that the "most significant relationship" test is a better means of determining which jurisdiction's law will apply. The same
ognized that the place of making rule still governed in Oklahoma, though the court held, citing section 6(1) of the Second Restatement, that an Oklahoma anti-subrogation statute applied in lieu of Arkansas law since the Oklahoma legislature apparently intended that its law should have extraterritorial effect.  

A 1985 Tenth Circuit decision, relying heavily on the opinion of the district court below, opined that the Oklahoma Supreme Court would continue to apply lex loci contractus in non-sales contract cases. This inference appears to be correct.

Oregon

Oregon courts have traditionally utilized a mixture of the interest analysis approach and the Second Restatement in resolving conflict of law cases. In order to make any sense out of the eclectic Oregon approach, it is necessary to review the decisions historically.

The first modern conflicts decision in Oregon was *Lilienthal v. Kaufman*, a contract case. In that case, an Oregon probate court declared the defendant, an Oregon resident, a spendthrift. The declaration voided all future contracts made by the defendant during the term of the court-imposed guardianship. Despite this declaration, defendant Kaufman proceeded to arrange two joint ventures, one for the purchase and resale of toys and the other for the purchase and resale of binoculars. Predictably, Kaufman failed to live up to his agreements. Kaufman’s partner in the first venture, an Oregon pharmacist, filed suit for the repayment of a loan. The Supreme Court of Oregon declared the joint venture agreement void under the spendthrift statute, and cancelled Kaufman’s

rationale for accepting the doctrine as to torts dictates that its application should be made to actions that fall under Article 2 of the Uniform Commercial Code.

Id. at 1046-47.


478. 239 Or. 1, 395 P.2d 543 (1964).

479. The court noted that under Oregon law: “After the appointment of a guardian for a spendthrift, all contracts, except for necessaries, and all gifts, sales and transfers of real or personal estate made by such spendthrift thereafter and before the termination of the guardianship are voidable.” Id. at 3-4, 395 P.2d at 544 (applying OR. REV. STAT. § 126.335 (repealed 1961)).
Undaunted, Kaufman went to California and reached agreement with Lilienthal on another joint venture. Lilienthal, too, advanced funds to Kaufman. Kaufman again failed to repay the debt. When Lilienthal sued Kaufman in Oregon, the trial court voided the agreement, relying on the Oregon spendthrift statute. The supreme court again affirmed the judgment in favor of the spendthrift Kaufman.481

In the Oregon Supreme Court, Lilienthal's argued that the promissory notes on which Kaufman had defaulted were executed in California and that the courts of Oregon were required under conflict of laws principles to resolve the controversy in accordance with California law, which did not recognize the contractual incapacity of spendthrifts.482

The court rejected the reference to lex loci contractus, but did find that California had substantial connections with the case. The court noted that California was both the place of making and performance, and only California law would uphold the parties' agreement.483 In the end, however, the court disregarded factual contacts entirely and resolved the choice of law issue via an interest analysis. The court identified at least two affected state interests in each jurisdiction: Oregon had an interest in protecting Kaufman's family from impoverishment and an interest in keeping Kaufman off the public dole; California had an interest in seeing its resident creditor, Lilienthal, repaid and also a generalized interest in maintaining the image of California as a state where contracts are enforced. Faced with an apparent true conflict, the court applied forum law and avoided the contract.484

The Lilienthal interest-analysis approach has been applied inconsistently in later Oregon decisions involving contracts. On one occasion, the supreme court ignored Lilienthal, and instead cited section 188 of the Second Restatement.485 The court of appeals has also been less than resolute in its adherence to the Lilienthal interest-analysis method, following it on one occasion,486 but employing a contact-counting approach in two later cases.487 The appellate court has also made use of section 187

481. 239 Or. at 16, 395 P.2d at 549.
482. Id.
483. Id. at 7-10, 395 P.2d at 545-47.
484. Id. at 14-16, 395 P.2d at 548-49.
485. See Davis v. State Farm Mut. Auto. Ins. Co., 264 Or. 547, 549, 507 P.2d 9, 10 (1973), where the court, without citation to any prior Oregon decisions, made the very uncontroversial decision that Michigan law would apply to an insurance contract issued to a Michigan resident in Michigan by a nationwide insurer.
487. See Citizens First Bank v. Intercontinental Express, Inc., 77 Or. App. 655, 657-58,
of the Second Restatement in judging the validity of a contractual choice of law clause.\footnote{488}

The first tort case after 
\textit{Lilienthal} was \textit{Casey v. Manson Construction and Engineering Co.}\footnote{489} Plaintiff Casey, an Oregon resident, was the wife of a truck driver who had been seriously injured when his truck went off the road while he was making a delivery to a construction site in Washington. Two Washington construction firms controlled the construction site, and it was determined that their negligence led to the accident which crippled the plaintiff's husband. The plaintiff brought an action for loss of consortium. The trial court dismissed the complaint applying Washington law, which did not recognize a cause of action for loss of consortium. The Supreme Court of Oregon affirmed, though not on the basis of lex loci delicti. Instead, the court formally adopted section 6 of the Second Restatement.\footnote{490} It then found that Washington had the most significant relationship to the case because the parties' business relationship centered there.\footnote{491}

In the next case, \textit{DeFoor v. Lematta},\footnote{492} the court was not required to espouse any particular choice of law theory. DeFoor and Lematta, both Oregon residents, were killed in a helicopter crash in the Sierra Nevada mountains of California. The plaintiff's executor sued the helicopter manufacturer, an Oregon corporation, and the pilot, also an Oregon resident, for wrongful death. The law of Oregon imposed a $25,000 cap on the recovery for wrongful death but California law did not. The court held Oregon law applicable "under any choice-of-law theory except that which would apply the law of the place of injury without regard to any other considerations."\footnote{493} The court relied extensively, however, upon \textit{Reich v. Purcell},\footnote{494} a leading interest-analysis case from California.

Next came \textit{Erwin v. Thomas},\footnote{495} a pure example of Currie interest

\begin{footnotes}
\footnote{488} Young v. Mobil Oil Corp., 85 Or. App. 64, 735 P.2d 654 (1987).
\footnote{489} 247 Or. 274, 428 P.2d 898 (1967).
\footnote{490} \textit{Id.} at 287-88, 428 P.2d at 904-05. "Careful consideration of these decisions, as well as of the extensive writings on the subject, persuade us that we should adopt for tort actions the rule of 'most significant relationship with the occurrence and with the parties' as set forth in the Tentative Draft of the Restatement." \textit{Id.}
\footnote{491} \textit{Id.} at 293, 428 P.2d at 907.
\footnote{492} 249 Or. 116, 437 P.2d 107 (1968).
\footnote{493} \textit{Id.} at 120, 437 P.2d at 109.
\footnote{494} 67 Cal. 2d 551, 432 P.2d 727, 63 Cal. Rptr. 31 (1967). \textit{See supra} note 65 and accompanying text.
\footnote{495} 264 Or. 454, 506 P.2d 494 (1973).
\end{footnotes}
analysis in a classic, unprovided-for case. The plaintiff’s husband, a Washington resident, was allegedly injured in Washington as a result of the negligent operation of a truck by the defendant, an Oregon resident. The plaintiff filed suit to recover damages. The issue here, as in Casey, was loss of consortium. Again, Oregon law allowed such recovery but Washington law did not.

A close analysis reveals that the relevant facts in Erwin were the same as in Casey, except that the domiciles of the parties were reversed. In Casey, plaintiff was an Oregon resident and the defendants were Washington corporations. In that case, both states were interested: Oregon sought to provide compensation to its injured plaintiff; Washington desired to protect its defendant corporations from excess liability imposed from without the state. In Erwin, the plaintiff was a Washington resident and defendant an Oregon resident. Here, neither state was interested: Washington had expressed a policy of denying loss of consortium claims entirely, and therefore it could have no interest in compensating its resident plaintiff where it did not even consider her to have been injured; Oregon, likewise, had no interest in shielding its resident defendant from liability, but instead favored a policy of compensation in loss of consortium cases.

What was the supreme court to do?

It decided to apply Oregon law, reasoning that “neither state has a vital interest in the outcome of this litigation and there can be no conceivable material conflict of policies or interests if an Oregon court does what comes naturally and applies Oregon law.”496 The court relied directly on the writings of Professor Currie in reaching this resolution.497

Having decided that Oregon law was applicable under a pro-forum analysis, the court then examined whether this approach was inconsistent with Casey. In Casey, the court refused to invoke Currie’s forum-law presumption in a true conflict case and instead applied the Second Restatement. The Erwin court held that there was no inconsistency. Because the Second Restatement would be applied only where there was a true conflict. The court concluded that the ultimate methodology in every choice of law decision was a governmental interest analysis.498

496. Id. at 459-60, 506 P.2d at 496-97.
497. Id. at 460, 506 P.2d at 497. The court quoted from Currie, Notes on Methods and Objectives in the Conflict of Laws, in SELECTED ESSAYS ON THE CONFLICT OF LAWS 184 (1963). Professor Currie there advocated application of forum law in the unprovided-for case, “simply on the ground that that is the more convenient disposition.” Id.
498. Our confidence in any set body of rules as an all-encompassing and readily applicable means of solution to conflict cases is not so great that we desire to undertake the application of such rules except in those situations where the policies and inter-
In *Myers v. Cessna Aircraft Corp.* the plaintiff’s husband was killed in an airplane crash in British Columbia. The plaintiff, an Oregon resident, brought a wrongful death action against the manufacturer of the airplane and a Washington corporation that repaired the airplane prior to its crash. The British Columbia statute of limitations barred the plaintiff’s claim. The suit, however, was timely according to the limitations laws of both Oregon, the plaintiff’s place of domicile, and Washington, the defendant’s place of incorporation. The court allowed the action to proceed, stating that the Second Restatement was controlling and citing sections 142, 143 and 175. In the end, however, the court did nothing more than eliminate British Columbia from the choice of law sweepstakes by pointing to the fortuitous nature of that province’s connection to the case. This was hardly a case of dutifully following the Second Restatement; nor would application of interest analysis or any other modern conflicts theory have produced a different result. For this reason, *Myers* is singularly unhelpful in analyzing the Oregon approach to choice of law.

Finally, came *Tower v. Schwabe*, an opinion written by Justice Holman, author of the *Erwin* decision and the leading proponent of interest analysis on the Oregon Supreme Court. *Tower* was a suit between two Oregon residents arising out of a car accident in British Columbia. 

ests of the respective states are in substantial opposition. We see no such conflict here and, therefore, find it unnecessary to resort to any such set of rules . . . . Where such policies and interests can be identified with a fair degree of assurance and there appears to be no substantial conflict, we do not believe it is necessary to have recourse in the “contacts” of Section 145(2) of Restatement (Second) Conflict of Laws.

*Erwin*, 264 Or. at 461-62, 506 P.2d at 497-98.


501. The *Myers* court’s analysis can best be viewed as a process of elimination. Of three interested jurisdictions, two — Washington and Oregon — had the same three-year statute of limitations. The court held that British Columbia had insufficient connections with the suit to have its law applied. It was not put to the difficult decision of choosing between the laws of Washington and Oregon, two concededly interested states, since their laws were identical. The court stated that:

As between Oregon/Washington and British Columbia, the only relationship which British Columbia has to this action is the entirely fortuitous event that it happened to be the site of the crash. British Columbia could, therefore, have no substantial interest in having its statute of limitations prevent the maintenance of this action. Thus, the trial court did not err in applying Oregon law.

*Id.* at 516, 553 P.2d at 367.

502. *Myers* was cited as controlling in *Powell v. Equitable Savings & Loan Assoc.*, 57 Or. App. 110, 114, 643 P.2d 1331, 1333 (espousing a “most significant relationship” approach to choice of law on issue of propriety of Oregon bank’s refusal to pay interest to certain Idaho borrowers), *review denied*, 293 Or. 394, 650 P.2d 927 (1982).

The Oregon guest statute precluded recovery by the plaintiff, but British Columbia law allowed recovery. The court began its analysis by quoting its earlier exposition of false conflict resolution in *Erwin*. The court then noted that Oregon had an interest, evidenced by its guest statute, in protecting host-drivers like the defendant from suits brought by ungrateful guest-passengers. British Columbia, however, had no interest in the case since its only connection was as the place of the auto accident. Thus, the court applied Oregon law, specifically rejecting the plaintiff’s request to consider application of the “better rule of law.”

The remaining decisions have been in the lower state and federal courts. In *Fisher v. Huck*, the Oregon Court of Appeals held British Columbia’s common law guest statute applicable on the following facts: The plaintiff, originally an Oregon domiciliary, was traveling in British Columbia, intending to establish a new residence there, when he was injured in an accident caused by a British Columbia native. According to the court, the case presented a classic false conflict, with Oregon having no interest in the outcome because neither party was an Oregon domiciliary at the time of the accident. In another court of appeals case, the court gave a perfunctory citation to section 148 of the Second Restatement before determining, on a pure contact-counting basis, that Louisiana law required dismissal of the plaintiff’s negligent misrepresentation claim. The sporadic federal decisions in Oregon have generally followed the *Erwin* approach, applying interest analysis with true-conflict resolution via the Second Restatement.

