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THE FIRST RESTATEMENT OF CONFLICT OF LAWS ON THE
TWENTY-FIFTH ANNIVERSARY OF ITS SUCCESSOR:
CONTEMPORARY PRACTICE IN
TRADITIONAL COURTS

WILLIAM M. RICHMAN*
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INTRODUCTION

Twenty-five years after the adoption of its successor,\(^1\) the first Restatement of Conflict of Laws\(^2\) persists as the dominant choice-of-law methodology in eleven states and as an important part of the conflicts landscape in five more.\(^3\) Say what you will, it's got legs. But do contemporary First Restatement courts apply the same wooden, mechanical, choice-of-law system we teach our students in the conflicts survey course? Does the system still rely on the metaphysics of vested rights? Does it persist in applying the law of the disinterested state in false conflicts cases? Are choice-of-law clauses still disfavored? Do the courts continue to avoid egregious results via manipulation of the rules and the escape devices of recharacterization, renvoi, and public policy? Finally, with the passing of guest statutes, what substantive law issues remain to provide the fodder for the system?

With these questions in mind, I examined appellate decisions from 1971 through 1996 in the states usually considered to be adherents to the First Restatement.\(^4\) The goal of this Article is a description of the First Restatement as a current (if not modern) choice-of-law regime and a comparison of that current regime with the traditional First Re-

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** I wish to thank David Riley, J.D., 1997, University of Toledo College of Law. Mr. Riley served as research assistant for this project, but his contributions went far beyond that role. Although he did not share in drafting this Article, his research and analysis were invaluable. Moreover, after a while, I began to notice that he gave me no time cards to sign. When I asked him about that, he said that he had been awarded a third-year tuition scholarship by the college (he graduated first in his class), and thus did not think he should be paid for his research.

2. RESTATEMENT OF CONFLICT OF LAWS (1934).
3. See infra tbl.II.
4. I used the states identified in Gregory E. Smith, Choice of Law in the United States, 38 Hastings L.J. 1041 app. at 1172-74 (1987), mostly for sentimental reasons. Smith was a student in my conflicts course, and his article, now widely cited by the courts, was his seminar paper for that course.
statement system that existed in the middle of this century, unmodified by the choice-of-law revolution. The idea, in other words, is to determine how the Second Restatement and the choice-of-law revolution have affected theory and practice in the courts that still claim to adhere to the First Restatement. Part I briefly discusses First Restatement theory and practice before the conflicts revolution. Part II then analyzes the more contemporary cases in the states that continue to apply the First Restatement.

I. TRADITIONALISM UNMODIFIED: PRE-REVOLUTIONARY THEORY AND PRACTICE

According to the standard account, the theoretical basis for the First Restatement system for choice-of-law was the vested rights theory. Developed in this country by Joseph H. Beale and in England by A.V. Dicey, the theory explained the forum's use of foreign legal rules in terms of the creation and enforcement of vested rights. According to the theory, the only law that could operate in a foreign territory was the law of the foreign sovereign. When an event (a tort, for example) occurred in the foreign territory, a right was created; the content of that right, of course, could be determined only by reference to the foreign law. The role of the forum court in the choice-of-law process was merely to enforce the right that had vested in the foreign territory according to the foreign law.

Crucial for practice under the vested rights theory was to determine when and where a particular right vested, because the law in place where the right vested would control the content of the right. The theory spawned a series of rules, each governing a major area of the law, such as torts, contracts, and property, that controlled the choice-of-law process by identifying a particular contact as the trigger for the vesting of a right. Thus, courts referred tort choice-of-law issues to the law of the place of injury, contract issues to the law of the
place of making, and property matters to the law of the situs of the land.

Choice-of-law practice in mid-century *First Restatement* courts thus depended upon a few broad, single-contact, jurisdiction-selecting rules moderated by three escape devices. Because the rules were few and broad, courts lumped together cases and issues that seemed quite unrelated. In tort cases, for example, traditionalist courts prescribed the law of the place of injury for all torts, from defamation to battery to misrepresentation. On the other hand, the *First Restatement's* categories sometimes separated problems that should have been closely linked. In a two-count product liability case, for example, *First Restatement* courts traditionally applied the law of the place of injury to the strict liability tort count, and the law of the place of making to the implied warranty count.

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12. See *id.* at 1288-1305.

13. See *id.* at 933. Walter Wheeler Cook led the attack on the vested rights theory even before the adoption of the *First Restatement* in 1934. See Walter W. Cook, *The Logical and Legal Bases of Conflict of Laws*, 33 *Yale L.J.* 457 (1924); see also Ernest G. Lorenzen, *Territoriality, Public Policy and the Conflict of Laws*, 33 *Yale L.J.* 736, 743 (1924) (citing confusion within the case law); Hessel Yntema, *The Hornbook Method and the Conflict of Laws*, 37 *Yale L.J.* 468, 477-83 (1928) (questioning the methodology behind the vested rights theory). The attack relied on the legal realist theory that a right is merely a prediction that a court will recognize a plaintiff's claim. See Oliver W. Holmes, *The Path of the Law*, 10 *Harv. L. Rev.* 457, 460-61 (1897) (distinguishing between rights in a moral sense and rights enforceable by the courts); see also R.W.M. Dias, *Jurisprudence* 619-36 (1976) (providing a history of legal realist thinking). According to the predictive theory, rights do not exist independently before courts enforce them; thus it made no sense to speak of "enforcing vested rights" in choice-of-laws cases. See Cook, *supra*, at 478. Until the court decided a case, there was no right for it to enforce. See *id.*

Cook also argued that the vested rights theory was an inaccurate account of the courts' actual choice-of-law practice. See *id.* at 467-70. According to the predictive theory, a "foreign right" is a prediction about what a foreign court would do if faced with the exact facts of the case at bar. See *id.* at 481. To make such a prediction, the forum court would have to apply the foreign choice-of-law rules as well as the foreign internal rule; in other words, the court would have to apply the doctrine of *renvoi*. See *id.* at 468-69. Because courts do not routinely apply the doctrine of *renvoi* to all choice-of-law problems, Cook concluded that the enforcement of vested rights was not a useful model to explain choice-of-law decisions. See *id.* at 469.


15. See *id.* at 134-35.


17. Compare *id.* § 379 cmt. F, with *id.* § 323 illus. 4.
The rules were jurisdiction-selecting, and thus courts picked between competing states, rather than competing rules. Traditionalist courts did not consider the content of the substantive rules of law until after the state had been chosen. Accordingly, these courts were not concerned with which law was "better" or which law validated the parties' intentions, nor did they consider whether the policy behind the chosen substantive law could be advanced by applying it in the particular case. As a result, in false conflicts cases, First Restatement courts often chose the law of a state with no interest in the resolution of the dispute.

Further, because the rules relied upon only a single connection between the dispute and the state, courts could select the law of a state that was only minimally connected to the case. The place-of-making rule, for instance, chose the law of the state where the contract was executed, no matter how fortuitous, even though another state was the site of negotiation, performance, and the residence of the parties.

Faced with unpalatable results, traditionalist courts sometimes attempted to evade the simple, hard-and-fast rules by manipulating them or by employing conceptualistic escape devices—recharacterization, renvoi, and public policy. Although these evasive maneuvers produced better results in individual cases, they threatened to

18. See, e.g., id. §§ 214 (law of the state where the thing is), 332 (law of the place of contracting), 378 (law of the place of the wrong), 121 (law of the state where the contract of marriage takes place), 303 (law of the state of decedent's domicile) (emphasis added). David Cavers invented the term "jurisdiction-selecting" and opposed it to choice-of-law rules that were law-selecting or content-selecting. See David Cavers, A Critique of the Choice-of-Law Problem, 47 Harv. L. Rev. 173, 194 (1933); see also Robert Leflar et al., American Conflicts Law 283 (4th ed. 1986).
19. See, e.g., Alabama Great S. R.R. Co. v. Carroll, 11 So. 803, 809 (Ala. 1892) (applying Mississippi law even though Alabama was the only interested state).
21. See, e.g., Milliken v. Pratt, 125 Mass. 374, 383 (1878) (interpreting a contract between a Massachusetts wife and a Maine creditor to be a unilateral contract formed in Maine by the creditor's performance, a maneuver that resulted in Massachusetts's place-of-making rule's referring to Maine capacity law, which validated the contract).
22. See, e.g., Duckwall v. Lease, 20 N.E.2d 204, 211 (Ind. App. 1939) (using "equitable conversion" to save a testamentary gift from Indiana's lapse rule by characterizing the property as personal rather than real).
compromise the First Restatement's vaunted virtues of simplicity, predictability, and forum neutrality.  

II. CONTEMPORARY THEORY AND PRACTICE

A. Allegiance

1. A Dwindling Minority.—The first question to consider in assessing the current state of the First Restatement is its prevalence; how many states continue to use it in any form? As anyone who reads conflicts opinions or surveys knows, counting and classifying is problematic. Opinions are eclectic; federal courts incorrectly predict decisions of state supreme courts, and there is the significant question of dictum versus holding. Tables 1 and 2 summarize two groups of surveys. Table 1 is the group contained in the American Journal of Comparative Law, compiled by P. John Kozyris, Symeon C. Symeonides, and Michael E. Solimine. Table 2 summarizes surveys compiled by Herma Kay, Greg Smith, Patrick Borchers, and William M. Richman, published in other journals. Differences are small and relatively insignificant, and the trend is clear in both. The results, indicated in both tables, clearly show that adherence to the First Restatement is in decline, and, moreover, that the decline has continued steadily since the first wave of defections accompanying the Second Restatement and the choice-of-law revolution. From twenty-nine in 1983, the total number of states using any substantial part of the First Restatement declined to twenty-five in 1986, nineteen in 1992, and sixteen today. In sum, nine states have abandoned the system in the last decade, and three defections occurred over the last three years.

