

CIVIL PROCEDURE
CASES, PROBLEMS, AND EXERCISES
Fourth Edition

CHAPTER 15
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CHAPTER 15

HORIZONTAL CHOICE OF LAW



Note: This Chapter is an expanded version of the materials in Ch. 5, pt. A. It is intended to be taught in lieu of those materials for those interested in exploring choice of law in greater depth.

A. OVERVIEW OF CHOICE OF LAW

INTRODUCTORY PROBLEM

Their friends warned them it would not last. Only five years after their wedding ceremony, Husband and Wife have agreed to a separation. Husband and Wife married late in life, when both were 57 years old. Although they had known each other in high school, they went their separate ways and lost touch. However, the two bumped into each other at a high school reunion, started a whirlwind romance, and were married in a wedding chapel in State Alpha. The two decided to live together in husband's house in State Beta.

Five years later, Wife decides she had made a bad decision. She informs Husband that she is moving back to her prior home in State Alpha. Husband agrees to a voluntary separation. The two also enter into an agreement under which Husband will sell the Wife's remaining State Beta personal property "for as much as he can get for it," and deliver the proceeds to Wife in Alpha. The parties enter into this agreement in State Beta.

Wife's prize possession is her 1972 AMC Gremlin, an automobile lovingly restored to its original splendor. A collector's dream, the Gremlin is worth at least \$20,000. However, Husband was stung by Wife's rejection, and in a fit of pique sells the Gremlin in State Beta for only \$5. When Husband delivers the proceeds to Wife in State Alpha, she accuses him of breach of contract. Husband refuses to pay any additional money. After negotiating for a year, Wife sues Husband for \$20,000 in a state court in State Alpha. That chosen court clearly has personal jurisdiction over Husband.

Husband moves to dismiss the action, relying on three arguments. First, he alleges that under the laws of State Beta, there is no contract, because the parties are married. Second, and in the alternative, he argues that even if there is a valid contract, it was not breached. Third, Husband also argues that the action is barred by the statute of limitations, because it was brought more than one year after the alleged breach occurred.

Wife counters by arguing the contract was both valid and breached, and that her action was timely filed. While acknowledging that contracts between

spouses are not enforceable under the law of State Beta, she argues that Alpha law, not Beta law, should govern the contract's validity. In the alternative, she argues that Alpha's marriage exception should not apply, because under the law of State Alpha, she and Husband were not legally married because they are first cousins. Wife also argues that Beta law should govern Husband's performance.

The governing laws are as follows:

Marriage. Under Alpha law, Husband and Wife would not be legally married because they are first cousins. Under Beta law, the marriage would be valid notwithstanding the family relationship because both parties are older than 55. While Beta bars certain marriages between relatives, it lifts the ban at age 55 (the rationale behind many incestuous marriage laws involves the fear of birth defects, a fear that is minimized when the parties are beyond childbearing years).

Contract validity. Under Alpha law, the contract would be fully enforceable, even if it turns out the parties are married. Under Beta law, contracts between husbands and wives are not legally enforceable.

Contract breach. Under Alpha law, Husband would not have breached the contract. Alpha imposes no duty of good faith, and Husband accordingly would have complied with the terms of the agreement by delivering the full sale proceeds, regardless of how small. Beta law imposes an obligation of good faith, which Husband would clearly have breached.

Limitations. The Alpha statute of limitations on contracts claims is only 12 months, and that period has expired. Beta's limitations period is 2 years, which means Wife's action was timely filed.

How should the court rule on Husband's motion to dismiss?

The rules governing subject-matter jurisdiction (Chapter 4), personal jurisdiction (Chapter 3, pt. A) and venue (Chapter 3, pt. B) dictate the court system in which a party may bring a civil case. Depending on the circumstances, several different states may be available. Moreover, within each possible state, the party may be able to choose between state and federal court.

The consequences of a plaintiff's choice of forum may not be as great as it might seem. Of course, that choice determines *where* the case is likely to be heard (subject to removal, transfer, and *forum non conveniens*). But it does not necessarily dictate what law the court will use to decide the case. The United States is a federal nation. Unlike most nations, there is often not a single unitary "law" on a given subject, but at least fifty laws. In many cases differences between the rules can significantly affect the outcome of a given case. Further complicating the situation is the possibility a fifty-first law may apply—namely federal law.