The result of this line of decisions appears to be that Lilienthal’s interest analysis has survived, although only in the modified form illustrated by *Casey* and *Erwin*. The Oregon Supreme Court will no longer, as it did in *Lilienthal*, resolve true conflicts by the automatic application

---

504. *Id.* at 107, 585 P.2d at 663 (applying OR. REV. STAT. ANN. § 30.115 (1983)).
505. Where, in the particular factual context, the interests and policies of one state are involved and those of the other are not (or, if they are, they are involved in only a minor way), reason would seem to dictate that the law of the state whose policies and interests are vitally involved should apply; or, if those of neither state are vitally involved, that the law of the forum should apply. *Id.* at 107-08, 585 P.2d at 663 (quoting Erwin v. Thomas, 264 Or. 454, 458, 506 P.2d 494, 496 (1973)).
506. *Id.* at 109-10, 585 P.2d at 664.
508. *Id.* at 642, 624 P.2d at 180.
of Oregon law. Rather, it will apply the law of the state of the most significant relationship when there is more than one interested state.

Pennsylvania

No state has a more convoluted, eclectic approach to choice of law than Pennsylvania. On various occasions, its courts have applied the First and Second Restatements, the center of gravity approach, interest analysis and Professor Cavers' "principles of preference." Because of a paucity of recent Pennsylvania Supreme Court cases, it is anyone's guess what principles will be cited next.

The tort cases decided by the Pennsylvania Supreme Court are dated. From 1964 to 1970, the court decided five conflicts cases, but it has not been called upon to decide another since. The first and foremost case was *Griffith v. United Air Lines, Inc.*,511 decided only a year after *Babcock v. Jackson*512 had heralded the dawn of the modern choice of law jurisprudence. In *Griffith*, a Pennsylvania plaintiff bound for Arizona was killed in an airplane crash in Colorado. The defendant was a Delaware corporation doing business nationwide. The court refused to apply Colorado's statutory limitations on recovery for wrongful death and instead applied Pennsylvania law, which allowed compensation for pain and suffering and loss of future earnings. The court expressly adopted an interest-analysis approach to choice of law issues.513 The court's analysis revealed a false conflict: Colorado was interested only in protecting Colorado defendants from huge or speculative damage awards, and the defendant here had no special connection with Colorado; conversely, Pennsylvania's interest in full compensation was furthered by application of its law because the decedent and his dependents were Pennsylvania residents.514

The Colorado connection reappeared in *McSwain v. McSwain*,515 where a Pennsylvania resident sued her spouse for negligence after their infant daughter died in a Colorado automobile accident. The court first reaffirmed its *Griffith* decision, adopting interest analysis for choice of

---

513. Thus, after careful review and consideration of the leading authorities and cases, we are of the opinion that the strict lex loci delicti rule should be abandoned in Pennsylvania in favor of a more flexible rule which permits analysis of the policies and interests underlying the particular issue before the court.

*Griffith*, 416 Pa. at 21, 203 A.2d at 805.
514. Id. at 24-25, 203 A.2d at 807.
law resolution. The court applied the law of the marital domicile, thus barring the suit due to Pennsylvania's spousal immunity rule.

In *Elston v. Industrial Lift Truck Co.*, a Pennsylvania resident employed in New Jersey, recovered workers' compensation benefits for injuries sustained while operating a forklift truck. He then sued the manufacturer of the forklift for negligence. The forklift manufacturer, a Pennsylvania corporation, sought to join the New Jersey employer in contribution. New Jersey law did not allow a third-party tortfeasor to join an employer as a defendant in an action for employment-related injuries if the employer was in compliance with state workers' compensation laws. However, Pennsylvania law allowed joinder in this situation. The court applied New Jersey law, emphasizing New Jersey's important state interest in not having its workers' compensation plan disrupted. Because New Jersey's workers' compensation statute applied, it was necessary that that state's entire compensation scheme be enforced.

*Kuchinic v. McCrory* was Pennsylvania's first guest statute case. Four Pennsylvania residents were killed when their small airplane crashed in Georgia. Survivors of all three passengers sued the pilot's estate. The estate claimed that the Georgia guest statute, which applied to aviation as well as motor vehicle cases, barred the action. Justice Roberts, the author of the *Griffith, McSwain, and Elston* opinions, reversed the trial court's decision to apply the guest statute. He reasoned that Pennsylvania's interests involved compensating survivors of the deceased, all of whom were Pennsylvania residents, and that Georgia's interests in protecting gracious hosts and preventing insurance fraud were not implicated here since neither the pilot nor his insurer had any connection with Georgia.

The latest and by far the most difficult case to reach the supreme

---

516. Whether the policies of one state rather than another should be furthered in the event of conflict can only be determined within the matrix of specific litigation. What should be sought is an analysis of the extent to which one state rather than another has demonstrated, by reason of its policies and their connection and relevance to the matter in dispute, a priority of interest in the application of its rule of law.

*Id.* at 94, 215 A.2d at 682.

517. *Id.* at 96-97, 215 A.2d at 683.


519. *Id.* at 109-10, 216 A.2d at 324.


521. *Id.* at 622, 222 A.2d at 899 (applying GA. CODE ANN. §§ 11-107, 105-203 (current versions at Code of 1981, § 6-2-6, 51-1-4 (1982))).

522. *Id.* at 624, 222 A.2d at 899-900.
court was *Cipolla v. Shaposka*. In that case, a Delaware defendant drove a Pennsylvania plaintiff home from classes at a technical school in Wilmington, Delaware. Plaintiff was injured in an accident in Delaware, which had a guest statute that barred suit. Pennsylvania had no guest statute. The court recognized that a true conflict existed since Pennsylvania sought recovery for its plaintiff and Delaware immunity for its defendant.

The court applied Delaware law, but it reached this result by two alternative routes. First, and somewhat unconvincingly, the court held that Delaware actually had two interests in the case—the protection of the defendant from tort liability and the maintenance of affordable insurance rates. The fact that Pennsylvania had only one interest—compensating its resident plaintiff—meant “that Delaware's contacts are qualitatively greater than Pennsylvania's and that it has the greater interests in having its law applied to the issue before us.”

Much more interesting, and certainly more defensible, was the *Cipolla* court's second rationale for applying Delaware law. The court quoted extensively from Professor Cavers' *The Choice-of-Law Process*, and applied Cavers' second “principle of preference”: the place of defendant's domicile in cases where the injury occurs there and that jurisdiction's law does not hold the defendant liable for the conduct alleged. Since the defendant here was from Delaware, and since Delaware's law did not hold the defendant liable for injuries suffered by a guest in his automobile, that law governed. Accordingly, the court dismissed the suit. The court failed to indicate which, if either, of these approaches to true-conflict resolution it would apply in the future. *Cipolla* remains the only Pennsylvania Supreme Court encounter with a true conflict of laws.

524. Id. at 564, 267 A.2d at 855 (applying Del. Code Ann. tit. 21, § 6101(a) (1979)).
525. Id. at 565, 267 A.2d at 855-56.
526. Id. at 566, 267 A.2d at 856.
528. Professor Cavers' second rule states:

Where the liability laws of the state in which the defendant acted and caused an injury set a lower standard of conduct or of financial protection than do the laws of the home state of the person suffering the injury, the laws of the state of conduct and injury should determine the standard of conduct or protection applicable to the case, at least where the person injured was not so related to the person causing the injury that the question should be relegated to the law governing the relationship.

Id. at 146.
529. Justice Roberts, the court's foremost advocate of interest analysis, dissented in *Cipolla*, arguing that each of the majority's alternative approaches was flawed. First, the Delaware legislature's sole purpose in passing a guest statute was the protection from liability of
Subsequent choice of law decisions in Pennsylvania have not been particularly helpful in resolving the uncertainties left by *Cipolla*. Two decisions of the Pennsylvania Superior Court, as well as one federal decision, involved the question of whether a Pennsylvania plaintiff could recover from a foreign property owner for injuries occurring on the foreign property where Pennsylvania law attached liability but the foreign law did not. In each case, the court held there could be no recovery due to the locus state's paramount interest in regulating the conduct of its citizens within the state. In each case, the court also held itself bound by *Griffith* to apply an interest-analysis approach in its decision. A recent Third Circuit case involving the issue of contribution among joint tortfeasors was resolved on a significant contacts basis. No case since *Cipolla* has relied upon the Cavers test in making a choice of law decision, although one panel of the Third Circuit, applying the Second Restatement, noted that its decision was also consistent with the *Cipolla* rationale.

The latest state court case in Pennsylvania was a sovereign immunity case decided in the commonwealth court. In *Davis v. School District of Philadelphia*, the Pennsylvania parents of a junior high school student brought a wrongful death action against the local school district after their child drowned in a motel swimming pool during a school field trip. The statute's potential effect on insurance rates was not a legislative concern. *Cipolla*, 439 Pa. at 569-71, 267 A.2d at 857-59 (Robert, J., dissenting). Second, the Cavers principles were based on a party expectation rationale. This rationale was inappropriate here, because it was unlikely that defendant had actually been relying upon the Delaware guest statute when he offered his Pennsylvania friend a ride in his automobile; it was also unlikely that defendant's father was relying upon the guest statute when he paid the insurance premiums. *Id.* at 571-72, 267 A.2d at 859. Justice Roberts would have applied a “better rule of law” approach to resolution of true conflicts. Using this approach, Pennsylvania's common law liability was clearly a better rule of law than was Delaware's guest statute. *Id.* at 573-78, 267 A.2d at 859-62.


531. See *Levin*, 318 Pa. Super. at 609, 465 A.2d at 1021; *Hager*, 268 Pa. Super. at 419, 408 A.2d at 858; *Kabo*, 523 F. Supp. at 1327-28. Significantly, the result in each case is consistent with Professor Cavers' second principle, adopted by the supreme court in *Cipolla*. In each of these three cases, the court absolved a defendant from liability in a situation where the defendant was acting in its own state and that state's law did not attach liability to the conduct.


533. See *Blakesley* v. Woford, 789 F.2d 236, 242-43 (3d Cir. 1986).

trip to Virginia. Pennsylvania had a rule of governmental immunity which barred the suit but Virginia did not. Unsurprisingly, the court held Pennsylvania law applicable, and dismissed the case. What was surprising in Davis, however, was that the court cited Griffith as authority for applying section 145 of the Second Restatement.\(^{535}\) The court’s interpretation of Griffith was totally wrong; unfortunately, the superior court has perpetuated the myth by applying the Second Restatement in a contract case, as well.\(^{536}\)

Discounting the mistaken lower court decision in Davis, it is clear that the Pennsylvania courts follow an interest analysis approach in tort cases. How the courts will resolve true conflicts in future cases is uncertain, but for now, Cipolla and the two most recent superior court cases indicate that Professor Cavers’ principles will be utilized where applicable. Eventually, a case will arise which is not covered by any of these rules. At that time, the courts will be forced to select a broader methodology.\(^{537}\)

The Pennsylvania Supreme Court has never officially discarded the old place of making rule in contract cases. In fact, as late as 1971, a full seven years after Griffith, it applied that rule in an international contract case.\(^{538}\) In 1983, the court, in puzzling dictum, stated that Pennsylvania law, governed a legal malpractice suit when the contract was made in Pennsylvania. The court cited section 188 of the Second Restatement and a number of federal court cases whose analyses “show Pennsylvania following a flexible conflicts methodology combining interest analysis

---

535. Id. at 30, 496 A.2d at 904-05.
537. The Third Circuit has gone beyond Cipolla and relied upon the resolution of a conflicts hypothetical by Professor Cavers in D. Cavers, supra note 527, at 143-44. See Broome v. Antlers’ Hunting Club, 595 F.2d 921, 925 (3d Cir. 1979), where the court held that a New York plaintiff’s wrongful death claim against a Pennsylvania defendant would be decided under the more liberal damage laws of Pennsylvania, the state where the accident occurred, rather than the laws of New York, where plaintiff was domiciled. This fact pattern presents an unprovided-for case, rather than a true conflict, but Professor Cavers argued in a hypothetical case that the law imposing higher damages should be applied in order to serve interests of deterrence and retribution expressed by the legislature in defendant’s state. Adoption by the court of appeals of this rule, a rule which is not expressed in any of the seven Principles of Preference, marked the first time that a Pennsylvania court had gone beyond Cavers’ second principle. The other federal court cases following Griffith have been false conflicts. See In re Air Crash Disaster at Mannheim, Germany on 9/11/82, 769 F.2d 115, 120 n.7 (3d Cir. 1985), cert. denied, 106 S. Ct. 851 (1986), re’g denied, 107 S. Ct. 1596 (1987); Reyno v. Piper Aircraft Co., 630 F.2d 149, 170-71 (3d Cir. 1980), rev’d on other grounds, 454 U.S. 235 (1981); Moser v. Bostitch Division of Textron, Inc., 609 F. Supp. 917, 920 (W.D. Pa. 1985).
and the Restatement (Second) of Conflicts."539

So matters stood until the 1984 case of *Myers v. Commercial Union Assurance Co.*540 In *Myers*, an Illinois resident was seriously injured in a car accident in Pennsylvania while acting on behalf of his Illinois employer. During the time that his workers' compensation claim was pending, the injured employee received an award of $324,000 from the other driver's no-fault automobile insurer. The employee's eligibility for workers' compensation was then established and he received another award under the Illinois worker's compensation statute. At that point, the no-fault insurer sued the employers' insurer for contribution of amounts earlier paid by it to the employee. Pennsylvania law allowed contribution on these facts, but Illinois law did not. The court held Pennsylvania law applicable since any other course might have seriously jeopardized the efficacy of the Pennsylvania insurance system.541 *Griffith*, *McSwain*, and *Cipolla* were all cited as controlling.542 The court distinguished a related claim by the employer's insurer, an Illinois company, against the employee since there both the claimant and the defendant were Illinois citizens.543 The court made no mention of the place of making rule and did not assign overwhelming importance to any single contact. There was no reference to the Second Restatement; the court instead relied on a combination contacts and interest-analysis approach.544

While *Myers* does not definitively establish any particular choice of law method for contract cases, it clearly represents a rejection of the place of making rule. Even before *Myers*, the lower courts had begun the search for a more flexible theory. As early as 1966, the superior court had applied a variant of the *Griffith* interest-analysis approach in a contract case, though only as an alternative holding since the place of making rule produced the same result.545 The real thunderbolt, struck in 1975, when the superior court, in *Gillan v. Gillan*,546 held that *Griffith* had adopted the Second Restatement approach for choice of law cases generally, and that section 188 would be applied to determine the law applicable to a separation agreement.547

541. *Id.* at 498-99, 485 A.2d at 1117.
542. *Id.* at 496, 485 A.2d at 1115-16.
543. *Id.* at 496-97, 485 A.2d at 1116.
544. *Id.* at 496-99, 485 A.2d at 1116-17.
547. *Id.* at 150-53, 345 A.2d at 744-45.
Recent lower court cases indicate that Pennsylvania no longer follows the place of making rule, but the courts have divided over what the proper approach should be in contract actions. Only one case following Gillan has held that Griffith requires application of the Second Restatement, although the court in that case in fact did nothing more than count contacts.\textsuperscript{548} In three other cases, the superior court has applied a most significant contacts or flexible contacts approach without reference to the Second Restatement.\textsuperscript{549} This latter approach has also been used to determine the applicable law in a case concerning the validity of an attempted revocation of a testamentary trust.\textsuperscript{550}

The cases are not entirely reconcilable, but Myers and the recent superior court cases indicate that a center of gravity approach is the method most often applied in Pennsylvania contract cases. The policy-sensitive interest-analysis approach of the early supreme court tort cases has so far not been extended to contract cases, although the supreme court has not had a real opportunity to pass upon the issue. There is little support for the Second Restatement.