Further, the current total of sixteen clearly overstates the prevalence of the traditional system. Only eleven states use the First Restatement as their predominant choice-of-law methodology. Four more states use it in contracts, but have switched to one of the more modern methods for tort cases. Only one state, Montana, is listed as doing the reverse (First Restatement for torts, modern method for contracts), but the listing is really by default because Montana has not decided a tort choice-of-law case in the last twenty-five years.

25. See infra notes 49-51 and accompanying text; see also Restatement of Conflict of Laws at viii-ix (1934) (citing the purpose of the Restatement as “certainty and clarity”).
26. See infra tbl.II.
27. See supra tbl.II.
28. See supra tbl.II.
29. See supra tbl.II.
30. See Herma Hill Kay, Theory into Practice: Choice of Law in the Courts, 34 MERCER L. REV. 521 app. at 591 (1983); Smith, supra note 4, at 1093-94.
Finally, adherence to the *First Restatement*, even within the listed states, is spotty and full of exceptions for statutory choice-of-law rules,\textsuperscript{31} Uniform Commercial Code (U.C.C.) cases,\textsuperscript{32} insurance cases,\textsuperscript{33} workers’ compensation disputes,\textsuperscript{34} and choice-of-law clauses.\textsuperscript{35}

\textsuperscript{31} See *infra* note 86 and accompanying text.
\textsuperscript{32} See *infra* Part II.B.4.
\textsuperscript{33} See *infra* Part II.D.
\textsuperscript{34} See *infra* Part II.B.3.
2. To Retain or Abandon.—The reasons articulated in recent opinions retaining the *First Restatement* are mostly familiar. A mild surprise is that the vested rights theory—the *First Restatement*'s original


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35. See infra Part II.B.1.
theoretical foundation—is almost dead. Only two recent interme-
diate appellate decisions in North Carolina rely on it at all. Strangely,
the most recent of these decisions treats the theory as though it were
alive and well, in language suggesting a jurisprudential time-warp:

The law of the place where the injury occurs controls tort
claims, because an act has legal significance only if the jurisdic-
tion where it occurs recognizes that legal rights and obliga-
tions ensue from it. . . . "If a legal right arises at the locus
[of the injury], this right vests in the injured party and he
may enforce it not only at the locus but in the courts of other
states and nations as well. If no right exists at the locus,
there is none to enforce anywhere." Somewhat more modern, but still in the same vein, is an opinion rely-
ing on comity and one highlighting the interests of the place of in-
jury in regulating wrongful conduct there. Legal process concerns motivated other courts to retain the tradi-
tional system. Some opinions appeal simply to stare decisis. Others
suggest that any change from *lex loci* (law of the place) should be the
province of the state’s highest court or its legislature.

By far, however, the most frequently cited reasons to retain the
traditional system are the vices of the more modern choice-of-law ap-
proaches. Among them is one that sounds strange to the modern

ing that all legal rights vest in state where injury takes place); Chewning v. Chewning, 201

37. Terry, 376 S.E.2d at 49 (quoting Seymour W. Wurfel, *Choice of Law Rules in North

38. See Abendschein v. Farrell, 170 N.W.2d 137 (Mich. 1969). In his opinion, Justice
Black notes:

> "Attempts to make the law or public policy of New York State prevail over the laws
and policies of other States where citizens of New York State are concerned are
simply a form of extraterritoriality which can be turned against us wherever ac-
tions are brought in the courts of New York which involve citizens of other
States."

*Id.* at 142 (quoting Babcock v. Jackson, 191 N.E.2d 279, 286 (N.Y. 1963) (Van Voohtis, J.,
dissenting)).


40. See, e.g., Winters v. Maxey, 481 S.W.2d 755, 756 (Tenn. 1972) ("In regard to torts
the rule has long prevailed in Tennessee that absent public policy the law of the place
where the tort occurred would control." (citations omitted)).

41. See, e.g., Commercial Union Ins. Co. v. Porter Hayden Co., 630 A.2d 261, 269 (Md.
Ct. Spec. App. 1992) ("[C]hanging the law in Maryland is the province of the Court of
Appeals and the General Assembly."); Abendschein, 170 N.W.2d at 140-41 ("[A]ny repudia-
tion of our standing rule *lex loci* should be made by some legislative measure . . ."); Wil-
28, 1988) (noting court must follow decisions of legislature or state supreme court).
Several opinions remark that the states that have discarded the traditional system have failed to reach a consensus on a replacement, adhering variably to the center-of-gravity, significant-relationship, interest analysis, and choice-influencing considerations.\(^2\) Worse yet, according to one court, are the confusing and uneven results that occur within a single state after abandoning \textit{lex loci}:

It was perhaps recognition of just such gross disparities in result that prompted the Court of Appeals of New York to remark, in a towering achievement in the art of understatement, “candor requires the admission that our past decisions have lacked a precise consistency.”\(^4\)

The modern systems are thought to be “confusing,”\(^4\) unpredictable,\(^4\) manipulable,\(^4\) result oriented,\(^4\) and incapable of providing guidance to the courts.\(^4\)

In contrast, traditionalist courts found the virtues of the \textit{First Restatement} to be “stability,”\(^4\) “predictability and certainty,”\(^4\) and “ease of application.”\(^4\) The most spirited defense of the traditional, rule-based system comes in \textit{Paul v. National Life}.\(^5\) Citing a Wisconsin case endorsing the \textit{Second Restatement} as a “method of analysis that permit[ted] dissection of the jural bundle constituting a tort and its environment,”\(^5\) the West Virginia Supreme Court of Appeals responded:

\(^{42}\) See, e.g., Fitts v. Minnesota Mining & Mfg. Co., 581 So. 2d 819, 822 (Ala. 1991) (“[J]urisdictions are not unanimous as to what th[e] ‘modern approach’ should be.”); General Tel. Co. v. Trimm, 311 S.E.2d 460, 462 (Ga. 1984) (citing other jurisdictions as saying that the center-of-gravity rule is just as confusing as the traditional approach); State Farm Mut. Ins. Co. v. Conyers, 784 P.2d 986, 990 (N.M. 1989) (noting confusion between significant-relationship test and \textit{lex loci contractus} test); First Nat’l Bank v. Benson, 553 P.2d 1288, 1289 (N.M. 1976) (noting that the “significant contacts choice-of-law” rule is in a “state of uncertainty”); Williaford, 1988 WL 77627, at *4 (noting that “no significant progress toward uniformity” had been made since an earlier higher court opinion).


\(^{44}\) Conyers, 784 P.2d at 990.

\(^{45}\) See Benson, 553 P.2d at 1289 (recognizing that choice-of-law decisions are often based on each judge’s individual views as to what is just).

\(^{46}\) See Paul, 352 S.E.2d at 554 (explaining how courts can manipulate results under the modern and traditional systems).

\(^{47}\) See Benson, 553 P.2d at 1290 (noting that the result of a case depends on who the judge wishes to protect).


\(^{49}\) Sturiano v. Brooks, 523 So. 2d 1126, 1129 (Fla. 1988).

\(^{50}\) Hauch v. Connor, 453 A.2d 1207, 1209 (Md. 1983).

\(^{51}\) Paul, 352 S.E.2d at 555. The West Virginia Supreme Court of Appeals also observed that other virtues of the \textit{First Restatement} are “consistency” and “predictability.” \textit{Id.}\(^{52}\)

\(^{52}\) 352 S.E.2d 550 (W. Va. 1986).

\(^{53}\) \textit{Id.} at 554.
That sounds pretty intellectual, but we still prefer a rule. The lesson of history is that methods of analysis that permit dissection of the jural bundle constituting a tort and its environment produce protracted litigation and voluminous, inscrutable appellate opinions, while rules get cases settled quickly and cheaply.\(^5^4\)

The court in \textit{Paul} determined that most of the dissatisfaction with the traditional system arose in cases involving guest statutes, intrafamily immunity, and contributory negligence. Yet these doctrines are rapidly disappearing, leaving reform-oriented courts with cumbersome, modern choice-of-law systems that produce mischief long after the substantive-law evils that provoked them have disappeared.\(^5^5\) Finally, faced with the argument that the system of escape devices had robbed the \textit{First Restatement} of its claimed virtues of certainty, uniformity, and predictability, the \textit{Paul} court responded with an unanswerable piece of traditional choice-of-law logic:

There is certainly some truth in this, and we generally eschew the more strained escape devices employed to avoid the sometimes harsh effects of the traditional rule. Nevertheless, we remain convinced that the traditional rule, for all of its faults, remains superior to any of its modern competitors. Moreover, if we are going to manipulate conflicts doctrine in order to achieve substantive results, we might as well manipulate something we understand. Having mastered marble, we decline an apprenticeship in bronze. We therefore reaffirm our adherence to the doctrine of \textit{lex loci delicti} today.\(^5^6\)

Courts that have recently abandoned the \textit{First Restatement} note that it no longer fits the times.\(^5^7\) The vested rights theory, with its excessive emphasis on the sanctity of state boundaries, makes little sense in an increasingly mobile world.\(^5^8\) As a result, the consensus of states has moved away from the \textit{lex loci} and toward the modern methods; oddly, that shifting consensus is the most frequently cited reason

\(^{54}\) \textit{Id.}

\(^{55}\) \textit{See id. at} 551-52.

\(^{56}\) \textit{Id. at} 556.

\(^{57}\) \textit{See, e.g.,} Travelers Indem. Co. v. Lake, 594 A.2d 38, 46 (Del. 1991) (abandoning the \textit{lex loci delicti} choice-of-law standard because “it is a doctrine that has lost its place in the growth of modern law”); Hataway v. McKinley, 830 S.W.2d 53, 57 (Tenn. 1992) (concluding that the doctrine of \textit{lex loci} is outmoded because of changes in society”).

\(^{58}\) \textit{See Lake,} 594 A.2d at 44; \textit{Hataway,} 830 S.W.2d at 57.
to join the exodus. Some courts citing the lost consensus indicate that it robs the First Restatement of one of its principal selling points—national uniformity and thus forum neutrality. Therefore, reliance on lost consensus is not merely an argument based on jurisprudential "fashion."