In the leading Third Circuit case, \textit{Melville v. American Home Assurance Co.},\textsuperscript{551} the court of appeals held that Delaware law was applicable in determining the burden of proof for suicide under an accidental death insurance policy. The insured was a Delaware resident, the beneficiary was a Pennsylvania resident, and the insurance company was located in New York. The court held that Griffith had adopted a combination of interest analysis and the Second Restatement. The court applied each of these approaches in turn and found Delaware law applicable each time.\textsuperscript{552} Since \textit{Melville}, there have been a large number of federal court decisions involving choice of law in contract. Most have applied a center of gravity approach as the Pennsylvania superior court has generally done.\textsuperscript{553} Others have relied more heavily upon the Second Re-

\textsuperscript{551} 584 F.2d 1306 (3d Cir. 1978).
\textsuperscript{552} Id. at 1313-15.
Rhode Island

Rhode Island was an early follower of Leflar’s choice-influencing considerations. However, the Rhode Island Supreme Court’s recent conflict of law cases involving torts have been somewhat inconsistent. Furthermore, the court has never applied Leflar in a contract case.

The premier choice of law case in Rhode Island was Woodward v. Stewart, an action between Rhode Island residents involving a car accident that occurred in Massachusetts. The trial court dismissed the plaintiff’s wrongful death action, reasoning that the applicable law was the Massachusetts Wrongful Death Act, and that the Act was unenforceable in Rhode Island due to its “penal” nature. The supreme court reversed, allowing the action to proceed under Rhode Island law. Although the court expressly adopted Leflar’s five-factor approach, it did not in fact apply it. Instead, the court merely sized up the contacts and found Rhode Island’s contacts to be greater.

The supreme court again applied Leflar’s five factor approach one year later in Brown v. Church of Holy Name of Jesus, another case involving application of the Massachusetts Wrongful Death Act. In Brown, a Rhode Island child drowned in Massachusetts during a recrea-
tional outing sponsored by defendant Rhode Island church. The court followed Woodward, holding the Massachusetts Wrongful Death Act inapplicable, thus avoiding once again the proscription on applying a foreign penal law.\(^5\) The court then addressed whether the Massachusetts rule of charitable immunity barred recovery from the Rhode Island church. The court applied the Leflar test and held the Massachusetts rule not applicable. The first three Leflar factors were said to be unimportant, but the fourth and fifth factors pointed toward Rhode Island law.\(^6\) The court also cited section 145 of the Second Restatement, though only as an indication of significant contacts to consider and not as a choice of law method.\(^6\)

In Busby v. Perini Corp.,\(^6\) the supreme court utilized sections 145 and 184 of the Second Restatement to find Massachusetts law applicable in a suit by a Massachusetts worker against a Massachusetts general contractor for an injury occurring in Rhode Island. Massachusetts law barred the suit because the employee had already recovered workers' compensation benefits from his employer, a Massachusetts subcontractor. Predictably, the court held that Massachusetts law governed. The decision rested less on general choice of law grounds than on a healthy respect for the compensatory equilibrium struck by the sister state's workers' compensation laws.\(^5\) The employee received his benefits under Massachusetts' workers' compensation laws, and that scheme was correctly held to apply to all claims arising from the employee's work-related injuries. Although the Second Restatement was used to support that result, the court, in dictum, indicated that it was not abandoning the Leflar approach to choice of law generally.\(^5\)

In 1973, however, the supreme court totally ignored the Leflar fac-

\(^5\) Id. at 325, 252 A.2d at 178.

\(^6\) The court explained:

The advancement of the forum's governmental interest is of significant weight in this case. Rhode Island has a natural interest in regulating the relationship among its domiciliaries. The instant relationship was apparently created in Rhode Island; the plaintiff and all defendants are residents of Rhode Island. Hence, only Rhode Island is concerned with the ultimate result. . . . Finally, we feel our policy to be the better rule. Although in most conflict circumstances it is difficult to say which is truly the better rule as between two conflicting policies, in the present situation, even the Massachusetts Supreme Judicial Court has recognized the disfavor in which the charitable immunity doctrine is held.

Id. at 330, 252 A.2d at 181.

\(^6\) See id. at 326-27, 252 A.2d at 179.

\(^6\) 110 R.I. 49, 290 A.2d 210 (1972).

\(^5\) Id. at 53-54, 290 A.2d at 212-13.

\(^6\) See id. at 52, 290 A.2d at 212.
tors and applied a straight interest-analysis in *Labree v. Major*, a guest statute case. The case involved a car accident in Massachusetts which injured a Massachusetts passenger. The defendant driver was a Rhode Island resident. Massachusetts had a guest statute, but Rhode Island did not. Surprisingly, the court applied Rhode Island law. Even more surprisingly, it did so without reference to Leflar's better rule of law approach, the court's previous benchmark for choice of law cases and the method which, more than any other, would have supported the result reached.

Analyzing the respective state interests, the *Labree* court found that Massachusetts had no interest in shielding an out-of-state driver from liability. Moreover, the Massachusetts courts had strived in recent years to avoid application of the guest statute, and the Massachusetts legislature had in fact repealed the statute two years before the supreme court decision; these factors were "indicative of the lack of importance of the host-guest gross-negligence rule in Massachusetts." Conversely, Rhode Island's interest in compensating injured passengers transcended jurisdictional boundaries. An apparent unprovided-for case was thereby transformed into a false conflict, and the law of the only interested state, Rhode Island, was applied. The suit was allowed to proceed.

The Leflar factors returned in *Pardey v. Boulevard Billiard Club*, a 1986 dram shop case. The plaintiff in *Pardey* was a Massachusetts woman who was injured in a car accident caused by an intoxicated minor from Massachusetts who had been served alcohol by the defendant Rhode Island tavern. The accident took place in Massachusetts. Both Rhode Island and Massachusetts had dram shop acts but the Massachusetts act applied only to Massachusetts vendors. The court, specifically citing the Leflar factors held the Rhode Island act applied. *Pardey* indicates a likelihood that the Leflar test will continue to govern Rhode

---

567. As the court itself recognized, id. at 667 n.2, 306 A.2d at 815 n.2, the fact pattern presented was the same as that in Neumeier v. Kuehner, 31 N.Y.2d 121, 286 N.E.2d 454, 335 N.Y.S.2d 64 (1972), another rare guest statute case in which driver and passenger hailed from different jurisdictions. The court specifically declined, however, to follow Judge Fuld's third rule in this case. 111 R.I. at 672-73, 306 A.2d at 817-18.
568. Id. at 699-70, 306 A.2d at 816.
569. "Rhode Island's policy of allowing recovery by passengers for the ordinary negligence of their hosts is not limited to the protection of Rhode Island guests. The state has an interest in enforcing the standard of care of an automobile operator no matter where his guest resides." Id. at 671, 306 A.2d at 816.
571. Id. at 1351-52.
Island conflict of law cases involving torts.\textsuperscript{572}

The federal courts in Rhode Island have consistently applied the Leflar factors in tort. The leading case is \textit{Roy v. Star Chopper Co.}\textsuperscript{573} This case was similar to \textit{Labree} in that the court managed to transform an apparent unprovided-for case into a false conflict favoring application of Rhode Island law. It did so, however, in the context of the five Leflar factors. Thus, where a Massachusetts plaintiff was injured in Massachusetts as a result of a defective product produced in Rhode Island, the Rhode Island rule of strict liability applied. Four of the five Leflar factors were said to support this result; a fifth factor was neutral.\textsuperscript{574}

One earlier First Circuit case and two federal district court cases also applied a factor-by-factor analysis under the Leflar method.\textsuperscript{575} A slightly different approach, adopted in an early federal district court case following the supreme court's decision in \textit{Brown}, applied both the Leflar factors and section 145 of the Second Restatement.\textsuperscript{576} Relying primarily upon the latter approach, the court again addressed an issue which had arisen in \textit{Woodward} and \textit{Brown}, the applicability of the Massachusetts Wrongful Death Act. A more recent case also adopted this parallel approach, but the court found the Massachusetts statute of limitations applicable on the strength of greater contacts.\textsuperscript{577}

These cases indicate that the five-factor Leflar approach is still active in Rhode Island tort cases. Variations on this method have appeared, but the basic inquiry is the same. Among difficult cases, only \textit{Labree}, the straight interest-analysis case, utilized a different methodology.

So far, the Supreme Court of Rhode Island has not changed the traditional rule that a contract is to be interpreted according to the law of the place of making. Although the governing case law is ancient,\textsuperscript{578} sev-\textsuperscript{572} But see Blais v. Aetna Cas. & Surety Co., 526 A.2d 854 (R.I. 1987) (Connecticut plaintiffs prohibited from recovering pain and suffering damages by law of Massachusetts since both wrongful conduct and injury occurred there).

\textsuperscript{573} 584 F.2d 1124 (1st Cir. 1978), cert. denied, 440 U.S. 916 (1979).

\textsuperscript{574} The court stated that only "simplification of the judicial task" was irrelevant. \textit{Id.} at 1129. Indeed, it is an extremely rare case where applying the law of another state imposes any significant hardship on the forum.


\textsuperscript{577} See Montauk Elec. Co. v. Ohio Brass Corp., 561 F. Supp. 740, 744-45 (D.R.I. 1983); see also Hart Eng'g Co. v. FMC Corp., 593 F. Supp. 1471, 1481 (D.R.I. 1984) (also espousing the two-track, combination Second Restatement and Leflar approach, but finding that the substantive laws of all three interested states were not in conflict).

\textsuperscript{578} See Owens v. Hagenbeck-Wallace Shows Co., 58 R.I. 162, 171, 192 A. 158, 163
eral recent federal cases have applied the place of making rule in reliance on the authority of the early supreme court decisions.\textsuperscript{579} In the 1972 case of \textit{A.C. Beals Co. v. Rhode Island Hospital},\textsuperscript{580} the supreme court held that Rhode Island law governed the enforceability of an arbitration clause in an interstate contract, since the “last act” necessary to make the contract binding occurred in Rhode Island.\textsuperscript{581} The court also noted that Rhode Island had the most significant interests in the litigation, but it specifically declined to decide whether to extend the \textit{Woodward} approach to contracts.\textsuperscript{582} The place of making rule remains the governing law in Rhode Island until its supreme court states otherwise.

South Carolina

The South Carolina Supreme Court remains firmly committed to the rule of lex loci delicti. Two spousal immunity cases, mirror images of one another, illustrate this position. In \textit{Oshiek v. Oshiek},\textsuperscript{583} a South Carolina woman sued her spouse for injuries resulting from a car accident in Georgia. South Carolina had abandoned the common law rule of spousal immunity but Georgia had not. The South Carolina Supreme Court treated the case as simply one of applying settled precedent. The law of the place of injury, Georgia, governed.\textsuperscript{584} The converse situation occurred in \textit{Algie v. Algie},\textsuperscript{585} where a Florida woman sued her spouse for injuries suffered during a crash landing of a small plane at the Charles-


\textsuperscript{580} 110 R.I. 275, 292 A.2d 865 (1972).

\textsuperscript{581} \textit{Id.} at 285-86, 292 A.2d at 870-71.

\textsuperscript{582} “On this record we need not, and do not, decide whether the doctrine enunciated in \textit{Woodward v. Stewart}, 104 R.I. 290, 243 A.2d 917 (1968), applies to contract cases.” \textit{Id.} at 287 n.5, 292 A.2d at 871 n.5.

\textsuperscript{583} 244 S.C. 249, 136 S.E.2d 303 (1964).

\textsuperscript{584} We conclude, as did the Circuit Judge, that the situs of the tort is controlling on the issue of the existence of a cause of action for personal injury by one spouse against the other. Since, under the law of the State of Georgia, the wife had no right of action against her husband for a personal tort, she has no right of action which can be enforced here. \textit{Id.} at 255, 136 S.E.2d at 306.

\textsuperscript{585} 261 S.C. 103, 198 S.E.2d 529 (1973).
ton, South Carolina airport. The court declined to overrule Oshiek, and instead applied the law of the place of injury, South Carolina, this time allowing the suit.586 All of the other tort cases have been decided in the federal courts, and these courts, without exception, have applied lex loci delicti.587

There have been no modern South Carolina Supreme Court decisions regarding choice of law in contract, though there is little doubt that the traditional rules still apply here as well. A series of cases in the 1940s established the place of making and place of performance rules in South Carolina.588 Although a federal district court has enforced a contractual choice of law clause, the court there noted the general applicability of the place of making and place of performance rules.589 In a hybrid situation involving the interstate sale of certain automobiles, a Fourth Circuit panel applied the traditional rule that the law of the state where the chattels are located at the time of the transaction governs.590

South Dakota

The supreme court of South Dakota remains committed to the place of injury rule in tort. The leading case, Heidemann v. Rohl,591 arose from an airplane crash in Nebraska which killed six members of a South Dakota college debating team. One of the victims' parents brought a wrongful death action against the South Dakota lessor of the airplane.

586. The court stated: "We are now urged to overrule Oshiek and formulate a rule which will bar this plaintiff's right to sue, although her injuries occurred, and right of action arose, in this non-immunity jurisdiction. We are not persuaded that this result would be in furtherance of justice." Id. at 106, 198 S.E.2d at 530.


588. See Murphy v. Equitable Life Assurance Soc'y of U.S., 197 S.C. 393, 407, 15 S.E.2d 646, 651 (1941) ("Our Courts hold that a contract is controlled by the law of the State in which it is made and is to be performed."); Knight v. Fidelity & Casualty Co., 184 S.C. 362, 376, 192 S.E. 558, 564 (1937) ("It is familiar law that a contract is governed by the laws of the state in which it is made and to be performed."); Livingston v. Atlantic Coast Line Railroad Co., 176 S.C. 385, 391, 180 S.E. 343, 345 (1935), stating that:
   It is fundamental that unless there be something intrinsic in, or extrinsic of, the contract that another place of enforcement was intended, the lex loci contractu governs.
   If the contract be silent thereabout, the presumption is that the law governing the enforcement is the law of the place where the contract is made.


590. See Rawl's Auto Auction Sales v. Dick Herriman Ford, 690 F.2d 422, 426 (4th Cir. 1982).

591. 86 S.D. 250, 194 N.W.2d 164 (1972).
The parent had earlier signed a release exculpating the college from liability. Two conflict of law problems were thus presented. First, Nebraska law allowed an airplane pilot's negligence to be imputed to the owner of the airplane, but South Dakota law did not. Second, Nebraska law provided that a release from liability of less than all joint tortfeasors did not operate as a release of those parties not named in the agreement, but South Dakota law, favoring a right of contribution among tortfeasors, provided otherwise. The court held Nebraska law applicable on each count. While acknowledging the trend toward adoption of modern choice of law analyses, the court bemoaned the inconsistencies of the new theories. A 1986 case once again involving a challenge to the validity of a release was decided under the law of the place where the underlying automobile accident occurred. The court cited Heidemann and reaffirmed the place of injury rule.

The South Dakota Supreme Court has not been called upon to decide any conflicts cases involving contracts in recent years. Probably it would continue to apply the place of making and place of performance rules. There have been no federal cases either.

Tennessee

The Tennessee Supreme Court flatly rejected an opportunity to adopt a modern choice of law theory in Winters v. Maxey, a guest statute case. In Winters, the plaintiff and the defendant, both Tennessee residents shared an automobile ride to Florida. The car crashed in Alabama, injuring the plaintiff passenger. The Alabama guest statute allowed recovery only upon a showing of gross negligence by the driver, a showing plaintiff could not make. Tennessee, however, had no guest statute. After discussing the leading choice of law cases in New York and Wisconsin and noting their inconsistency both internally and with one

---

592. Although there is dissatisfaction with the lex loci delicti rule there is also a reluctance on the part of many courts to adopt the modern fragmented approach to the settlement of multi-state conflict of laws problems because of the lack of discernible and suitable guidelines. For the most part the variants of the modern approach set forth theory and concepts rather than followable rules. As a result there is considerable confusion and inconsistency in its application.

Id. at 259, 194 N.W.2d at 169.

593. Id.


595. "The 'place of the wrong' rule governs the substantive rights of parties to a multistate tort action." Id. at 466.

596. 481 S.W.2d 755 (Tenn. 1972).
another, 597 the court retained the old rule. The court of appeals acquiesced in this decision. 598 In addition, there have been a large number of federal court decisions, all of which have applied the rule of lex loci delicti. 599

In contract, as in tort, Tennessee adheres to the traditional rule that a contract will be interpreted according to the law of the state where it is made. The latest statement of the rule occurred in 1975, in *Great American Insurance Co. v. Hartford Accident & Indemnity Co.* 600 In that case, a negligent driver operating his sister’s car was involved in an accident. After the owner’s insurer settled claims held by other persons involved in the accident, it sought contribution from the driver’s insurer. The driver’s policy was issued in New York, the law of which required that the owner’s insurance coverage be exhausted before contribution from the driver’s insurance coverage. Thus, the owner’s insurer would be denied contribution. Tennessee law, however, provided for proration of liability between insurers. The Tennessee Supreme Court held the New York law applicable and dismissed the suit. In retaining the rule of lex loci contractus, the court reasoned that “the dominant contacts rule has made no significant progress toward uniformity since *Winters.*” 601 Its decision was aided by the fact that the Tennessee legislature had, subsequent to the issuance of the policy involved in this case, changed its law

597. The court stated:
In our examination of cases using the “dominant contacts” rule, we have not been able to discern they provide any “uniform common law of conflicts” to take the place of the uniform rule of lex loci delicti. As an example, in the cases we have used in this opinion under the method of analysis used in New York in a given factual situation, one result could be reached, while under the method of analysis used by Wisconsin a different result would be reached.

*Id.* at 758 (comparing *Wilcox v. Wilcox*, 26 Wis. 2d 617, 635, 133 N.W.2d 408, 417 (1965), with Babcock v. Jackson, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963)).


600. 519 S.W.2d 579 (Tenn. 1975).

601. *Id.* at 580.
to conform to the New York law in question.\textsuperscript{602} Prior supreme court decisions also followed the traditional rule.\textsuperscript{603} Recent appellate decisions have done likewise.\textsuperscript{604} In the federal courts, too, application of the rule of lex loci contractus has been frequent and unerring.\textsuperscript{605} Indeed, Tennessee's adherence to the traditional rules in conflict of laws generally is so firm that there does not appear to have been any Tennessee conflicts case in which a different rule has been espoused, even in dissent.

Texas

Texas courts apply the Second Restatement approach in both tort and contract cases. The big break with the past came with the Texas Supreme Court's decision in \textit{Gutierrez v. Collins},\textsuperscript{606} which involved a car accident between two Texas residents in Chihuahua, Mexico. The laws of Texas and Mexico differed substantially with regard to damages.\textsuperscript{607} In

\textsuperscript{602} Accordingly, "[t]he conflict between the Tennessee rule and the New York involves no consideration prejudicial to the general interest of the citizens of Tennessee. . . ."

\textit{Id.}

\textsuperscript{603} \textit{See} \textit{Ohio Casualty Ins. Co. v. Travelers Indem. Co.}, 493 S.W.2d 465, 466 (Tenn. 1973) ("It is a familiar rule in Tennessee that the construction and validity of a contract are governed by the law of the place where the contract is made."); \textit{see also} Sloan v. Jones, 192 Tenn. 400, 407, 241 S.W.2d 506, 509 (1951) ("It is a familiar rule that the construction and validity of a contract are governed by the law of the place where the contract is made.").

\textsuperscript{604} \textit{See} \textit{Hutchison v. Tennessee Farmers Mut. Ins. Co.}, 652 S.W.2d 904, 905 (Tenn. Ct. App. 1983) ("Plaintiff concedes lex loci contractus becomes as much a part of a contract as if specifically incorporated therein and, in the absence of evidence of a contrary intention, the laws of the state where the policy was issued and delivered are applicable to the terms of the agreement."); \textit{see also} State Farm Mut. Auto. Ins. Co. v. Thomas, 699 S.W.2d 156, 157 (Tenn. Ct. App. 1983) ("Since the policy at issue was issued in Virginia, the substantive law of Virginia governs.").

\textsuperscript{605} \textit{See} \textit{United States v. Republic Ins. Co.}, 775 F.2d 156, 160 (6th Cir. 1985); Boatland, Inc. v. Brunswick Corp., 558 F.2d 818, 821 (6th Cir. 1977); Agricultural Serv. Ass'n, Inc. v. Ferry-Morse Seed Co., 551 F.2d 1057, 1063 (6th Cir. 1977); MacPherson v. MacPherson, 496 F.2d 258, 261 (6th Cir. 1974); \textit{In re Fickey}, 23 Bankr. 586, 588 (E.D. Tenn. 1982); American Training Serv., Inc. v. Commerce Union Bank, 415 F. Supp. 1101, 1104 n.3 (M.D. Tenn 1976), aff'd, 583 S.W.2d 312 (Tex. 1979).

\textsuperscript{606} 583 S.W.2d 312 (Tex. 1979).

\textsuperscript{607} The supreme court explained the Mexican law as follows:

First, there are the limitation-of-damages statutes which index a plaintiff's recovery to the prevailing wage rates set by Mexican labor law. These provisions have the effect of substantially reducing a plaintiff's recovery compared to that which he might expect to receive in a United States court. Secondly, Mexican law does not recognize pain and suffering as an element of damages, contrary to the laws of Texas and other jurisdictions in this country. Thirdly, Mexican law authorizes recovery for moral reparations which include injuries to a plaintiff's reputation, dignity, or honor. The award is within the discretion of the judge and may not exceed one third of the other damages awarded.

\textit{Id.} at 321.
a well-written opinion, Justice Johnson brushed aside the tired arguments for retention of the lex loci delicti rule, and instead announced that the Texas courts would abandon that approach and adopt sections 6 and 145 of the Second Restatement for resolution of conflicts in tort cases.\textsuperscript{608} Although it seemed certain that Texas law would apply, the court left to the lower court the task of applying its newly-adopted choice of law methodology.

One year later, in \textit{Robertson v. McKnight},\textsuperscript{609} the court again followed the Second Restatement approach. In that case, a New Mexico couple was killed in an airplane crash in Texas. The wife's estate brought a wrongful death action against the husband's estate, alleging that the husband had been negligent in piloting the airplane. New Mexico had no proscription on interspousal suits, but Texas did. The supreme court, citing section 169 of the Second Restatement,\textsuperscript{610} held that New Mexico, the spousal domicile, had the most significant relationship to the case, and its law would be applied.\textsuperscript{611}

The court's most recent foray into choice of law came in \textit{Total Oilfield Services, Inc. v. Garcia}.\textsuperscript{612} There the court affirmed a court of appeals' ruling that the Texas wrongful death statute applied to an action brought by survivors of a Texas oil worker against a Texas corporation for the workers' employment-related death in Oklahoma. The court specifically reaffirmed its adherence to section 145 of the Second Restatement.\textsuperscript{613}

In recent years, there have been a plethora of conflict of laws decisions in the Texas federal courts, all of which cited \textit{Gutierrez} or the Second Restatement.\textsuperscript{614} Unfortunately, these cases have generally been

\textsuperscript{608} Id. at 318. The court stated:

Having considered all of the theories, it is the holding of this court that in the future all conflicts cases sounding in tort will be governed by the "most significant relationship" test as enunciated in Sections 6 and 145 of the Restatement (Second) of Conflicts. This methodology offers a rational yet flexible approach to conflicts problems. It offers the courts some guidelines without being too vague or too restrictive. It represents a collection of the best thinking on this subject and does indeed include "most of the substance" of all the modern theories.

\textit{Id.}

\textsuperscript{609} 609 S.W.2d 534 (Tex. 1980).

\textsuperscript{610} The Second Restatement provides: "(1) The law selected by application of the rule of § 145 determines whether one member of a family is immune from tort liability to another member of the family. (2) The applicable law will usually be the local law of the state of the parties' domicile." \textbf{RESTATEMENT (SECOND) OF CONFLICT OF LAWS} § 169 (1969).

\textsuperscript{611} \textit{Robertson}, 609 S.W.2d at 537.

\textsuperscript{612} 711 S.W.2d 237 (Tex. 1986).

\textsuperscript{613} \textit{Id.} at 239.

\textsuperscript{614} See Johansen v. E.I. Du Pont de Nemours & Co., 810 F.2d 1377, 1381 n.5 (5th Cir. August 1987] CHOICE OF LAW 1147
lacking in true analysis. It appears from these decisions that the federal courts are merely adding up contacts. Similarly, a Texas appellate court, paying lip service to the Second Restatement, applied Texas law to a medical malpractice suit on the strength of factual contacts alone.615

The Texas Supreme Court expressly extended the Second Restatement approach to contract cases in *Duncan v. Cessna Aircraft Co.*616 Interestingly, however, the court there applied false-conflict analysis to find Texas law applicable to a release from liability signed by the wife of a Texan killed in an airplane crash in New Mexico. At the time the decedent was employed in New Mexico. The release was given to the airplane owner but purported to release from liability "any other corporations or persons whomsoever responsible therefore" as well.617 Under the New Mexico law this language discharged any tortfeasor within the named class, including the defendant manufacturer. In Texas, however, as the court explained, the rule is different: "A tortfeasor can claim the protection of a release only if the release refers to him by name or with such descriptive particularity that his identity or his connection with the tortious event is not in doubt."618 The court based its application of the Texas rule on an analysis of the relevant governmental interests. New Mexico had no interest at all, since neither party resided in that state; Texas, on the other hand, was critically interested in the full compensation of its resident plaintiff. Also, the fact that the release was executed in Texas was indicative that the parties expected Texas law to govern. Consequently, the release did not release the defendant from liability.