Other courts abandoned the lex loci doctrine because of its serious practical flaws; it produces harsh results, ignores state interests, and applies the law of a state with no significant contact with the dispute. Still others left the fold not for programmatic reasons but because an alternative, modern approach yielded a better solution to the particular choice-of-law issue before the court. Finally, rule manipulation and the system of escape devices were the impetus in several opinions. Although those maneuvers ameliorated the most obvious defects of the First Restatement, they sacrificed the certainty, predictability, and ease of application that are the lex loci's principal virtues.

3. Divided Loyalties.—Four states—Florida, Connecticut, Tennessee, and Oklahoma—have abandoned the First Restatement for tort cases, but retain it for contract cases. This divided approach is clear-

59. See Wallis v. Mrs. Smith's Pie Co., 550 S.W.2d 453, 456 (Ark. 1977) (in banc); O'Connor v. O'Connor, 519 A.2d 13, 20 (Conn. 1986); Lake, 594 A.2d at 44-45; Sturiano v. Brooks, 523 So. 2d 1126, 1129 (Fla. 1988); Hataway, 830 S.W.2d at 56.

60. See, e.g., O'Connor, 519 A.2d at 20 (noting that "lex loci's arguable advantages of uniformity and predictability have been undermined by its widespread rejection by courts...that avoid its strict interpretation"); Sexton v. Ryder Truck Rental, Inc., 320 N.W.2d 843, 849-50 (Mich. 1982) (suggesting that, because a number of jurisdictions no longer follow lex loci delicti, the rule loses its principle virtues of certainty and predictability).

61. See, e.g., O'Connor, 519 A.2d at 18; Sexton, 320 N.W.2d at 849; Motenko v. MGM Dist., Inc., 921 P.2d 933, 934 (Nev. 1996).

62. See, e.g., O'Connor, 519 A.2d at 18; Lake, 594 A.2d at 44; Sexton, 320 N.W.2d at 849; Hataway, 830 S.W.2d at 56.

63. See, e.g., O'Connor, 519 A.2d at 20 (rejecting lex loci in part because it ignores the interest of the common domicile of the tort plaintiff and defendant in favor of the state of injury, which had no interest in the case); Bishop v. Florida Specialty Paint Co., 389 So. 2d 999, 1001 (Fla. 1980) (adopting the Second Restatement's significant-relationship test because it "recognizes that the state where the injury occurred may have little actual significance for the cause of action").

64. See, e.g., Sweeney v. Sweeney, 262 N.W.2d 625, 628 (Mich. 1978) (rejecting the lex loci delicti approach because it conflicted with Michigan public policy); Forsman v. Forsman, 779 P.2d 218, 219 (Utah 1989) (adopting the Second Restatement's modern approach because it yielded a more desirable result in this case involving interspousal immunity).

65. See O'Connor, 519 A.2d at 20; Lake, 594 A.2d at 45-46; Hataway, 830 S.W.2d at 56.

66. See supra notes 49-51 and accompanying text.

67. See infra notes 68-88 and cases cited therein. Two additional states might also fit this description, but their choice-of-law jurisprudence is too unclear to be certain. In Vermont, the problem is the lack of unambiguous supreme court decisions. In Amiot v. Ames,
est in Florida, where the state supreme court abandoned the law of the place of injury in *Bishop v. Florida Specialty Paint Co.*\(^6\) in 1980, but announced its continued adherence to the place-of-contracting rule in *Sturiano v. Brooks*\(^6\) in 1988. Unlike most courts that split their allegiances, the *Sturiano* court offered a principled reason for its divided loyalty:

> We recognize that this Court has discarded the analogous doctrine of lex loci delicti with respect to tort actions and limitations of actions. However, we believe that the reasoning controlling those decisions does not apply in the instant case. With tort law, there is no agreement, no foreseen set of rules and statutes which the parties had recognized would control the litigation. In the case of an insurance contract, the parties enter into that contract with the acknowledgment that the laws of that jurisdiction control their actions. In essence, that jurisdiction's laws are incorporated by implication into the agreement. The parties to this contract did not bargain for Florida or any other state's laws to control. We

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\(^6\) 693 A.2d 675, 677 (Vt. 1997), the court finally confirmed its adoption of the *Second Restatement* for torts. The state's contract jurisprudence is unclear. In *Pioneer Credit Corp. v. Carden*, 245 A.2d 891 (Vt. 1968), the court discussed the place-of-making rule and center-of-gravity approach, but failed to apply either because of a failure of the parties to prove the foreign law. *Id.* at 893-94. In *Hitchcock Clinic, Inc. v. Mackie*, 648 A.2d 817 (Vt. 1993), the court characterized the issue of a wife's liability for her husband's debt as a domestic relations matter rather than a contract problem and applied the law of the marital domicile rather than the place of contract. The court then helpfully suggested that the marital domicile had the "paramount interest," thus showing the same result followed under traditional and modern systems. *Id.* at 818-19.


Arkansas probably does not divide its loyalties between traditional and modern systems, but it is hard to tell for sure. In torts cases, the court is clear regarding its adherence to the homegrown choice-influencing considerations of Professor Leflar. See *Wallis v. Mrs. Smith's Pie Co.*, 550 S.W.2d 453, 456 (Ark. 1977) (in banc). In contract cases, however, Arkansas has vacillated. *McMillen v. Winona National & Savings Bank*, 648 S.W.2d 460 (Ark. 1983), and *Standard Leasing Corp. v. Schmidt Aviation, Inc.*, 576 S.W.2d 181 (Ark. 1979) (in banc), applied a "significant contacts" approach. *McMillen*, 648 S.W.2d at 462; *Standard Leasing*, 576 S.W.2d at 184. Nonetheless, *Stacy v. St. Charles Custom Kitchens, Inc.*, 683 S.W.2d 225 (Ark. 1985), may have reverted to the place-of-contracting rule. *Id.* at 227. In *Stacy*, the court applied the law of the state where the contract was signed because both states had substantial connections to the contract and the contracting state's law made the contract "valid rather than void." *Id.* Symeonides classifies Arkansas as a "significant contacts" jurisdiction for contract cases. See Symeonides, *supra*, at 196.

\(^6\) 68. 389 So. 2d 999, 1001 (Fla. 1980).

\(^6\) 69. 523 So. 2d 1126, 1129 (Fla. 1988).
must presume that the parties did bargain for, or at least expected, New York law to apply.\textsuperscript{70}

Almost as clear is the situation in Connecticut. After opting for the Second Restatement in \textit{O'Connor v. O'Connor}\textsuperscript{71}—a no-fault automobile accident case—the Connecticut Supreme Court nevertheless retained the place-of-contracting rule in \textit{Williams v. State Farm Mutual Automobile Insurance Co.}\textsuperscript{72}

In \textit{Williams}, an underinsured tortfeasor injured the plaintiff, a Connecticut resident, in New York.\textsuperscript{73} The lower courts applied the most-significant-relationship test from \textit{O'Connor} and chose New York law, thereby denying recovery.\textsuperscript{74} The plaintiff appealed to the Connecticut Supreme Court, arguing that the place-of-contracting rule required application of Connecticut law.\textsuperscript{75} The court agreed with the plaintiff's contract choice-of-law analysis, but ultimately applied New York law because the contract permitted recovery only if the plaintiff was "legally entitled to collect" damages, a phrase that the court held required a reference to the tort law of New York, the injury state.\textsuperscript{76}

The choice-of-law split between contract and tort is somewhat less certain in Tennessee, because its supreme court has not ratified it. In \textit{Hataway v. McKinley},\textsuperscript{77} the Tennessee Supreme Court clearly abandoned the place-of-injury rule, but has not made a definite contract ruling since then.\textsuperscript{78} In \textit{Walker v. Freeman},\textsuperscript{79} however, the Tennessee Court of Appeals held that \textit{Hataway} applied only to tort cases and that the place-of-contracting rule remains valid in Tennessee.\textsuperscript{80}

The choice-of-law split between contract and tort is the least clear in Oklahoma. Although in 1974 its supreme court made a clean break with the place-of-injury rule in \textit{Brickner v. Gooden},\textsuperscript{81} the situation

\begin{itemize}
\item 70. \textit{Id.} at 1130 (footnotes omitted).
\item 71. 519 A.2d 13, 21-22 (Conn. 1986).
\item 72. 641 A.2d 783, 787 (Conn. 1994).
\item 73. \textit{Id.} at 784-85.
\item 74. \textit{Id.} at 785.
\item 75. \textit{Id.} at 786.
\item 76. \textit{Id.} at 787. I would be completely confident about my reading of this case, and thus certain of Connecticut's divided loyalties, except that Professor Symeonides, who probably has read more American choice-of-law decisions than anyone, reads \textit{Williams} as a Second Restatement case. \textit{See} Symeonides, supra note 67, at 199 n.106.
\item 77. 830 S.W.2d 53 (Tenn. 1992).
\item 78. \textit{Id.} at 59.
\item 80. \textit{Id.} at *3.
\item 81. 525 P.2d 692, 637 (Okla. 1974) ("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.").
\end{itemize}
in contract cases is more complicated. The Oklahoma Supreme Court, like most current First Restatement courts, is particularly hospitable to choice-of-law clauses and uses section 187 of the Second Restatement to evaluate them. As a result, a fair amount of most-significant-relationship discussions appear in Oklahoma Supreme Court opinions. That, without more, however, does not portend a break with the traditional system, because acceptance of choice-of-law clauses and reference to section 187 have become routine in First Restatement states.

In non-choice-of-law clause cases, an Oklahoma statute governs contract choice-of-law and requires interpretation of the contract according to the "law...of the place where it is to be performed, or, if it does not indicate a place of performance, according to the law...of the place where it is made." Under the influence, if not the command, of the statute, the Oklahoma Supreme Court adheres to the First Restatement but cheerfully supplies plenty of most-significant-relationship dicta from the Second Restatement.

Complicating matters further, the court also has interpreted the statute to permit an exception for auto insurance contract cases, which are referred to the law of the place of making unless the terms of the contract violate Oklahoma public policy, or unless "another jurisdiction has the most significant relationship with the subject matter and the parties." A fair conclusion is that Oklahoma is probably still a place-of-making state, but that it is teetering on the brink of adopting the Second Restatement.

Currently, no state divides loyalties in the opposite fashion—using the First Restatement in tort cases and a modern method in contract cases—although two states provoke some controversy. Wyoming clearly retains the place-of-injury rule. In contract cases, the court

82. See supra Part II.A.1. and cases cited therein.
84. See Symeonides, supra note 67, at 200 n.121 ("In general, reliance on [section] 187 with regard to choice-of-law clauses does not necessarily portend a more general adoption of the Restatement Second for other issues of contract conflicts.").
85. See infra notes 116-119 and cases cited therein.
89. Montana is the third possibility. Its supreme court adopted the Second Restatement for contract cases in Casarotto v. Lombardi, 886 P.2d 931, 934-35 (Mont. 1994), but has not decided a tort case since Lewis v. Reader's Digest Ass'n, 512 P.2d 702, 706 (Mont. 1973) (applying the place-of-injury rule to a libel action).
90. See Jack v. Enterprise Rent-A-Car Co., 899 P.2d 891, 894 (Wyo. 1995) ("It is thoroughly established as a general rule that the lex loci delicti, or the law of the place where
uses section 187 for choice-of-law clauses, \(^\text{91}\) and in its U.C.C. cases uses the Second Restatement’s most-significant-relationship formula to interpret the section 1-105 “appropriate relation” provision. \(^\text{92}\) Nevertheless, the use of section 187 and the U.C.C. choice-of-law provisions—practices common in several First Restatement states—does not guarantee abandonment of the place-of-making rule. \(^\text{93}\)

The North Carolina Supreme Court has announced that the state will follow the First Restatement in both tort cases and contract cases. \(^\text{94}\) In contracts, however, two lines of cases confuse matters somewhat. One set, dealing with U.C.C. warranty issues, reads section 1-105’s “appropriate relation” language to mean the same as the Second Restatement’s most-significant-relationship test. \(^\text{95}\) Yet once again, this maneuver—common in traditional courts—probably does not signify general abandonment of the place-of-making rule.

The second line of cases applies a North Carolina statute which provides that all contracts insuring risks in North Carolina “shall be deemed to have been made within this State and are subject to the laws thereof.” \(^\text{96}\) The result, although perfectly consistent with section 193 of the Second Restatement, \(^\text{97}\) is dependent entirely upon the statute

the tort or wrong has been committed, is the law that governs and is to be applied with respect to the substantive phases of torts or the actions therefor . . . .” (quoting Ball v. Ball, 269 P.2d 302, 304 (Wyo. 1954) (internal quotations omitted)).

91. See, e.g., Resource Tech. Corp. v. Fisher Scientific Co., 924 P.2d 972, 975 (Wyo. 1996) (following section 187’s rule to apply the law of the state chosen by the parties in their contract so long as it will not be contrary to the law, public policy, or the general interest of the forum state).

92. See, e.g., Cherry Creek Dodge, Inc. v. Carter, 733 P.2d 1024, 1029 (Wyo. 1987) (applying “the law of the state bearing an appropriate relation to the totality of the transaction” to a case involving a contract governed by the U.C.C.).

93. See infra notes 140-145 and accompanying text.

94. See Braxton v. Anco Elec., Inc., 409 S.E.2d 914, 915 (N.C. 1991) (“We do not hesitate in holding that as to the tort law controlling the rights of the litigants in the lawsuit allowed by this decision, the long-established doctrine of lex loci commissi applies.”); Boudreau v. Baughman, 368 S.E.2d 849, 853-54 (N.C. 1988) (applying lex loci in a breach of warranty case).

95. See Boudreau, 368 S.E.2d at 855.

96. N.C. GEN. STAT. § 58-3-1 (1996); see also, e.g., Collins & Aikman Corp. v. Hartford Accident & Indem. Co., 416 S.E.2d 591, 594 (N.C. 1992) (applying § 58-3-1 to hold that an insurance policy shall be subject to the laws of North Carolina).

97. 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 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.

Restatement (Second) of Conflict of Laws § 193 (1971).
and probably does not signal general adoption of a modern contract choice-of-law approach.\textsuperscript{98}

In addition to the contemporary examples of divided loyalties, recent history also suggests that a state court is likely to abandon the \textit{lex loci} rule in tort before doing so in contract.\textsuperscript{99} The reason may be, as the Florida Supreme Court suggested, that predictability and reliance are more important in contract than in tort cases.\textsuperscript{100} An equally likely hypothesis, however, is that courts abandon the place-of-injury rule first simply because tort choice-of-law cases occur much more frequently, outnumbering contract cases by two-to-one.

Three states provide exceptions to the torts-first approach. Strangely, Indiana abandoned the place-of-contracting rule in 1945,\textsuperscript{101} but retained the place-of-injury rule until 1987.\textsuperscript{102} Delaware, perhaps because of the heavy volume of interstate corporate litigation, abandoned the place-of-contracting rule in 1978,\textsuperscript{103} yet retained the place-of-injury rule until 1991.\textsuperscript{104} The third state, Nevada, is especially interesting because of the progressive steps the court took in shifting from the traditional system to a hybrid modern approach. The transformation began in \textit{Ferdie Sievers \& Lake Tahoe Land Co. v. Diversified Mortgage Investors},\textsuperscript{105} a 1979 usury case. Relying on section 187 of the \textit{Second Restatement}, the Nevada Supreme Court held that it would enforce a choice-of-law clause if the chosen state had a substantial relation with the transaction and its law did not violate the public policy of

\textsuperscript{98} But see Symeonides, \textit{supra} note 67, at 200 n.119 (reading Boudreau to signal adoption of modern approach, but acknowledging that his classification is "questionable").


\textsuperscript{100} See \textit{Sturiano v. Brooks}, 523 So. 2d 1126, 1130 (Fla. 1988) (recognizing that, unlike in tort cases, the parties in contract cases often bargain for a particular state’s law to apply).


\textsuperscript{103} See \textit{Oliver B. Cannon \& Son, Inc. v. Dorr-Oliver, Inc.}, 394 A.2d 1160, 1166 (Del. 1978).


\textsuperscript{105} 603 P.2d 270 (Nev. 1979).
Although use of section 187 does not always, or even usually, herald an imminent shift away from the *lex loci*, in Nevada's case it seems to have encouraged the court to begin performing a substantial-relationship analysis.

The court reaffirmed the choice-of-law clause rule from *Sievers*—substantial relation plus no violation of forum public policy—in several cases throughout the 1980s, and then in 1990 applied that test to a case involving a contract that lacked a choice-of-law clause. The court then completely abandoned the place-of-making rule in 1993, citing *Sievers* for the proposition that Nevada uses the substantial-relationship test generally for contracts—with or without a choice-of-law clause. By this time, the court had begun citing, quoting, and applying in detail the *Second Restatement*, including section 188 and other sections relevant to specific contract issues.

In 1996, the court completed the exodus from the *First Restatement* by abandoning the place-of-injury rule in favor of a *lex loci*-plus-contacts-override system of its own devising. Thus, the Nevada transformation provides some hope that the remaining *First Restatement* states may one day give up the ghost. Because so many states use a section 187-style rule for choice-of-law clauses, and because that rule

106. *Id.* at 273.
107. *See, e.g.*, Daniels v. National Home Life Assurance Co., 747 P.2d 897, 899 (Nev. 1987) (relying on *Sievers* in refusing to enforce a choice-of-law provision in an insurance contract on grounds that it violated the public policy of the forum state); Engel v. Ernst, 724 P.2d 215, 217 (Nev. 1986) (applying *Sievers* to enforce a choice-of-law provision in a partnership agreement because the chosen state had a substantial relationship to the transaction and the agreement did not violate public policy); Costanzo v. Marine Midland Realty Credit Corp., 701 P.2d 747, 748 (Nev. 1985) (relying on *Sievers* to enforce the choice-of-law provision in a promissory note because the chosen state had a substantial relationship to the transaction and the transaction was not motivated by bad faith).
110. *See, e.g.*, *id.* at 267 (noting that, under § 193 of the *Second Restatement*, the location of the insured risk is a significant factor in determining choice of law); *Sotirakis*, 787 P.2d at 791 (citing with approval § 193 of the *Second Restatement*).
111. *See* Motenko v. MGM Dist., Inc., 921 P.2d 933 (Nev. 1996). The court stated:
Under this approach, the law of the forum (the place where the action is brought) governs in a tort case, unless another state has an overwhelming interest. Another state has an overwhelming interest if two or more of the following factors are met:
(a) it is the place where the *conduct* giving rise to the injury occurred;
(b) it is the place where the *injury* is suffered;
(c) the *parties have the same domicile*, residence, nationality, place of incorporation, or place of business and it is different from the forum state;
(d) it is the place where the relationship, if any, between the parties is centered.
*Id.* at 935.
requires a contacts analysis, they, like Nevada, may acquire the habit of analyzing contacts in contract cases and gradually extend that practice to other types of cases.

B. Deviations

The number of states that adhere, in one form or another, to the First Restatement clearly overstates the traditional system's influence, because even hard-core traditionalist courts tend to deviate from it on several choice-of-law issues.