1987); Lee v. Miller County, Ark., 800 F.2d 1372, 1374-75 & n.6 (5th Cir. 1986); Rosenberg v. Celotex Corp., 767 F.2d 197, 199 (5th Cir. 1985); Webb v. Rodgers Mach. Mfg. Co., 750 F.2d 368, 374 (5th Cir. 1985); Levine v. CMP Publications, Inc., 738 F.2d 660, 667 (5th Cir. 1984), reh'g denied, 753 F.2d 1341 (5th Cir. 1985); Wood v. Hustler Magazine, Inc., 736 F.2d 1084, 1087 (5th Cir.), reh'g denied, 744 F.2d 94 (5th Cir. 1984), cert. denied, 469 U.S. 1107 (1985); Brown v. Cities Serv. Oil Co., 733 F.2d 1156, 1159 (5th Cir.), reh'g denied, 739 F.2d 633 (5th Cir. 1984); Union Carbide Corp. v. UGI Corp., 731 F.2d 1186, 1187 n.1 (5th Cir. 1984); Hines v. Tenneco Chemicals, Inc., 728 F.2d 795, 800-01 (5th Cir. 1984), rev'd on other grounds, 804 F.2d 1344 (5th Cir. 1986); Falona v. Hustler Magazine, Inc., 607 F. Supp. 1341, 1352 (N.D. Tex. 1985), aff'd, 799 F.2d 1000 (5th Cir.), reh'g denied, 802 F.2d 455 (5th Cir. 1986), cert. denied, 107 S. Ct. 1295 (1987).


616. 665 S.W.2d 414 (Tex. 1984).

617. *Id.* at 418.

618. *Id.* at 419-20.
The court of appeals followed *Duncan* in *Ossorio v. Leon*, which involved the enforceability of a survivorship clause in certain certificates of deposit executed by a Mexican citizen at a Texas bank. All parties claiming an interest in the deposit account were residents of Mexico. The court, citing *Duncan* and section 6 of the Second Restatement, applied Mexican law, notwithstanding that the certificates were "made" in Texas.

The Fifth Circuit has noted three times *Duncan*'s extension of the Second Restatement to contract. In a Texas appellate case, the court used section 6 to void an Islamic divorce rendered through a summary, *ex parte* proceeding in Kuwait.

The supreme court has clearly adopted the Second Restatement in tort cases and it has announced that it will employ the same approach in contract cases as well. On this record, Texas can properly be classified as a Second Restatement state for all choice of law issues.

**Utah**

Utah follows the traditional rules of the First Restatement in both tort and contract and there is no sign of impending change.

The only recent tort case is *Rhoades v. Wright*, a wrongful death action brought by the wife of a Utah farmer who was shot and killed by the defendant, a Colorado farmer, during a visit to the defendant’s farm. The plaintiff brought suit individually and as administrator of her husband’s estate in federal district court in Utah. The court dismissed the case without prejudice for lack of in personam jurisdiction over the Colorado defendant. Within one year after the dismissal, the plaintiff filed simultaneous claims in the state courts of Utah and Colorado. The Colorado court dismissed due to the running of the state’s statute of limitations. The Utah court dismissed for lack of in personam jurisdiction, but the supreme court of Utah reversed, holding that attachment jurisdiction existed since defendant owned certain property in Utah. On remand, the trial court again dismissed, this time reasoning that Colorado law applied and that that state’s statute of limitations had expired. Again the case reached the supreme court, and again that court reversed.

---

For the second time, the supreme court held that the courts of Utah could exercise attachment jurisdiction over the Colorado defendant's Utah property.\textsuperscript{624} It then tackled the choice of law issue regarding the statute of limitations. The Utah Supreme Court agrees with the Colorado trial court that under the law of Colorado, plaintiff's suit was barred. Under the law of Utah, however, the suit was not barred. The Utah renewal statute provided that one who had earlier filed a timely claim and had it dismissed "otherwise than upon the merits" could bring a new action within one year after the dismissal.\textsuperscript{625} Because the plaintiff's original action in federal district court had been timely filed and her present action had been brought within one year of the federal court dismissal, the statute preserved the plaintiff's action.\textsuperscript{626} The court held that the statute of limitations issue was "procedural," and that Utah's statute would apply notwithstanding the fact that the shooting occurred in Colorado.\textsuperscript{627}

Finally, the court had to decide whether to enforce a Colorado statute which limited the allowable recovery for wrongful death. Here, the court invoked the Utah public policy in favor of full compensation, and refused to apply the Colorado law.\textsuperscript{628} Thus, the supreme court utilized two escape devices in one case: the dichotomy between procedure and substance and the forum's public policy. Aided by its handy escape devices, the court found the adoption of the governmental interest analysis unnecessary.\textsuperscript{629}

The latest contract case is \textit{Jacobsen v. Bunker},\textsuperscript{630} another statute of limitations dispute. In that case, two sisters while living in California, signed promissory notes in favor of their father. The family apparently moved to Utah before the father died. When he died, each sister and a

\textsuperscript{624} Rhoades v. Wright, 622 P.2d 343 (Utah 1980) (\textit{Rhoades II}), cert. denied, 454 U.S. 897 (1981). In the interim between \textit{Rhoades I} and \textit{Rhoades II}, the United States Supreme Court decided, in Shaffer v. Heitner, 433 U.S. 186 (1977), that the "minimum contacts" requirement of in personam jurisdiction announced in International Shoe Co. v. Washington, 326 U.S. 310 (1945), also applied to in rem cases. Defendant argued that jurisdiction was lacking under this standard. The Utah Supreme Court did not agree. \textit{Rhoades, II}, 622 P.2d at 345.

\textsuperscript{625} See \textsc{Utah Code Ann.} § 78-12-40 (1977).

\textsuperscript{626} \textit{Rhoades, II}, 622 P.2d at 350 n.34. Colorado also had a renewal statute, but it had been interpreted by the Colorado trial court as not applicable to wrongful death actions.

\textsuperscript{627} \textit{Id.} at 349.

\textsuperscript{628} "Again, our statutory approach to the problem evidences a strong public policy against limitations being placed on damages. Since application of a foreign state's law limiting such damages would do violence to this policy, we are constrained to apply our own law concerning this matter." \textit{Id.} at 351.

\textsuperscript{629} \textit{Id.} at 351.

\textsuperscript{630} 699 P.2d 1208 (Utah 1985).
brother became entitled to a one-third share of the amount which remained due on each promissory note. The first sister sued the second for the amount the second had not yet paid on her note. The second sister counterclaimed for the amount which the first sister had not yet paid on her note. The first sister contended that the counterclaim was barred by the California statute of limitations and that California law did not allow a set-off under these circumstances. Under Utah law, although the statute of limitations on the counterclaim had expired, set-off was still available.

The court held that the rule of lex loci contractus required application of California law. Unfortunately, the plaintiff had failed to supply the court with the relevant California law. The court therefore assumed that law to be the same as Utah's, and the set-off was allowed.

Four years earlier, in *Morris v. Sykes*, a similar situation had arisen. The plaintiff and the defendant had entered into a contract in Alaska for the sale of certain undeveloped Alaska real estate, the supreme court held that it was bound by the lex loci contractus rule to apply Alaska law. However, the defendant in that case failed to make any showing of a "significant difference between the law of Alaska and [Utah] in regard to the enforceability of such a contract and the forfeiture clause therein." Utah law was therefore applied.

In conclusion, Utah courts have continued to follow the traditional rules of the First Restatement in tort and contract. The courts have shown no signs of changing in the near future.

Vermont

The Vermont Supreme Court has been slow to adopt a modern choice of law theory. Although the cases are old, they indicate a continuing adherence to lex loci delicti in tort, and some confusion in contract.

---

631. "The law of California governs the outcome of this case. Both litigants' notes were executed and payable in California." *Id.* at 1209. Again, after citing the place of making rule, the court said, "the rule is the same for promissory notes. Their legal effect is governed by the law of the jurisdiction where they are executed and delivered." *Id.*

632. *Id.* at 1210.


634. We have no disagreement with the proposition that when a contract is entered into and is to be performed in a foreign jurisdiction the law of that jurisdiction should be applied; and this is particularly so when the contract deals with land in that jurisdiction. Therefore, it is our duty to apply the substantive law of Alaska to this controversy.

*Id.* at 683-84 (footnotes omitted).

635. *Id.* at 684.
The latest tort case in the supreme court is *Goldman v. Beaudry,* a case which provides an example of the reflexive way in which pre-Babcock courts invoked the place of injury rule. In *Goldman,* the plaintiff and the defendant, apparently both Vermont residents, were involved in an auto accident in Quebec. The defendant pleaded Vermont's contributory negligence law as a complete defense, but the plaintiff argued for application of Quebec's rule of comparative negligence instead. The court applied Quebec law reasoning that the First Restatement mandated the result.

In a 1956 dictum, the Vermont Supreme Court indicated approval of the center of gravity approach to choice of law in contract. Although the court ultimately held that the disputed issue was one of property and not one of contract, its more liberal approach to contract cases continued in later cases. The supreme court in fact went so far as to quote section 188 of the Second Restatement in the 1968 usury case of *Pioneer Credit Corp. v. Carden.* However, the court in that case held only that a promissory note naming a Vermont borrower and a Massachusetts lender would be evaluated according to the laws of Massachusetts, where the note was executed.

---

637. The plaintiff's claim of error is well-founded. The rights and liabilities of the parties to an action arising from a motor vehicle accident are determined by the laws of the state where the accident happened. Whether contributory negligence on the part of the plaintiff precludes recovery in whole or in part is to be settled by the law where the claimed injury was inflicted. If the law of the foreign country applies the doctrine of comparative negligence in fixing the rights and liabilities of the parties, we must administer that law accordingly.

*Id.* at 301, 170 A.2d at 638 (citations omitted).
638. Even between the parties, in making a choice of law, the doctrine that the place of the contract shall govern has been modified. In cases presenting a choice of law of a particular jurisdiction, where the contract contains no explicit provision that it is to be governed by some particular law the courts examine all the points of contact which the transaction has with the two or more jurisdictions involved, with the view to determine the 'center of gravity' of the contract, or of that aspect of the contract immediately before the court; and when they have identified the jurisdiction with which the matter at hand is predominantly or most intimately concerned, they conclude that this is the proper law of the contract which the parties presumably had in view at the time of contracting.

640. *Id.* at 233-34, 245 A.2d at 894. In fact, the court ultimately was forced to apply Vermont law because the parties failed in their obligation to establish proof of the relevant Massachusetts law. *See also* Crocker v. Brandt, 130 Vt. 349, 293 A.2d 541 (1972); General Acceptance Corp. v. Lyons, 125 Vt. 332, 215 A.2d 513 (1965) (both applying Vermont law where parties failed to plead or prove Georgia law).
Two federal courts sitting in diversity were less hesitant to abandon the old rules. In the 1972 case of *LeBlanc v. Stuart*, federal district court Judge Holden, a former member of the Vermont Supreme Court and author of the *Goldman* opinion, predicted that the Vermont courts would overrule *Goldman* and extend the center of gravity approach, purportedly adopted in *Pioneer Credit Corp.* to tort cases. *LeBlanc* itself was a spousal immunity case in which a Rhode Island couple had been involved in a car accident in Vermont. The court held that Rhode Island's rule of spousal immunity applied. Although the court stated that section 145 of the Second Restatement governed, it relied principally upon a California case, *Emery v. Emery*, which held that the law of the common domicile should govern questions of intra family immunity. Later, in a 1975 choice of law *tour de force*, the federal district court in Massachusetts, relying upon *Pioneer Credit Corp.* and *LeBlanc*, found that the Vermont Supreme Court, if faced with the question, would no longer follow *Goldman* but would adopt the Second Restatement. That decision rested on a very liberal reading of *Pioneer Credit Corp.*

The Second Circuit, in 1971, expressed its opinion that the Vermont courts would continue to apply lex loci delicti. The case involved alienation of affections, an intentional tort. The lower court applied a two-track choice of law approach, relying on the traditional Goldman rule and, in the alternative, on the Second Restatement. Although the court of appeals agreed with the district court's determination that Vermont law applied, it relied exclusively on the traditional rule in intentional tort cases that the applicable law is the law of the place of defendant's conduct.

The division among the federal courts as to the current state of

---

642. Id. at 774-75.
643. Id.
648. Although no Vermont decision has considered the choice-of-law rule applicable in an alienation of affection dispute involving multi-state conduct, the district court properly determined that Vermont would, in this instance, employ the law of the state in which the defendant's conduct primarily occurred. The traditional approach to the choice of law determined the applicable law by locating territorially the "place of the wrong," defined in the context of negligent torts as the place of the injury, and in the context of intentional torts as the place of the wrongful conduct. *Marra*, 447 F.2d at 1283 (citations omitted).
choice of law in Vermont is directly attributable to the confusing *Pioneer Credit Corp.* decision. Probably the federal courts have read too much into the supreme court’s citation in that case to the Second Restatement. A fair reading of that opinion in fact leaves *lex loci contractus* intact. Certainly, that case is not authority, as suggested in the two district court cases, for abandoning *lex loci delicti* in tort. With only these few cases, it is too early to remove Vermont from the list of states still adhering to the rules of the First Restatement.