1. Party Autonomy. - According to Beale, party autonomy was inconsistent with the territorialist vested rights approach:

The fundamental objection to this in point of theory is that it involves permission to the parties to do a legislative act. It practically creates a legislative body from any two persons who choose to get together and contract.112

Consequently, the First Restatement contained no provision permitting the parties to stipulate the law that would govern their agreement. One might expect, therefore, to find a lack of support for party autonomy in contemporary First Restatement courts, but in fact, the opposite is the case. Contemporary First Restatement courts routinely enforce choice-of-law clauses and routinely endorse the principle of party autonomy.113

Research revealed over thirty opinions treating contracts with choice-of-law clauses, and not one adopted Beale's position of principled opposition. Indeed, all but two contain language explicitly approving party autonomy in principle, regardless of whether they enforce the particular choice-of-law clause before the court.114 Thus,

112. 2 BEALE, supra note 11, at 1079-80. Beale's view earned some respectable intellectual support, including that of Learned Hand. See E. Gerli & Co. v. Cunard S.S. Co., 48 F.2d 115, 117 (2d Cir. 1931) (noting that laws and not parties impose the obligation of transforming an agreement into a contract).

113. See infra notes 116-120 and cases cited therein.

114. The two exceptions are Schick v. Rodenburg, 397 N.W.2d 464 (S.D. 1987), and Equi-lease Corp. v. Belk Hotel Corp., 256 S.E.2d 836 (N.C. App. 1979). There is no reason to suspect, however, that either state is generally hostile to party autonomy. Both cases involved strong public policy considerations, and the court's decision to ignore a choice-of-law clause in such circumstances is consistent with modern party autonomy rules. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(2) (1971). Schick involved a release, and at the time, South Dakota treated the validity and effect of a release as a tort question and consequently applied the law of the place of injury. The court has since switched to the Second Restatement. See Stockmen's Livestock Exch. v. Thompson, 520 N.W.2d 255 (S.D. 1994) (applying the Second Restatement's approach to conflicts between principals and third parties); Chambers v. Dakotah Charter, Inc., 488 N.W.2d 63 (S.D. 1992) (adopting the
it is fair to conclude that every contemporary *First Restatement* state today approves the principle of party autonomy. This development makes sense, considering the reasons the courts give for adhering to the traditional system generally. Few courts still rely on the vested rights theory or territorialism, choosing instead to remain with the *First Restatement* because of its predictability, certainty, and ease of application.115 Those very reasons, however, also push courts toward embracing party autonomy in spite of its theoretical inconsistency with vested rights.

Most courts dealing with party autonomy cite, quote, and carefully apply the provisions of section 187 of the *Second Restatement*.116 Others use the *Restatement* test, but do not cite section 187, allowing the reader to believe that the court came to the position on its own.117 In addition, there are courts that cite very old cases, suggesting that party autonomy was alive and well even in Beale’s time.118

The strong tendency among the courts is to enforce the choice-of-law clause, especially when it calls for the law of the forum.119 Nev-$\ldots$
ertheless, about one-third of the cases invalidated the choice-of-law clause, mostly because the chosen law violated the forum’s public policy.\footnote{120} Thus, the tendency to validate the clause, while strong, does not seem to be as reliable among the traditionalist courts as it is in American courts generally.\footnote{121}

2. Usury.—Seven states have shown a willingness to depart from the standard \textit{lex loci} rules in usury cases. The most emphatic are from Tennessee, Arkansas, and Florida, where courts have announced an explicit validation principle. Its clearest statement appears in \textit{Goodwin Brothers Leasing, Inc. v. H & B, Inc.}:\footnote{122}

Tennessee, like many other states, has long recognized a choice of law principle unique in usury cases that parties are presumed to have chosen that law which will uphold the legality of their bargain. That law which will lend greatest validity to the transaction will be applied if it is otherwise logically relevant.\footnote{123}

\begin{itemize}
\item 122. 597 S.W.2d 303 (Tenn. 1980).
\item 123. Id. at 308. To the same effect is \textit{Morgan Walton Bancorp, Inc. v. International City Bank & Trust Co.}, 404 So. 2d 1059 (Fla. 1981). The court stated:
\end{itemize}
Other states' courts, although not as explicitly, have made their views on usury relatively clear by refusing to invoke public policy to invalidate a choice-of-law clause, or by refusing to invalidate a usurious contract unless it was both made and intended to be performed in the forum, or by sympathetically citing pro-validation authorities.

One state, by contrast, deviates from the place-of-contracting rule with an anti-validation principle for some usury cases. In North Carolina, the courts consistently invalidate loans, although legal where made, if they exceed the maximum North Carolina rate and are secured by North Carolina property.

3. Workers' Compensation.—Traditionalist courts routinely deviate from the lex loci rules in workers' compensation cases. That should not come as too great a surprise, because the First Restatement itself is uncharacteristically flexible in this area.

Georgia appears to be the only state that still adheres to the place-of-injury rule. In Sargent Industries, Inc. v. Delta Air Lines, Inc., the plaintiff, an Iowa resident, employed by Delta Air Lines, Inc. (Delta) as a flight attendant in Illinois, was injured in Georgia on an emergency evacuation slide manufactured by Sargent Industries, Inc.

In a situation where, under the law of one state with a relation to the transaction, it is void, while under the law of the other state with a relation, the interest is forfeited but principal is an enforceable debt, the law construes the parties' intent to be that the latter law should apply. The law that partly invalidates the transaction is preferred over the law that wholly invalidates it, where both states have a normal and reasonable relation to the transaction.

Id. at 1063; see also Arkansas Appliance Distrib. Co. v. Tandy Elecs., Inc., 730 S.W.2d 899, 900 (Ark. 1987) (“This [c]ourt has, moreover, consistently inclined toward applying the law of the state that will make the contract valid, rather than void.” (citations omitted)).


125. See Kronovet v. Lipchin, 415 A.2d 1096, 1104-05 (Md. 1980) (citing § 187(a) of the Second Restatement as authority).


127. Many choice-of-law issues in workers' compensation cases are governed by statute, but enough issues remain to generate a fair number of decisions in the survey period. Three types of issues predominate: (1) coverage of the state statute (some provide for higher benefits than others); (2) employer's immunity from tort suit; and (3) third party's immunity from tort suit. For a complete discussion of these and other workers' compensation conflicts issues, see 3 Arthur Larson, Larson's Workmen's Compensation Law, ch. XVI (1997).

128. Restatement of Conflict of Laws §§ 398-399 (1934) (permitting recovery if the statute of either the state of injury or the state of the employment contract permits it).

129. 303 S.E.2d 108 (Ga. 1983).
After receiving an Illinois workers' compensation award, she sued Sargent in Georgia. Sargent sought to implead Delta, a procedure permitted by Illinois's workers' compensation law, but not Georgia's. With little discussion, the Supreme Court of Georgia applied the traditional place-of-injury rule for tort cases and chose Georgia law.

Other traditionalist states reject the lex loci rules in workers' compensation cases, instead employing either a balancing-of-interests or center-of-gravity approach. Regardless of the description of their methods, the courts seem willing to apply the law of the forum as long as there is some reasonable connection with the dispute.

Once a court begins balancing interests or weighing contacts, the process can become infectious. Connecticut courts abandoned the place-of-injury rule in workers' compensation cases, which eventually led to the adoption of modern methods for tort cases generally. In Simaitis v. Flood, the Supreme Court of Connecticut relied on the United States Supreme Court's decision in Thomas v. Washington Gas Light Co. and the Second Restatement to adopt a modern approach for compensation cases. Six years later, it relied heavily on Simaitis in definitively abandoning the place-of-injury rule in O'Connor v. O'Connor.

4. Uniform Commercial Code.—The U.C.C. has its own choice-of-law provisions. Chief among them is section 1-105, which provides for party autonomy and, in the absence of a choice-of-law clause, for the law of the forum, provided that the transaction bears "an appropriate

130. Id. at 109.
131. Id.
132. Id.
133. Id. at 110; see also Maryland Cas. Ins. Co. v. Glomski, 437 S.E.2d 616, 617 (Ga. 1993) (holding that Georgia's place-of-injury rule governs insurer's subrogation rights even though employee received workers' compensation in Illinois).
134. See, e.g., Bishop v. Twiford, 562 A.2d 1238, 1240 (Md. 1989) (applying Maryland workers' compensation statute when employer had substantial business activity in Maryland, injury occurred in Maryland, and action was against a Maryland resident).
135. See, e.g., Bryant v. O.T. Seward, 490 S.W.2d 497, 499 (Tenn. 1973) (applying Tennessee workers' compensation statute when state had legitimate interest in the controversy, and there was a substantial connection between Tennessee and the employer-employee relationship).
136. 437 A.2d 828 (Conn. 1980).
137. 448 U.S. 261 (1980).
138. Simaitis, 437 A.2d at 832.
139. 519 A.2d 13, 15-16 (Conn. 1986).
relation" to the forum.\textsuperscript{140} By and large, contemporary First Restatement courts displace the usual \textit{lex loci} rules and faithfully apply the Code's provisions in U.C.C. cases.\textsuperscript{141} The issue then shifts to the construction of the phrase "an appropriate relation." Most opinions use some modern choice-of-law methodology to interpret the phrase and often equate it with the Second Restatement's most-significant-relationship formula.\textsuperscript{142}

In these courts, the U.C.C. and its modern choice-of-law provisions exist side-by-side with the \textit{lex loci} rules and often produce some interesting opinions. In product liability cases, for instance, it is not unusual to see the courts rigidly apply the law of the place of injury to the strict liability count and then slide into a fully modern analysis of the most significant relationship for choosing the law governing the implied warranty count.\textsuperscript{143}

Not all contemporary First Restatement courts have made their peace with the U.C.C., however. In Virginia, for example, a federal court opined that the state's adoption of section 1-105 was not "intended to reject or supersede previously established choice-of-law rules in Virginia" and thus read the appropriate-relation formula to do little more than codify the \textit{lex loci} rules.\textsuperscript{144} A Georgia federal court went one better and simply ignored section 1-105, instead applying the place-of-injury rule to both the strict liability and warranty counts in a product liability case.\textsuperscript{145}

C. The Dismal Part of the Landfill\textsuperscript{146}

1. False Conflicts and Worse.—The good news is the \textit{lex loci} rules are steadily decreasing in popularity, and even committed First Restate-
First Restatement courts have deviated from the *lex loci* rules on several issues. The bad news, however, is contemporary First Restatement courts still mechanically apply the law of the disinterested state in false conflicts and still use recharacterization, *renvoi*, and public policy as escape devices to produce palatable results but unprincipled opinions.

Alabama leads the league in mechanical decisions in false conflicts cases. *Fitts v. Minnesota Mining & Manufacturing Co.* is an impressive, recent example. After an Alabama family was killed in a Florida plane crash, the plaintiffs brought a wrongful death action against two non-Florida defendants—the manufacturer of the plane and the manufacturer of a flight instrument. In a well-researched opinion, the Alabama Supreme Court refused to adopt modern choice-of-law methods and, instead, applied the trusty place-of-injury rule. As a result, Florida rather than Alabama law applied, and the court limited compensatory damages for the death of the wife and children to funeral expenses, because they had no income.

Even more wooden is an Alabama federal court's decision in *Thomas v. FMC Corp.* Almost two years after her husband was killed in Germany by a defective Howitzer, manufactured in part by General Motors Corporation, the Alabama plaintiff added General Motors Corporation as a defendant in her existing action against FMC. Both Alabama and Germany had wrongful death limitations periods of two years or longer, but Alabama had a one-year limitation period for torts generally. The court held that the substantive law of Germany applied and that Alabama's two-year wrongful death limitations period ap-

**decisions. I suggest that the conflict of laws section formally retire the swamp metaphor. My suggestion for a replacement is “landfill,” but “sinkhole” is always popular.**

147. See supra Part I.A.3.


149. See also Powell v. Sappington, 495 So. 2d 569, 570 ( Ala. 1986) (applying place-of-injury rule to choose Georgia workers' compensation law even though employee and employer were Alabamans); Norris v. Taylor, 460 So. 2d 151, 152 ( Ala. 1984) (using place-of-injury rule to select Kentucky law for negligence action even though employee and co-employees were Alabamans and act of negligence occurred in Alabama). Although Alabama leads the league in false conflicts, it has not cornered the market. See, e.g., Jacobs v. Adams, 505 A.2d 930, 936 ( Md. Ct. Spec. App. 1986) (using place-of-injury rule to choose no-fault insurance law of the District of Columbia to prohibit negligence action by Maryland plaintiff against Maryland defendant). Somewhat personally embarrassing is the Jacobs court's prominent citation of Richman & Reynolds, supra note 14, at 116, for the proposition that there would be no reason to consider D.C.'s no-fault law to be procedural, en route to its refusal to use the recharacterization escape device. See Jacobs, 505 A.2d at 936.

150. Fitts, 581 So. 2d at 823.

151. *Id.* at 820 n.1.

plied only to actions brought under the Alabama wrongful death statute, not those brought under the German statute.\textsuperscript{153} The court refused to apply Germany's three-year limitations statute because it was not specific enough to be considered a "substantive" limitations provision.\textsuperscript{154} Rather, the court applied Alabama's one-year residual statute of limitations for torts generally and barred the plaintiff's claim, even though the common policy of Alabama and Germany was to allow at least two years to bring a wrongful death action.\textsuperscript{155}

2. Escape.—The standard First Restatement maneuver to avoid the system's most egregious results is to employ one of the many escape devices. Contemporary First Restatement courts do so as willingly as did their predecessors before the conflicts revolution.

\textit{a. Rule Manipulation.}—Surprisingly, traditionalist courts rarely quote or cite in detail the specific provisions of the First Restatement; apparently, they are content with general statements of the \textit{lex loci} rules.\textsuperscript{156} A notable exception is Witkowski \textit{v. Corrections Department},\textsuperscript{157} in which the Court of Appeals of New Mexico relied on a detailed analysis using the Restatement's tort provisions to avoid an unpalatable result.\textsuperscript{158} The plaintiffs' case against the New Mexico Department of Corrections alleged that prison employees were negligent in failing to prevent the escape of two inmates, who then killed the husband of one of the plaintiffs in a robbery in Colorado.\textsuperscript{159} Because

\begin{itemize}
\item \textsuperscript{153} Id. at 914.
\item \textsuperscript{154} Id. at 915. The court acknowledged that Alabama used a particularly "stringent version of the aforesaid tests." \textit{Id}.
\item \textsuperscript{155} Id. at 916. In the strikingly similar case, Jones \textit{v. R.S. Jones & Associates, Inc.}, 431 S.E.2d 33 (Va. 1993), the Supreme Court of Virginia used the specificity exception to avoid the dysfunctional result. Almost two years after her husband died in an airplane crash in Florida, a Virginia widow brought a wrongful death action against the owner of the airplane and the firm that maintained it. \textit{Id.} at 33. As in Thomas, Virginia had a two-year statute for wrongful death claims and a one-year "catch all" statute. \textit{Id.} at 33-34. The Jones court held that Florida's two-year wrongful death statute was sufficiently specific to be substantive and applied it to save the plaintiff's claim from Virginia's one-year "catch all" statute. \textit{Id.} at 35. Apparently the court could not have applied Virginia's two-year wrongful death statute for reasons analogous to those relied on in \textit{Thomas}. \textit{Id.} at 35-36.
\item \textsuperscript{157} 710 P.2d 93 (N.M. Ct. App. 1985).
\item \textsuperscript{158} \textit{Id.} at 95-96.
\item \textsuperscript{159} \textit{Id.} at 94-95.
\end{itemize}
of New Mexico’s adherence to the place-of-injury rule, the court faced the possibility that Colorado’s negligence law might determine the appropriate standard of care for New Mexico prison administrators. The court avoided that result by relying on section 380(2) of the *First Restatement* which creates an exception to the place-of-injury rule. Section 380(2) directs the court to apply the law of the place of the defendant’s conduct when the standard for that conduct “has been defined in particular situations by statute or judicial decision.”

Usually, however, rule manipulation is accomplished by other means. In North Carolina insurance cases, it is based on a statute which provides that all contracts insuring risks in North Carolina “shall be deemed to be made therein,” thus using the place-of-making rule to accomplish the same result that the *Second Restatement* accomplishes in section 193. The most typical method of rule manipulation is justified neither by the *First Restatement* nor by special statute, but only by its result. In *Trahan v. E.R. Squibb & Sons*, a product liability case, the plaintiff suffered injuries in Tennessee while giving birth, and she attributed her difficulties to her mother’s ingestion of diethylstilbestrol (DES) in North Carolina. Had the federal court read the place-of-injury rule to refer to North Carolina law, the plaintiff would have lost her strict liability claim on summary judgment. Instead, the court determined that the place of injury was not North Carolina, where the drug first had its effect on plaintiff and her mother, but Tennessee, where the injury was first discovered.

b. Recharacterization.—Characterization is as crucial for today’s traditionalist courts as it always has been. Indeed, the more complex choice-of-law practice of contemporary *First Restatement* courts may have increased the importance of characterization. In di-

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160. *Id.* at 95.
161. *Id.*
162. *Id.* at 95-96.
167. This result possibly may be justified under section 377 illustration 2 of the *First Restatement*, but the court did not cite this or any other provision of the *First Restatement*.
vided loyalty states, \textsuperscript{169} characterization does more than drive choice-of-law results; it also controls choice-of-law methodology, because in those states a contract characterization calls for the law of the place of contracting, whereas a tort characterization requires analysis under one of the modern approaches. \textsuperscript{170}

Borrowing statutes also can emphasize the importance of characterization. In \textit{Lumberman's Mutual Casualty Co. v. August}, \textsuperscript{171} the plaintiff, while covered by an auto insurance policy issued in Massachusetts, was injured in a Florida automobile accident involving an uninsured motorist. \textsuperscript{172} Almost five years after the accident, the policyholder sued the insurance company in Florida, and the lower courts, treating the case as a Florida tort, applied Florida's five-year statute of limitations. \textsuperscript{173} The Florida Supreme Court reversed the decision, stating that under a contract characterization the claim arose in Massachusetts. \textsuperscript{174} That determination required the court to apply Florida's borrowing statute, which in turn called for the application of Massachusetts's three-year statute of limitations, thus barring the plaintiff's claim. \textsuperscript{175}

Considering the importance of characterization, it is not surprising that contemporary \textit{First Restatement} courts still use it as an escape device. The case of \textit{Baxter v. Sturm, Ruger \& Co.} \textsuperscript{176} is a textbook example. The plaintiff, an Oregonian, sued a Connecticut firearms manufacturer in a federal court in Connecticut. \textsuperscript{177} The plaintiff alleged that the defendant was liable for the plaintiff's son's injuries, which were caused by the accidental discharge of a gun manufactured by the defendant. \textsuperscript{178} Eventually, the United States Court of Appeals for the Second Circuit certified to the Supreme Court of Connecticut the question whether Oregon's eight-year \textsuperscript{179} statute of repose barred the

\textsuperscript{169} See \textit{supra} Part II.A.3.

\textsuperscript{170} The dichotomy is most apparent in product liability claims in which the strict liability tort count is referred to the law of the place of injury and the implied warranty count is analyzed via the appropriate-relation standard. \textit{See}, \textit{e.g.}, \textit{Thornton v. Cessna Aircraft Co.}, 886 F.2d 85, 89 (4th Cir. 1989) (holding that South Carolina conflicts law required the place-of-injury test for the tort count and the most-significant-relationship test for the warranty count).

\textsuperscript{171} 530 So. 2d 293 (Fla. 1988).

\textsuperscript{172} Id. at 294.

\textsuperscript{173} Id.

\textsuperscript{174} Id. at 296.

\textsuperscript{175} Id.

\textsuperscript{176} 644 A.2d 1297 (Conn. 1994).

\textsuperscript{177} Id. at 1297-98.

\textsuperscript{178} Id.