**Virginia**

There have been only two modern conflicts decisions made by the Supreme Court of Virginia, one in tort and one in contract. These two cases established the continued vitality of the traditional rules of the First Restatement in that state.

The tort case is *McMillan v. McMillan*, a spousal immunity case which comes about as close as any modern decision to a ringing endorsement of the rule of *lex loci delicti*. The supreme court dispensed with the drama and gave away its holding in the first paragraph of the opinion: *Lex loci delicti* would be applied to bar suit between Virginia spouses for an accident occurring in the immunity state of Tennessee, even though Virginia had no immunity rule. The court used the usual arguments of inconsistency and unpredictability to support the rejection of modern conflicts theory.

The contract case is *Woodson v. Celina Mutual Insurance Co.* In that case, Mr. Delawder purchased a used automobile from Mr. Hinkle during a brief visit by Delawder to West Virginia. Two days later, when Delawder had returned to his home in Virginia, he was involved in a two-car accident which took his life and that of Mrs. Woodson, a passenger in the other vehicle. Mr. Woodson brought a wrongful death action against Delawder and Hinkle. Hinkle's insurer sought a declaratory

---

650. In resolving conflicts of laws, the settled rule in Virginia is that the substantive rights of the parties in a multistate tort action are governed by the law of the place of the wrong. *Maryland v. Coard*, 175 Va. 571, 580-81, 9 S.E.2d 454, 458 (1940). Today in an intra-family suit, we are invited to reject that *lex loci delicti* principle and to follow the so-called “modern trend” by applying the law of the domicile of the parties. We decline the invitation and reaffirm “the place of the wrong” rule. *Id.* at 1128, 253 S.E.2d at 663.
651. “Thus, we do not think that the uniformity, predictability, and ease of application of the Virginia rule should be abandoned in exchange for a concept which is so susceptible to inconstancy, particularly when, as here, the issue involves the substantive existence of a cause of action in tort.” *Id.* at 1131, 253 S.E.2d at 664.
judgment that its insured was not the owner of the automobile on the day of the accident and that, therefore, it was not liable to Mr. Woodson. The attempted transfer of ownership from Hinkle to Delawder might not have been effective under Virginia law since there was no conclusive evidence of transfer of the certificate of title. The transfer of title, however, was valid under the law of West Virginia, where the sale was made, because that law made possession of the certificate of title only evidence of ownership, and not conclusive evidence. The court held West Virginia law applicable on the basis that the sale took place in that state.\textsuperscript{653} Since the transfer from Hinkle to Delawder was valid, Hinkle's insurer was released from liability. The court based its choice of law decision on a Virginia precedent established in 1938.\textsuperscript{654}

The rest of the cases in Virginia have been in the federal courts. In a series of decisions handed down since \textit{McMillan} and \textit{Woodson}, the federal courts sitting in diversity have reaffirmed Virginia's commitment to the traditional rules in both tort and contract cases.\textsuperscript{655}

\textbf{Washington}

The State of Washington follows the Second Restatement approach to choice of law problems. The supreme court first adopted this approach in a 1967 contract case, \textit{Baffin Land Corp. v. Monticello Motor Inn, Inc.}\textsuperscript{656} In that case, a husband and wife, owners of a Washington

\textsuperscript{653} In our consideration of this case, we are controlled by the law of the State of West Virginia. The transaction which involved the purchase of the Pontiac vehicle and the transfer of its title occurred in that state. Likewise the transaction which involved the issuance of a policy of automobile liability insurance to Hinkle by Celina occurred in that jurisdiction. \textit{Id.} at 426, 177 S.E.2d at 613.

\textsuperscript{654} "The nature, validity and interpretation of contracts are governed by the law of the place where made, unless the contrary appears to be the express intention of the parties." \textit{Id.} (quoting C.I.T. Corp. v. Guy, 170 Va. 16, 22, 195 S.E. 659, 661 (1938)).


\textsuperscript{656} 70 Wash. 2d 893, 425 P.2d 623 (1967).
motel, contracted to rent television sets from a Delaware corporation. The contract was consummated in New York when the lessor's vice president signed the contract. The lessor then assigned the contract to the plaintiff, also a Delaware corporation. The owners of the motel later divorced. The trial court awarded the plaintiff a judgment against the motel for delinquent rentals, but held that the plaintiff could not satisfy any part of that judgment out of the wife's property, since the law of New York, where the contract was made, did not recognize community property liability. Instead, only the actual signer of the contract, the husband, was liable thereon.

The Washington Supreme Court reversed, holding that Washington community property law applied, and that the portion of the wife's current property holdings that were acquired during of her former marriage remained subject to the execution of the plaintiff creditor's judgment. In order to reach this result, the court expressly abandoned the old place of making rule and adopted in its place what is now section 188 of the Second Restatement. The court applied the same rule in a second contract case decided the same day.

The court applied the Second Restatement again in 1969, in Potlatch No. 1 Federal Credit Union v. Kennedy, but this time the analysis focused on governmental interests and party expectations. The plaintiff, Idaho credit union, was the named payee on a note made by Roy Kennedy and signed by his brother, both Washington residents. The brother signed only as an accommodation, and received no benefit from the plaintiff's loan to Roy Kennedy. When the maker defaulted on the note, the plaintiff sued the marital communities of Roy Kennedy and his wife, and the co-signer and his wife. Under Washington surety law, the mar-

---

657. We have determined that we should no longer adhere to the rule of lex loci contractus. We therefore adopt what we consider to be the better rule, viz., that the law of the state with which the contract has the most significant relationship, except perhaps in the unusual case of usury, will govern the validity and effect of a contract. In so doing, we follow the lead of various other states which have adopted a similar rule as an escape from the rigidity of lex loci contractus. The rule we adopt is more flexible and thus better adapted to deal with the contracts with multistate aspects which are becoming the rule today and making commonplace choice of law problems such as this one. The rule we approve here also gives much more emphasis to the desires and expectations of the parties, as the state with the most significant relationship is the state chosen by the parties, if an actual, valid choice is made. Where no choice is made, it is most likely that the parties would expect the law of the state with the most significant contacts to be applied. Id. at 899-900, 425 P.2d at 627 (citations omitted).


tal community of the co-signer and his wife was not liable for repayment of the note since neither spouse received any benefit from the loan. Under Idaho surety law, however, the community was liable. The court noted that a true conflict was presented because the purpose of each state's law would be served by its application. Relying heavily on a comment to section 188 of the Second Restatement, the court resolved the conflict by applying the law that most nearly conformed to the expectations of the parties, the law of Washington. The judgment in favor of the cosigner and wife was affirmed.

The Washington Supreme Court's emphasis upon the interest-analysis aspect of section 188 was evidenced again in a 1974 case in which three states were implicated, and the court again found Washington law applicable. The choice of law discussion was dicta, however, since the parties failed to prove any foreign law, thus making forum law applicable anyway.

The supreme court has twice dealt with contractual choice of law provisions. In one case, the court applied section 187(2) but also emphasized the significant contacts of the state whose law was selected. In the other case, however, it again applied section 187(2) and decided not to uphold a choice of law clause which would have resulted in usurious interest charges of twenty-five percent. The Washington legislature

---

660. The legislatures and courts of the two states have made conflicting policy decisions with respect to this question. Idaho has chosen to recognize the interests of creditors over the interests of marital property in these situations. Washington has taken the opposite view. These two policy decisions come into direct conflict where, as here, the controversy involves an Idaho creditor and a Washington marital community. This, then, is not a "false conflict."

661. Id. at 809-09, 459 P.2d at 34.


664. See O'Brien v. Shearson Hayden Stone, Inc., 90 Wash. 2d 680, 586 P.2d 830 (1978). The O'Brien court's analysis was really quite sophisticated. Applying § 187(2), it first quoted a clear legislative statement showing that the Washington usury law expressed a "fundamental policy" of the State of Washington. The court further determined that Washington had a materially greater interest in the resolution of the usury issue than did New York, which,
later codified this result by enacting a choice of law statute requiring application of the Washington usury laws in all cases involving Washington borrowers regardless of the situs of the loan.\textsuperscript{665}

In \textit{Whitaker v. Spiegel, Inc.},\textsuperscript{666} the supreme court held that this statute removed from the Washington courts the discretion to select the applicable law in usury cases. Thus, the Second Restatement will no longer be applied in contract cases where the disputed issue involves the legality of an interest rate charged to a Washington borrower. In all other contract cases, the most significant relationship test will govern. A 1985 court of appeals decision confirms this analysis.\textsuperscript{667}

Tort cases have followed a similar approach. In \textit{Werner v. Werner},\textsuperscript{668} the court for the first time announced that the Second Restatement applied in tort as well as contract.\textsuperscript{669} The court there held that California had the greatest contacts with a negligence action brought against California notaries who affixed a jurat to a forged document conveying certain Washington real property. However, the court did not actually refer to the Restatement factors when making its choice of law.

A clearer case was \textit{Johnson v. Spider Staging Corp.},\textsuperscript{670} a wrongful death action. In that case, a Kansas resident died when he fell from a scaffolding which had been manufactured and sold by the defendant, a Washington corporation. The accident occurred in Kansas, a state which imposed a $50,000 limit on recovery for wrongful death. Washington law imposed no such limits. The court, applying section 145 of the Second Restatement, found the contacts to be "evenly balanced."\textsuperscript{671} The court then engaged in a detailed analysis of the governmental inter-
chooses at stake, holding that Kansas had no interest in applying its limitation of damages statute where the defendant was a Washington corporation. Although Washington's interest in full compensation for survivors in wrongful death cases was not implicated where the decedent and his family were not Washington residents, the forum state had a further interest in allowing unlimited damages as a means of deterring tortious activity by defendants residing within the state. The deterrence rationale pertains regardless of where the plaintiff lives. Thus, the case presented a false conflict. Washington law was applied.672

In Barr v. Interbay Citizens Bank of Tampa, Florida673 a case involving the conversion of a Washington resident's car by a Florida bank acting through its Nevada agent, the court applied Washington law, forbidding punitive damages, rather than Florida law, allowing such damages. Again, the court primarily analyzed the relative purposes behind the two states' rules. Traditional interest analysis probably would have called for application of Florida law here since defendant was a Florida bank and, presumably, the purpose behind Florida's punitive damages law was to punish and deter wrongdoers. Instead of analyzing the case this way, however, the court emphasized the overriding importance of Washington's policy of not allowing punitive damages.674

The most recent supreme court case is a 1984 wrongful death action, Southwell v. Widing Transportation, Inc.675 In Southwell, a British Columbia motorcyclist was killed in British Columbia when he was hit by a steel casting which dislodged from a flatbed truck. The truck belonged to an Oregon corporation and was operated by one of its employees, a Washington resident. The administrator of decedent's estate filed a wrongful death complaint against the truck's owner and the driver. The defendants answered contending that British Columbia law, which did not allow recovery of lost future earnings, governed. Plaintiff moved to strike the affirmative defense but the trial court denied the motion. The supreme court held that it had an insufficient factual basis upon which to make a choice of law decision. Nevertheless, in the course of its opinion, the court made clear its commitment to the Johnson "2-step analysis,"

672. Id. at 584, 555 P.2d at 1002. The court relied heavily on the decision of the California Supreme Court in a similar limitation of damages case, Hurtado v. Hurtado, 11 Cal. 3d 74, 522 P.2d 666, 114 Cal. Rptr. 106 (1974). There, as here, the deterrence rationale was utilized to create a false conflict out of an apparent, unprovided-for case.

674. Id. at 700, 635 P.2d at 445.
involving section 145 and interest analysis.\footnote{676}

The Washington Court of Appeals, in \textit{Mentry v. Smith},\footnote{677} applied an interest analysis to find an Oregon guest statute inapplicable in a suit between Washington residents arising from an auto accident in Oregon. The court used a contact-counting approach rather than an interest analysis in two other cases.\footnote{678}

The Washington Supreme Court cases are not easily categorized. In \textit{Johnson}, the court came to consider the relative governmental interests only after first deciding that the contacts listed at section 145 were inconclusive. Similarly, the most recent case, \textit{Southwell}, appears to advocate a twin-track approach in which section 145 and governmental interest analysis are equally considered. Washington is best described, therefore, as a Second Restatement jurisdiction. However, its emphasis upon discovering and effectuating the purposes and policies supporting the relevant laws is greater than in most other Second Restatement states.

\textbf{West Virginia}

West Virginia courts follow the lex loci delicti rule in tort and the lex loci contractus rule in contract. There have been several modern reaffirmations of each rule. Indeed, in none of these cases did the West Virginia Supreme Court of Appeals even consider adopting a modern choice of law theory. The continued vitality of the traditional rules in West Virginia is simply undeniable.