\textsuperscript{179} The time period is measured from the date the product was first purchased or consumed. \textit{See} \textit{ORE. REV. STAT.} \textsection 30.905(1) (1988).
plaintiff’s claim.\textsuperscript{180} Apparently, the Connecticut court’s views on gun control and product liability differed from those of the Oregon legislature, because the court, ignoring substantial authority on the question, recharacterized the issue of repose from tort to procedure and applied the law of Connecticut, which included no statute of repose.\textsuperscript{181} In effect, the court rewarded the plaintiff for his clever forum shopping and sent a powerful message of deterrence to Connecticut’s firearms industry.\textsuperscript{182}

\textit{Baxter}, however, is small potatoes compared to a series of cases in West Virginia and Virginia. By statute in West Virginia, an insurer need not pay uninsured motorist benefits to an insured whose damages are caused by a hit-and-run driver unless there is physical contact between the two vehicles.\textsuperscript{183} Apparently, the purpose of the statute is to avoid fraudulent claims involving “phantom” hit-and-run drivers fabricated by insureds who have been involved in ordinary one-car accidents.\textsuperscript{184} The adjacent states do not have similar statutes.\textsuperscript{185} The courts of both West Virginia and Virginia are quite unsympathetic to the statute and have struggled mightily to avoid its application in conflicts cases.\textsuperscript{186}

In \textit{Perkins v. Doe},\textsuperscript{187} the first case in the series, the insureds were West Virginia residents who were involved in a Virginia accident.\textsuperscript{188} The West Virginia Supreme Court of Appeals held that the case sounded in tort and applied the law of Virginia, thereby permitting recovery.\textsuperscript{189} Two years later, in \textit{Lee v. Saliga},\textsuperscript{190} the court dropped the other shoe. The insured was a resident of Pennsylvania who was involved in an accident in West Virginia.\textsuperscript{191} After a half-hearted attempt

\begin{itemize}
\item \textsuperscript{180} \textit{Baxter}, 644 A.2d at 1299.
\item \textsuperscript{181} \textit{See id. at 1302} (“The certified question asked: ‘Is a statute of repose, such as Oregon Revised Statutes § 30.905(1), properly considered substantive for choice of law purposes under Connecticut law?’ Our answer is: No.”).
\item \textsuperscript{182} \textit{Id.} Another example is \textit{Maxfield v. Estate of Maxfield}, No. CA 87-373, 1988 WL 30197, at *1 (Ark. Ct. App. Mar. 30, 1988), in which the court recharacterized the issue from real property to contract in order to validate a contract that otherwise would be held usurious.
\item \textsuperscript{183} \textit{See W. VA. CODE} § 33-6-31(e)(iii) (1996).
\item \textsuperscript{184} \textit{See Perkins v. Doe}, 350 S.E.2d 711, 714 n.4 (W. Va. 1986).
\item \textsuperscript{185} \textit{See id. at 713}.
\item \textsuperscript{186} \textit{See id. at 714-15}.
\item \textsuperscript{187} 350 S.E.2d 711 (W. Va. 1986).
\item \textsuperscript{188} \textit{Id.} at 712-13.
\item \textsuperscript{189} \textit{Id.} at 715.
\item \textsuperscript{190} 373 S.E.2d 345 (W. Va. 1988).
\item \textsuperscript{191} \textit{Id.} at 347.
\end{itemize}
to distinguish *Perkins*,\(^\text{192}\) the court held the issue to be one of contract and applied the law of Pennsylvania—the place the contract was made—again permitting recovery.\(^\text{193}\) *Quod Erat Faciendum!*

As yet, the Supreme Court of Virginia has had no opportunity to make inconsistent characterizations, having decided only one case on the matter. In *Buchanan v. Doe*,\(^\text{194}\) the insured, a Virginian, was forced off the road in West Virginia by a truck; the driver stopped, but did not identify himself.\(^\text{195}\) Not surprisingly, the court applied a contract characterization and, therefore, the recovery-generating law of Virginia.\(^\text{196}\)

### D. Renvoi

Mercifully, *renvoi* opinions are rare, as its value to the court as an escape device is often outweighed by the difficulty of comprehending and applying the doctrine.\(^\text{197}\) Nevertheless, traditionalist courts occasionally used *renvoi* as an escape device in the years before the conflicts revolution.\(^\text{198}\) Since then, *renvoi* decisions are even less

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\(^{192}\) *Id.* at 349. The opinion suggests a distinction based on the circumstance that *Perkins* was a certified question case referred to the Supreme Court of Appeals of West Virginia by the federal district court. *Id.* According to the opinion in *Saliga*, the federal court's certified question in *Perkins* called for the West Virginia court's solution to the tort conflict-of-law issue. *Id.* In fact, the question is ambiguous, and it is not readily apparent why the form of the question is a distinction worth a difference.

\(^{193}\) *Id.* at 352. West Virginia's rule for insurance contracts is in fact a bit more sophisticated than the typical place-of-making rule. It calls for the "law of the state where the policy was issued and the risk was principally located, unless another state has a more significant relationship to the transaction and the parties." *Id.* at 353. *Compare* Restatement (Second) of Conflict of Laws § 193 (1971):

The validity of a contract of fire, surety or casualty insurance and rights created thereby are determined by the local law of the state which the parties understood 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.

*Id.*

\(^{194}\) 431 S.E.2d 289 (Va. 1993). This series of cases is reminiscent of the famed Arkansas telegraph cases described originally by Professor Leflar. *See* LEFLAR ET AL., supra note 18, at 258. The Arkansas courts, in order to apply Arkansas law permitting emotional damages for misdelivered telegraph messages, characterized the issue as a contract when the message was sent from Arkansas and a tort when the message was received in Arkansas. For a description of the telegraph cases, see VERNON ET AL., supra note 20, at 257-58.

\(^{195}\) *Buchanan*, 431 S.E.2d at 290.

\(^{196}\) *Id.* at 292.

\(^{197}\) For a good explanation of *renvoi*, see American Motorists Insurance Co. v. ARTRA Group, Inc., 659 A.2d 1295, 1301-03 (Md. 1995).

\(^{198}\) *See*, e.g., University of Chicago v. Dater, 270 N.W. 175, 176 (Mich. 1936) (using *renvoi* in a contract case to escape Michigan's place-of-making rule); *In re* Schneider's Es-
common. Occasionally, a court will throw in *renvoi* as an afterthought to recharacterization and public policy as one more reason to refuse to apply the standard *lex loci* rules.

One recent case from a *First Restatement* court, however, uses *renvoi* much more significantly. This case, *American Motorists Insurance Co. v. ARTRA Group, Inc.*, decided by the Court of Appeals of Maryland, has been discussed illuminatingly and at length by Professor Symeonides, and thus warrants only summary treatment here.

The issue in *ARTRA* was whether ARTRA's insurance policy with American Motorists Insurance Co. (American Motorists) required the insurer to indemnify and defend ARTRA in a suit by Sherwin-Williams, which had purchased a paint factory from ARTRA. The Maryland Department of the Environment had required Sherwin-Williams to remedy hazardous waste contamination of soil and ground water at the site, and Sherwin-Williams sued ARTRA in federal court in Maryland seeking reimbursement for its cleanup expenses. When American Motorists refused to defend the action, ARTRA sued the insurer in Maryland state court.

When the case arrived at the court of appeals, the issue was whether to interpret the contract under the law of Illinois or Maryland. Under Illinois law, the issue of coverage was ambiguous, but under Maryland law, the policy clearly did not cover ARTRA's loss. First, the court of appeals reaffirmed its adherence to the place-of-making rule: Although it had used selected provisions of the *Second Restatement* on occasion, it did not need to abandon the place-of-making rule to decide the case.

Instead, the court announced "a limited *renvoi* exception" to the rule:

tate, 96 N.Y.S.2d 652, 657-60 (Sup. Ct. 1950) (using *renvoi* to escape law-of-the-situs rule in a case of a will involving proceeds from Swiss land).

199. Occasionally, courts will toy with the concept but not apply it because the forum and the foreign state both use the same choice-of-law rule. See, e.g., Eichel v. Goode, Inc., 680 P.2d 627, 631-32 (N.M. App. 1984). In those circumstances, *renvoi* does not produce an escape.


201. 659 A.2d 1295 (Md. 1995).

202. *Id.* at 1297.

203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.* at 1297-98.

207. *Id.*

208. *Id.*
Under this exception, Maryland courts should apply Maryland substantive law to contracts entered into in foreign states' jurisdictions in spite of the doctrine of *lex loci contractus* when:

1) Maryland has the most significant relationship, or, at least, a substantial relationship with respect to the contract issue presented; and

2) The state where the contract was entered into would not apply its own substantive law, but instead would apply Maryland substantive law to the issue before the court.\(^{209}\)

The exception worked to escape the place-of-making rule, because Illinois used the most-significant-relationship test of the *Second Restatement*, and under sections 188 and 193, an Illinois court would have applied the law of Maryland (the state where the insured risk was located) to interpret the contract.\(^{210}\)

In light of Professor Symeonides's complete discussion of the case,\(^ {211}\) only a few comments are warranted here. First, the court never considered the *First Restatement*’s provisions on *renvoi*, which makes sense because they would not have permitted the use of *renvoi* in *ARTRA*;\(^ {212}\) nor did the court address the *Second Restatement*’s *renvoi* provisions, although they might have justified using the concept in *ARTRA*.\(^ {213}\)

Second, the court expended a great deal of effort to travel a very short distance. All that it really accomplished with its extensive discussion of *renvoi* is the application in an insurance case of the law of the state where the risk was located. The court reached that result by applying Illinois choice-of-law rules, including *Second Restatement* sections 188 and 193, but it could have reached the same result simply by adopting section 193 as a special Maryland choice-of-law rule for insurance cases. This is a maneuver that several other *lex loci* courts have adopted.\(^ {214}\) Its price in terms of Maryland choice-of-law precedent—

\(^{209}\) *Id.* at 1304.

\(^{210}\) *Id.* at 1298-99.

\(^{211}\) *See* Symeonides, *supra* note 67, at 182-86.

\(^{212}\) *Restatement of Conflict of Laws* § 8 (1934) (permitting *renvoi* only in cases involving land titles and validity of divorce decrees).

\(^{213}\) *Restatement (Second) of Conflict of Laws* § 8(2) (1971) (permitting reference to a foreign state’s choice-of-law rule as a way of measuring that state’s level of interest in the controversy).

carving a small hole in the place-of-making rule—would have been small compared to the adoption of a broad renvoi provision that could apply in a wide range of contract cases.

Finally, the use of renvoi in ARTRA inevitably will involve the Maryland courts in the application of the most-significant-relationship test. The Court of Appeals of Maryland has noted already that Maryland’s flexibility in contract choice-of-law jurisprudence has increased in recent years. Given that momentum, additional experience with the most-significant-relationship test required by ARTRA’s renvoi rule may be all that Maryland needs to abandon the lex loci rule in favor of the Second Restatement. In other words, Maryland may “ease” into the Second Restatement via the new renvoi rule, just as other states have done via choice-of-law clauses, the U.C.C., and the special workers’ compensation choice-of-law rules.

E. Public Policy

Public policy was the ultimate escape device before the choice-of-law revolution. Traditionalist courts were willing to override their own lex loci rules when those rules called for the application of foreign law that violated the forum’s public policy. Use of the device by lex loci courts continues today; indeed, it is one of the most frequently litigated choice-of-law issues, often representing the last hope of the losing litigant.

Standards for the application of the doctrine vary widely. Most opinions indicate that it is not enough that the foreign law is different from that of the forum. Rather, the foreign law “must violate some prevalent conception of good morals or fundamental principle of natural justice or involve injustice to the people of the forum.”

215. ARTRA, 659 A.2d at 1305.
216. Perhaps the most well-known applications are New York’s in Loucks v. Standard Oil Co., 120 N.E. 198, 202 (N.Y. 1918), in which the court held that Massachusetts’s wrongful death damage limitation was not sufficiently odious to violate New York’s public policy, and Kilberg v. Northeast Airlines, Inc., 172 N.E.2d 526, 529 (N.Y. 1961), in which the court held that the same Massachusetts law did violate New York’s policy.
217. Both Restatements contain provisions permitting the use of the doctrine. See Restatement of Conflict of Laws § 612 (1934); Restatement (Second) of Conflict of Laws § 90 (1971).
219. See, e.g., Boudreau v. Baughman, 368 S.E.2d 849, 857 (N.C. 1988) (stating that “the mere fact that the law of the forum differs from that of the other jurisdictions does not mean that the foreign statute is contrary to the public policy of the forum”).
220. Id.; see also Alexander v. General Motors Corp., 466 S.E.2d 607, 609 (Ga. 1995) (ruling that the public policy exception is justified when foreign law “contravenes our established public policy, or the recognized standards of civilization and good morals”).
Other opinions are considerably more cavalier, providing no discussion of standards at all.\textsuperscript{221}

It is impossible to predict which issues will prompt a court to use the public policy escape. Surprisingly, courts in both Tennessee and Georgia, for instance, held that the failure to adopt strict liability in tort by the state in which the injury occurred (relying instead on negligence and warranty) was sufficiently crucial as to violate fundamental forum public policy.\textsuperscript{222} Another oddity occurs in Maryland, where the courts seem much more willing to use public policy to override the place-of-contracting rule than the place-of-injury rule.\textsuperscript{223} Maryland courts also suggest that the key variable may be whether the state legislature has spoken on the particular public policy before the court.\textsuperscript{224} Further, some issues, such as gambling contracts, have generated different results in different states.\textsuperscript{225} The only possible generalization is that courts seem most willing to invalidate foreign contract law when it permits a powerful party to overreach a weaker one.

From the point of view of progress in \textit{First Restatement} states, the most interesting development is the importation of modern choice-of-law methods into the public policy discussion. Several opinions clearly perform a center-of-gravity analysis in the guise of the traditional public policy exception. In \textit{Ratzlaff v. Seven Bar Flying Service, Inc.},\textsuperscript{226} the plaintiff, a New Mexico worker, injured himself on the job in New Mexico.\textsuperscript{227} Following surgery for the injury, he moved to Minnesota, where his recuperation progressed.\textsuperscript{228} Eventually, his employer's insurance company terminated his compensation benefits.\textsuperscript{229} When the plaintiff objected, negotiations ensued, and in return for a lump sum payment, the plaintiff signed a release in Minnesota, which was valid according to that state's law, but not according to the law of

\begin{itemize}
\item \textsuperscript{221} See, e.g., Wixom Bros. Co. v. Truck Ins. Exch., 435 So. 2d 1231, 1233-34 (Ala. 1983) (concluding that California law violated forum's public policy).
\item \textsuperscript{223} See Black v. Leatherwood Motor Coach Corp., 606 A.2d 295, 300 (Md. Ct. Spec. App. 1991) (finding no modern Maryland cases that have invalidated foreign tort rules, but several that have invalidated foreign contract rules).
\item \textsuperscript{224} See Bethlehem Steel Corp. v. G.C. Zarnas & Co., 498 A.2d 605, 608 (Md. 1985).
\item \textsuperscript{225} Compare Kramer v. Bally's Park Place, Inc., 535 A.2d 466, 470 (Md. 1988) (holding that a New Jersey gambling contract did not violate Maryland public policy), with Casanova Club v. Bisharat, 458 A.2d 1, 2 (Conn. 1983) (holding that a British gambling contract violated Connecticut public policy).
\item \textsuperscript{226} 646 P.2d 586 (N.M. 1982).
\item \textsuperscript{227} Id. at 588.
\item \textsuperscript{228} Id.
\item \textsuperscript{229} Id.
\end{itemize}
New Mexico. When the plaintiff returned to New Mexico and filed a workers’ compensation claim, the employer and the insurer pled the release in defense.

Refusing to apply the place-of-making rule, and thus the law of Minnesota, the court emphasized New Mexico’s close contact with the case, rather than the “evil” content of the Minnesota law:

In this case the plaintiff signed a release for a workmen’s compensation claim that arose entirely out of New Mexico circumstances. The plaintiff was then a New Mexico resident, working in New Mexico, and was injured in New Mexico. His initial treatment was also in New Mexico. To allow Minnesota law to govern the release of plaintiff’s rights would conceivably deny plaintiff some of the important protections guaranteed by the two acts in question. The policies of protection underlying the two acts require that New Mexico law be applied to the workmen’s compensation claim release in this case.

In Braxton v. Anco Electric, Inc., the North Carolina Supreme Court’s “public policy” discussion focused on the center of gravity, but also included a classic interest analysis. The plaintiff, a North Carolina employee, brought a tort action against a third-party tortfeasor in North Carolina after being injured at a Virginia job site. The law of Virginia barred his claim, but the law of North Carolina did not. The court, refusing to apply the place-of-injury rule, reasoned that the workers’ compensation law of North Carolina had struck a bargain among employees, employers, and third parties involving an exchange of compensation of benefits and tort immunities. The construction of that bargain, entirely among North Carolinians, should occur under the law of North Carolina—not Virginia. Thus, under the

230. Id.
231. Id. at 588-89.
232. Id. at 590; see also Johns v. Automobile Club Ins. Co., 455 S.E.2d 466 (N.C. App. 1995). In Johns, the plaintiff’s son negligently caused an auto accident in North Carolina in which the plaintiff was injured. Id. at 467. The plaintiff, a Tennessee resident, sued her insurer for underinsured motorists benefits. Id. The policy contained an intra-family exclusion, valid under the law of Tennessee but not North Carolina. Id. at 468-69. The court refused to apply the public policy exception to the place-of-making rule and relied in part on a contacts analysis showing Tennessee, not North Carolina, to be the center of gravity, thereby denying coverage. Id. at 469.
234. Id. at 915.
235. Id. at 914.
236. Id. at 915.
237. Id.
238. Id.
guise of public policy, the court performed a false conflicts analysis and applied the law of North Carolina, the only interested state.\footnote{239}{Id. at 916.}

The use by \textit{lex loci} courts of modern choice-of-law methods under the guise of public policy is a positive development. It represents yet another path for those courts to take in their gradual abandonment of the traditional choice-of-law system.

\section*{Conclusion}

On the silver anniversary of the \textit{Second Restatement}, modern choice-of-law theory cannot yet claim complete victory. Eleven states' courts still use the \textit{First Restatement's lex loci} rules as their dominant choice-of-law methodology, and four more use them in contract cases but not in tort. Further, some of the worst aspects of traditional choice-of-law practice persist. Thus, \textit{First Restatement} courts still mechanically apply the law of the disinterested state in false conflicts cases and still use rule manipulation and the escape devices to produce more palatable results via unprincipled opinions.

Nevertheless, a review of recent cases in traditionalist states provides reason for optimism. First, the trend toward abandonment of the \textit{First Restatement} in favor of more modern choice-of-law systems continues. In the last ten years, nine states have deserted the \textit{First Restatement} camp, and defections continue at roughly the same rate. Further, retentionist courts no longer insist on the metaphysics of vested rights, relying instead on the supposed functional virtues of the \textit{lex loci} rules.

More hopeful yet is the finding that practice even among traditionalist courts tends to deviate towards modern methods in several key areas. Thus, all contemporary \textit{lex loci} courts routinely enforce choice-of-law clauses despite Beale's disapproval; seven states have adopted the modern alternative-reference or validation approach in usury cases; only one court retains the \textit{lex loci delicti} rule in workers' compensation cases; and all but two use modern choice-of-law methods in U.C.C. cases.

Another positive sign is that some courts are beginning to use the traditional escape devices of rule manipulation, recharacterization, \textit{renvoi}, and public policy not only to achieve better results, but also to import modern choice-of-law methods into their \textit{lex loci} systems.

Finally, the most positive sign is that, within a given state, deviation from the \textit{lex loci} tends to be progressive. Once courts begin using modern methods in exceptional cases, they seem to acquire the habit
and sometimes move progressively towards the *Second Restatement* as the dominant choice-of-law methodology. This represents real progress and holds out the hope that the next twenty-five years may see the demise of the *lex loci* choice-of-law regimes.