The leading case in tort is \textit{Hopkins v. Grubb}.\footnote{679} In \textit{Hopkins}, two West Virginians were involved in an accident in Virginia, a guest statute state. The court applied the Virginia guest statute under the rule of lex

\footnote{676. \textit{Johnson} established a 2-step analysis applicable to such cases. The first step involves an evaluation of the contacts with each interested jurisdiction. \textit{See} Restatement § 145. These contacts are to be evaluated according to their relative importance with respect to the particular issue. The approach is not merely to count contacts, but rather to consider which contacts are most significant and to determine where these contacts are found. \textit{Johnson}, 87 Wash. 2d at 581, 555 P.2d at 997. The second step involves an evaluation of the interests and public policies of potentially concerned jurisdictions. The extent of the interest of each potentially interested state should be determined on the basis, among other things, of the purpose sought to be achieved by their relevant local law rules and the particular issue involved. \textit{Id.} at 204, 676 P.2d at 480.}

\footnote{677. 18 Wash. App. 668, 571 P.2d 589 (1977).}


\footnote{679. 160 W. Va. 71, 230 S.E.2d 470 (1977).}
loci delicti. The *Hopkins* court reaffirmed a Babcock-era decision in which the Ohio guest statute was applied in a suit between West Virginia residents over an accident occurring in Ohio. Indeed, in an even earlier case, the court held, on facts precisely the same as in *Hopkins*, that Virginia’s guest statute governed. The court’s reflexive, almost matter-of-fact, application of lex loci delicti has not been confined to guest statute cases. In a series of recent cases, the West Virginia Supreme Court of Appeals, as well as federal courts, have held the place of injury rule applicable to other tort issues as well.

The court’s application of lex loci contractus in contract is without exception. The case most often cited is *Michigan National Bank v. Mattingly*, which involved a retail installment contract with a rate of interest usurious under the law of West Virginia but legal in Ohio. The borrowers in that case were West Virginia residents. The retail installment contract covered a trailer home purchased in Ohio. There was a factual dispute as to where the contract was signed, but there was no dispute as to the applicable choice of law rule. The jury found that the contract had been signed at the borrower’s home in West Union, West Virginia. On this basis, the supreme court of appeals applied West Virginia law.

680. “This unfortunate incident, having occurred in the State of Virginia, the substantive law of that state will be applied.” *Id.* at 73, 230 S.E.2d at 472.

681. “Inasmuch as the automobile accident occurred in Ohio, the right to recover must be measured and determined in accordance with the laws of that state.” *Thornsbury v. Thornsbury*, 147 W. Va. 771, 773, 131 S.E.2d 713, 715 (1963).

682. *See* *Dodrill v. Young*, 143 W. Va. 429, 102 S.E.2d 724 (1958). “As the collision in which the plaintiff sustained the injuries of which she complained occurred in the Commonwealth of Virginia the right of the plaintiff to recover damages for such injuries must be determined by the laws of that state as applied by its courts.” *Id.* at 431, 102 S.E.2d at 726.


These cases reflect a consistent and unswerving application of lex loci delicti by West Virginia courts. The opinions in the above cited cases do not even contain a suggestion of dissatisfaction with or criticism of this venerable conflicts rule. These cases commend but one conclusion—lex loci delicti has been, and continues to be, the controlling conflicts of law doctrine in West Virginia.

See also *In re Silver Bridge Disaster Litig.*, 381 F. Supp. 931, 946 (S.D. W. Va. 1974).


686. “The applicable rule is clear. The law of the state in which it was made and to be performed governs a contract’s construction when it is involved in litigation in the courts of this State.” *Id.* at 624, 212 S.E.2d at 756.
The court recently reaffirmed the principle of lex loci contractus on several occasions. On one such occasion, in *General Electric Co. v. Keyser*, the court actually utilized parts of the Second Restatement, but it ultimately rested its decision on the place of making rule. In *General Electric*, a West Virginia resident signed a guaranty on three promissory notes, agreeing to assume secondary liability for the repayment of certain debts owed by a California corporation to a New York corporation. When the borrower defaulted and filed for bankruptcy, the lender sued the West Virginia guarantor for the balance due. The guarantor defended on the ground that the interest rate was usurious. The guarantor counterclaimed under a West Virginia usury statute, which provided the debtor of a usurious loan with a cause of action for damages against the lender in the amount of four times the interest agreed to be paid. The supreme court of appeals held that California law, the place of the making, governed the question of whether the interest rate was usurious. Under California law, the interest rate was indeed usurious. The court then held that a separate question was presented as to the issue of what state's remedial laws would be applied. In the guaranty agreement, the parties provided that New York law would govern. The court, however, relying on section 187(2) of the Second Restatement, held this clause ineffective both because New York had no substantial relationship to the parties or the transaction and because that state's law, which apparently would have precluded the defense of usury altogether, was contrary to the fundamental public policy against usury in West Virginia. The court then relied on the place of making rule again in determining that California law would provide the appropriate remedy. The counterclaim based on the West Virginia statute was therefore dismissed. The court noted, however, that the result reached was also consistent with section 194 of the Second Restatement, which it praised but did not adopt.

---


691. *Id.* at 293-95.

692. *Id.* at 295.

693. We need not today adopt the Restatement view, however, because West Virginia law supports the application of California law. West Virginia traditional conflicts of law rule for contracts is set out in *Michigan National Bank v. Mattingly*... where we said that a contract will be construed under the laws of the state in which it was made and to be performed when it is involved in litigation in the courts of this state.
Whether General Electric signals a trend toward eventual adoption of the Second Restatement in West Virginia is uncertain. For now, however, West Virginia remains a First Restatement state in both contract and tort.

Wisconsin

Wisconsin was one of the first states to depart from the traditional rules of the First Restatement. In time, the Wisconsin Supreme Court adopted Professor Leflar's five choice-influencing considerations. That approach remains extant today.

Quite early, the Wisconsin Supreme Court expressed its dissatisfaction with the place of injury rule in tort. In the pre-Babcock case of Haumschild v. Continental Casualty Co.,694 the court held that Wisconsin law governed spousal immunity in a direct action suit brought by a Wisconsin woman against her husband's insurer for an accident occurring in California, which at that time was an immunity state. Then, in Wilcox v. Wilcox,695 the court abandoned lex loci delicti entirely. This time the court used an interest analysis approach in holding that the Nebraska guest statute did not bar a suit between Wisconsin spouses over an automobile accident occurring in Nebraska. Wisconsin had a vital interest in apportioning liability between two of its citizens, but Nebraska had no interest in protecting a Wisconsin host from ingratitude or a Wisconsin insurer from the risk of fraud. The court cited what is now section 145 of the Second Restatement, but it declined to make that rule its own.696

The Wisconsin Supreme Court first adopted the Leflar factors in 1967 in Heath v. Zellmer.697 The case was the mirror image of Wilcox: two Indiana residents, a state with a guest statute, were involved in an accident in Wisconsin. The court held that this fact pattern presented a

---

694. 7 Wis. 2d 130, 138, 95 N.W.2d 814, 818 (1959).
695. 26 Wis. 2d 617, 133 N.W.2d 408 (1965).
696. The concern, therefore, of the courts must not be merely with the contacts quantitatively, but with them qualitatively in light of policy considerations. We therefore conclude that we cannot accept invariably the order of importance that the Tentative Draft No. 9 of the Restatement of Conflicts has assigned to various contacts, although in general we agree with the order of importance assigned. However, the weight depends on their relevancy to the policies of the place of the wrong and the forum.
697. 35 Wis. 2d 578, 151 N.W.2d 664 (1967).
true conflict between the foreign states’ desire to protect gracious hosts and Wisconsin’s need to deter negligent driving on its roads. The court resolved this true conflict by applying Leflar’s five choice-influencing considerations. In applying these factors, the court held that factors four and five required application of Wisconsin law: the Indiana guest statute would frustrate the forum’s twin governmental interests of compensating injured plaintiffs and deterring negligent driving in Wisconsin; Wisconsin’s rule of common law liability was the better rule of law.698

In a pair of cases decided the following year, the supreme court again applied the fourth and fifth Leflar factors, and again found Wisconsin law applicable. In Zelinger v. State Sand and Gravel Co.,699 an Illinois mother and her daughter were injured when their automobile collided with a truck owned by the defendant Wisconsin corporation. The accident occurred in Wisconsin. Mother and daughter brought an action for damages, and Bernard Zelinger sought recovery for emotional damages caused by the injuries to his wife and daughter. The defendant sought contribution from the mother for payments made by the defendant on account of Bernard Zelinger’s claim of emotional distress and his daughter’s injury claim. The counterclaim pitted the mother against her husband and daughter. The counterclaim was therefore impermissible under the law of Illinois, both because Illinois retained the concepts of spousal and parental immunity and because the Illinois guest statute precluded a suit by a guest passenger against a host driver. However, the court held each of these Illinois laws inapplicable, and allowed the counterclaim. This time, the court relied exclusively on the better rule of law inquiry, having found neither state’s governmental interest predominant.700

698. Id. at 600-04, 151 N.W.2d at 674-76. As to the better rule of law inquiry, the court said that “the application of the rule of ordinary negligence, rather than gross negligence or ‘wanton or willful’ conduct, makes better socioeconomic sense in modern America. It is the sounder law. The Indiana law is an anachronism.” Id. at 602, 151 N.W.2d at 675. The first three Leflar factors were, as usual, held to be irrelevant in the case of unintentional torts.

699. 38 Wis. 2d 98, 156 N.W.2d 466 (1968).

700. In Heath, we detailed our judgment of a host-guest statute characterizing such law as archaic and not justified in the law of torts in this modern day. Likewise, the interspousal immunity has little justification. It was based upon the common-law theory of unity of person and that person was the husband. The status of women in our society with rights as well as immunities and duties is now recognized and the wife as a legal person is equal to her husband. Likewise, this state sees no social need for the existence of the doctrine of parental immunity but rather its existence works an injustice to the child . . . . In our view the existence of parental immunity in torts is not the better law.

Id. at 112-13, 156 N.W.2d at 472-73.
In *Conklin v. Horn*er,701 the court was again faced with an apparent false conflict calling for application of a foreign guest statute. As it did in *Heath*, however, the court applied Wisconsin common law by using of a two-step approach, combining interest analysis and the Leflar factors. Wisconsin had a substantial interest in this suit between two Illinois residents over a car accident in Wisconsin, because it was the forum and because the Wisconsin legislature's refusal to enact a guest statute expressed a policy in favor of deterring negligent driving on Wisconsin roads. Thus, a true conflict was presented, and the court evaluated the choice-influencing considerations. This analysis was precisely the same as it had been in *Heath*: the first three factors were irrelevant; factors four and five pointed toward the application of Wisconsin law.

Up to this point, the Wisconsin Supreme Court had espoused a two-step approach to conflicts questions. In *Hunter v. Royal Indemnity Co.*,702 however, the court abandoned the interest-analysis component and moved directly to a consideration of the Leflar factors. No longer would the court first determine whether a "true" or "false" conflict existed. The two-step technique of *Heath* was now only one step.703 The court also announced a presumption that forum law would apply whenever application of the five Leflar factors produced an inconclusive result.704 Nevertheless, the court applied Ohio law to prohibit a suit by an injured worker against a co-employee where the injured party had al-

701. 38 Wis. 2d 468, 157 N.W.2d 579 (1968).
702. 57 Wis. 2d 588, 204 N.W.2d 897 (1973).
703. We deem this method of analysis a redundancy. No useful purpose is served by a preliminary analysis that only tells us our problem is difficult. Moreover, the same considerations are in part likely to be tediously reiterated in each of the two steps. More importantly, by using the two-step analysis, what appears to be an easy choice is likely to be resolved at the first stage without a proper evaluation of the five choice-influencing considerations we adopted in *Heath*.

While the Wilcox analysis well served its purpose where once made the choice of law was apparent, we deem it more appropriate merely to determine whether there is a conflict, *i.e.*, will the choice of one law as compared to another determine the outcome. Once that is decided and the facts on their face reveal that to apply any of multiple choices of law would not constitute mere officious intermeddling, in the constitutional sense, the analysis should proceed with the law-selecting process based on the five factors approved in *Heath*.

*Id.* at 598, 204 N.W.2d at 902.

704. When a conflict exists that may constitutionally be determined by the choice of the law other than the forum, we are obliged to make the choice in light of the choice-influencing considerations. While it may be difficult to dispel innate parochial preference, the resolution of a conflict ought not be skewed by a forum preference. Nevertheless, if the choice-influencing considerations do not indicate that the foreign law is appropriate, the conflict should be resolved by the application of forum law.

*Id.* at 600, 204 N.W.2d at 903.
ready received workers’ compensation benefits and Wisconsin’s only connection with the case was as site of the accident. The court found that applying Ohio law served the consideration of predictability of results, and that the Wisconsin law favoring compensation was not demonstrably better than the Ohio law barring recovery.  

The last case decided by the Wisconsin Supreme Court was Lichter v. Fritsch. In Lichter, an Illinois resident negligently left his car unlocked, with the keys in the ignition, in the parking lot of an Illinois mental hospital. A patient at the hospital drove off in the car, eventually traveled into Wisconsin, and caused an accident, which injured the plaintiff, a Wisconsin resident. Under Illinois law the owner of the car was liable to the plaintiff, but under Wisconsin law he was not. The supreme court applied the Illinois law. This time, three of the five considerations were served by applying the foreign law: predictability of results, maintenance of interstate order and, oddly, the governmental interests of the forum. Additionally, this case is notable for the fact that the court found Wisconsin law to be the better law, and yet declined to apply it.  

In the context of tort cases, the Leflar theory has become the benchmark in Wisconsin. Leflar’s test has also been applied twice to find Wisconsin’s statute of limitations applicable.

---

705. As to the better rule of law analysis, see Hunter, 57 Wis. 2d at 610, 204 N.W.2d at 908, which stated:

The bar of co-employees’ actions does not represent merely past thinking. The trend, to the extent that it is discernible, appears to be toward barring these actions rather than permitting them. We cannot conclude, as we did in Heath, Zelinger, and Conklin, that Wisconsin’s rule of liability unmistakably represents the better law.

706. 77 Wis. 2d 178, 252 N.W.2d 360 (1977).

707. Id. at 186, 252 N.W.2d at 363-64. Rather than relying on the specific Wisconsin law implicated by the facts of this case, a non-compensatory law, the court generalized and found that Wisconsin had a broader interest in compensating injured plaintiffs. The plaintiff here was from Wisconsin.

708. The result in this case is astounding from a conflicts point of view. Lichter is probably the only case ever decided under the Leflar regime in which the forum found its own law to be better but nevertheless applied foreign law. This is truly unusual when one considers that the choice of law in tort cases ordinarily comes down to the last two factors and one of these is exclusively concerned with serving the interests of the forum. Moreover, even the better law inquiry is heavily forum-favoring since most judges feel their own law, particularly the common law which they helped forge, is the better law.

709. See American Standard Ins. Co. v. Cleveland, 124 Wis. 2d 258, 263, 369 N.W.2d 168, 171-72 (Wis. Ct. App. 1985) (Leflar factors mandate application of Wisconsin “collateral source” rule in lieu of Minnesota no-fault automobile insurance act); see also Tillett v. J. I. Case Co., 756 F.2d 591, 594-95 (7th Cir. 1985); Grabski v. Finn, 630 F. Supp. 1037, 1043 (E.D. Wis. 1986) (recent federal cases also applying the Leflar factors in tort).

The applicability of Leflar's factors in contract, however, is a bit unsettled. In the first case to reject lex loci contractus, *Urhammer v. Olson*,711 the Wisconsin Supreme Court adopted a center of gravity approach rather than the Leflar factors.712 *Urhammer* was an easy case for applying Minnesota law to an insurance contract since all contacts except the insurer's place of business were in that state.

It was in its second contracts case, however, that the supreme court adopted its current approach. *Haines v. Mid-Century Insurance Co.*713 involved a direct action suit by a Minnesota resident against her husband's Minnesota insurer for injuries suffered as a result of her husband's negligent driving in Wisconsin. The husband's insurance policy contained a family-exclusion clause, under which the insurer was not to be held liable for bodily injuries suffered by members of the insured's household. Family-exclusion clauses had been declared unenforceable by the Wisconsin legislature. The court noted its adoption of the center of gravity approach in *Urhammer*, and stated that section 188 of the Second Restatement was "the embodiment of this approach."714 At one point in the opinion, the court went so far as to say that section 188 provided the rule of decision.715 Unfortunately, the court found its cursory review of the section 188 contact points to be inconclusive, and it proceeded to analyze the case under the Leflar factors. It found Wisconsin law applicable, even though all parties were Minnesota residents: the only relevant factor here was the application of the better rule of law; Wisconsin's rule precluding enforcement of the exclusionary clause was held to be the better rule of law.716

In 1977, the supreme court again cited section 188. The court offered no analysis, instead merely summarily affirmed the trial court's ruling that Iowa law governed an insurance contract since it was the site of the insured.717 In the most recent supreme court case to engage in choice

711. 39 Wis. 2d 447, 159 N.W.2d 688 (1968).

712. See id. at 450, 159 N.W.2d at 689: "We now adopt the grouping-of-contacts approach for the resolution of conflicts questions pertaining to the validity and rights created by the provisions of a disputed contract."

713. 47 Wis. 2d 442, 177 N.W.2d 328 (1970).

714. Id. at 446, 177 N.W.2d at 330.

715. "The particular issue here is as to the validity of the family-exclusion provision and we are governed in the selection of the law to apply to that issue by the method of analysis embodied in the grouping of contacts approach of sec. 188, Restatement." Id. at 449, 177 N.W.2d at 332.

716. Id. at 451, 177 N.W.2d at 333.

of law analysis, *Schlosser v. Allis-Chalmers Corp.*, the court used the Leflar factors exclusively. It found that all five of the choice-influencing considerations pointed to application of Wisconsin law.

The two most recent contract cases, *Haines* and *Schlosser*, indicate the Wisconsin Supreme Court intends to apply Leflar across the board. However, the federal cases applying choice of law analysis in contract are wildly inconsistent. A pair of court of appeals decisions indicate that choice of law clauses will usually be given effect.

Wyoming

The Wyoming Supreme Court has so far declined to adopt a modern choice of law theory. Conflicts inquiries in this state are still guided by the rules of the First Restatement.

The prevailing rule was announced in the 1954 case of *Ball v. Ball*, in which a Montana minor sued his father for injuries suffered in the crash of an airplane piloted by the father. The crash occurred in Montana where the suit was barred. The court remarked that the rule of lex loci delicti was "supported by undoubted authority," as, in fact, it was at the time.

The court, in 1972 declined an opportunity to adopt the Second Restatement in *Brown v. Riner*. In that case, the plaintiff was injured in an automobile accident at a Wyoming air force base. Both the plaintiff and the car's driver were Colorado residents. Colorado and Wyoming

718. 86 Wis. 2d 226, 271 N.W.2d 879 (1978).
719. *Id.* at 239-40, 271 N.W.2d at 885-86.
723. The defendant consented to being sued in Wyoming. *Id.* at 35-36, 269 P.2d at 303. Sheridan, Wyoming, where the suit was filed, was apparently the nearest city to the Balls' home in Big Horn County, Montana. It was also the city where plaintiff was hospitalized following the accident. *Id.* at 34-35, 269 P.2d at 303.
724. *Id.* at 37, 269 P.2d at 304.
each had guest statutes, but there was some evidence that the plaintiff would not have been considered a guest under the Colorado statute. The court flatly rejected the plaintiff’s request to apply the Colorado statute on the basis of the Second Restatement. 726

Finally, in *Duke v. Housen,* 727 the court utilized the Wyoming borrowing statute to apply the New York statute of limitations to a claim for tortious infection with venereal disease. The plaintiff argued for application of Wyoming’s longer statute of limitations. The court noted that application of the Wyoming borrowing statute, which directed its attention to the limitations statute of the state where the cause of action arose, was “entirely consistent with the past utterances of this court with respect to causes of action arising outside the state of Wyoming.” 728 The court cited its decision in *Ball* and quoted from a legal encyclopedia reference to the place of injury rule. 729 A Tenth Circuit panel invoked *Duke v. Housen* and the lex loci delicti rule as authority in applying a Wyoming’s workers’ compensation statute, to bar a suit by an injured Wyoming worker against his Colorado coemployee for an automobile accident which occurred while the two were on company business in Wyoming. 730 A federal district court has held, citing the First Restatement, that Wyoming courts applying lex loci delicti would apply the law of the state of plaintiff’s domicile in defamation cases. 731

There have been no reported decisions in Wyoming involving choice of law in contract. Undoubtedly, the Wyoming Supreme Court would rely upon its lex loci delicti holdings as authority for applying the traditional rules in contract as well.

### III. Conclusion

In this Article, I have attempted to gather in one place the significant choice of law decisions in every state and the District of Columbia, and to provide litigants and judges with a reference which will enable

726. *Id.* at 526.
728. *Id.* at 342.
729. *Duke,* 589 P.2d at 342. The court cited to 15A C.J.S. *Conflict of Laws* § 12(2) (1967), which now reads:

For many years it has been thoroughly established as a general rule that the lex loci delicti, or the law of the place where the tort has been committed, is the law which governs and is to be applied with respect to the substantive phases of torts or the actions therefore, and determines the question of whether or not an act or omission gives rise to a right of action or civil liability for tort.

them to determine the choice of law rules currently in use in their jurisdictions.

The above survey has revealed that there is substantial disagreement among the courts in the area of choice of law methodology. The trend away from the traditional rules of lex loci delicti and lex loci contractus continues. From this common point of departure, however, courts have gone in variant directions.

About half of all states adopting a modern theory have settled on the most significant relationship test of the Second Restatement. The Restatement is a curious montage of virtually every choice of law theory imaginable, all brought together in one, almost undecipherable text. Its enactment, by a thirteen to twelve vote of the American Law Institute's Choice of Law council in 1971, appears to have produced varying effects in the courts. On the one hand, the Second Restatement provides courts with a ready means of escape from the harshness of the traditional conflict of laws rules. On the other hand, the promulgation of the Second Restatement has had a noticeable inhibitory effect on development of other choice of law methodologies. Many courts behave as if the Second Restatement were the final consummation of all modern choice of law theories, with all other methodologies subsumed therein, never to appear again. Since the Second Restatement approach has evolved in the last fifteen years, there is evidence that the expansion of other theories has been aborted.

For instance, Professor Currie's finely-tuned method of governmental interest analysis has been largely relegated to a secondary role in conflicts jurisprudence. It is used, with a few notable exceptions, not as a method of its own, but as one of several considerations listed at section 6 of the Second Restatement to be used in the discovery of the most significant relationship. Likewise, Professor Leflar's analysis has been incorporated in various provisions of section 6, but is no longer being adopted as a choice of law approach in its own right, as had been the case in the years immediately preceding adoption by the ALI of the most significant relationship test.

In short, the most notable event to take place in conflicts jurisprudence during the last twenty years has had both a broadening and inhibiting effect on the development of theory into practice. Certainly the Second Restatement is a far superior mechanism for resolving choice of law disputes than was its predecessor. Unfortunately, judicial skill in manipulating this difficult test has varied. Continued growth and development in this area of the law will require an increased sophistication among the members of the legal profession. An ability to recognize and
distinguish among choice of law systems is an essential ingredient in this growth of understanding.
## Appendix

The following chart indicates in capsule form the choice of law methods currently in use in the fifty states and the District of Columbia.

<table>
<thead>
<tr>
<th></th>
<th>First</th>
<th>Second</th>
<th>Center of Interest</th>
<th>Fuld's Lex</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Restatement</td>
<td>Restatement</td>
<td>Gravity Analysis</td>
<td>Leflar Cavers Rules Fori</td>
</tr>
<tr>
<td>AL</td>
<td>Tort</td>
<td>Contract</td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>AK</td>
<td>Tort</td>
<td>Contract</td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>AZ</td>
<td>Tort</td>
<td>Contract</td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>AR</td>
<td>Tort</td>
<td>Contract</td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>CA</td>
<td>Tort</td>
<td>Contract</td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>CO</td>
<td>Tort</td>
<td>Contract</td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>CT</td>
<td>Tort</td>
<td>Contract</td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>DE</td>
<td>Tort</td>
<td>Contract</td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>DC</td>
<td>Tort</td>
<td>Contract</td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>FL</td>
<td>Tort</td>
<td>Contract</td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>GA</td>
<td>Tort</td>
<td>Contract</td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>HI</td>
<td>Tort</td>
<td>Contract</td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>ID</td>
<td>Tort</td>
<td>Contract</td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>IL</td>
<td>Tort</td>
<td>Contract</td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>IN</td>
<td>Tort</td>
<td>Contract</td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>IA</td>
<td>Tort</td>
<td>Contract</td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>KS</td>
<td>Tort</td>
<td>Contract</td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>KY</td>
<td>Tort</td>
<td>Contract</td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>LA</td>
<td>Tort</td>
<td>Contract</td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>ME</td>
<td>Tort</td>
<td>Contract</td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>MD</td>
<td>Tort</td>
<td>Contract</td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>State</td>
<td>Contract</td>
<td>Tort</td>
<td>Restatement Restatement</td>
<td>Center of Interest Gravity Analysis Leflar Cavers Rules Fori</td>
</tr>
<tr>
<td>-------</td>
<td>----------</td>
<td>------</td>
<td>--------------------------</td>
<td>----------------------------------------------------------</td>
</tr>
<tr>
<td>MA</td>
<td>X</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>MI</td>
<td>X</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>MN</td>
<td>X</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>MS</td>
<td>X</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>MO</td>
<td>X</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>MT</td>
<td>X</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>NE</td>
<td>X</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>NV</td>
<td>X</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>NH</td>
<td>X</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>NJ</td>
<td>X</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>NM</td>
<td>X</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>NY</td>
<td>X</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>NC</td>
<td>X</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>ND</td>
<td>X</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>OH</td>
<td>X</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>OK</td>
<td>X</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>OR</td>
<td>X</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>PA</td>
<td>X</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>RI</td>
<td>X</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>SC</td>
<td>X</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>SD</td>
<td>X</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>TN</td>
<td>X</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>TX</td>
<td>X</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

August 1987

CHOICE OF LAW

1173
<table>
<thead>
<tr>
<th>State</th>
<th>Tort</th>
<th>Contract</th>
<th>First Restatement</th>
<th>Second Restatement</th>
<th>Center of Interest</th>
<th>Gravity</th>
<th>Analysis</th>
<th>Lex Leflar</th>
<th>Cavers Rules</th>
<th>Fori</th>
</tr>
</thead>
<tbody>
<tr>
<td>UT</td>
<td></td>
<td></td>
<td>X</td>
<td>X</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>VT</td>
<td></td>
<td></td>
<td>X</td>
<td>X</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>VA</td>
<td></td>
<td></td>
<td>X</td>
<td>X</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>WA</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>X</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>WV</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>WI</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>WY</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>TOTAL</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>18</td>
<td>16</td>
<td>1</td>
<td>5</td>
<td>7</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>23</td>
<td>16</td>
<td>5</td>
<td>4</td>
<td>3</td>
</tr>
</tbody>
</table>

**Notes:**
- X indicates a mention or relevance in the specified category.