Two key features of the United States federal system can affect which of these laws will apply. First, federal and state courts have the inherent authority to apply the laws of another sovereign. Thus, for example, a state court situated in Colorado can—and often will—apply the laws of another state, federal laws, or even the laws of another nation. While the easiest solution might be for every state simply to apply its own law to all cases in its courts, no United States court automatically applies forum law on every issue in every case that comes before it. Applying some other law will often afford the parties some predictability in how they organize their daily activities.

Second, sometimes a court is *required* to apply the laws of a different sovereign. Because under the United States Constitution federal law reigns supreme, in some situations a court will be required to apply federal law in lieu of state law. Conversely, there are also cases where a federal court will be required to defer to state law. Finally, mandatory rules can even apply to a court's decision between two states' laws. Depending on the respective connections each state has with the underlying dispute, a state court may be required to apply some other state's law.

These two key features give rise to two core concepts underlying the choice of law problem. The first feature—that a court *can* apply the law of another sovereign—underlies what this book (like many others) calls “horizontal” choice of law, those rules that determine which of various competing rules of equal stature will be applied to determine a case. Jurisdictions vary in the rules they apply for this core issue. These rules are discussed in Parts B and C of this Chapter. While choice of law rules generally deal with competing state laws, foreign laws may also come into play.

The second feature involves various constitutional limits on the choice of law decision. These materials deal only with one small aspect of this broad issue. Part D of this Chapter explores when a state is barred from choosing the law of a particular state or foreign nation to decide a case. The U.S. Constitution limits a state's ability to choose the law of a jurisdiction which has little connection with the underlying dispute. The law in question may be the law of some other jurisdiction, or even the law of the state in which the court sits. In other words, having jurisdiction over a case and the parties does not guarantee that a court in State X can apply the law of State X to the case.

This book also deals with one other constitutional limit. Chapter 5, pt. B (in the hardcover materials) discusses the *Erie* doctrine, pursuant to which a federal court may be required to apply the law of a particular state instead of a federal rule on the subject. While there are other constitutional limits—such as federal preemption of state law—these are best relegated to a course in Constitutional Law.

If you have already studied personal jurisdiction (Chapter 3, pt. A), you may notice that many of the principles of “horizontal” choice of law resemble basic tenets of personal jurisdiction law. Indeed, historically the two were essentially a single doctrine. To illustrate, review the foundational personal jurisdiction case of *Pennoyer v. Neff*, set out in Chapter 3, pt. A.1. The Supreme Court in that case recites “two well-established principles of public law concerning the jurisdiction of an independent State.” Although the court labels these rules dealing with “jurisdiction,” in truth it is quoting core principles of *choice of law*, as set out in Joseph Story’s highly influential 1834 work entitled *Conflict of Laws*. Notwithstanding this common heritage, do not assume the rules of personal jurisdiction and choice of law are the same today. The two have developed along different paths. Today, there are important differences between the two, especially the rules governing what counts as a sufficient “connection” between the forum and the dispute.

Most of the cases and discussion in this chapter involve issues of tort and contract law. That focus should not lead you to assume that choice of law is limited to these areas of the law. As briefly mentioned in pt. B, courts have also had to develop choice of law rules for property, family law, and even procedural issues. Our focus on tort and contract is based on two considerations. First, the space limits inherent in a book of this sort make coverage of all areas impossible. There are numerous casebooks and treatises dealing with choice of law in greater depth. Second, and more important, most of the development in choice of law reasoning has taken place in the areas of tort and contract law.

B. THE “TRADITIONAL” RULES OF THE FIRST RESTATEMENT

Choice of law questions usually arise only when an event or transaction has connections with multiple jurisdictions. Before the mid-1800s, courts rarely had to deal with such matters, in large part because interstate travel, communications, and transactions were relatively rare. In the late 1800s, however, technological developments such as the railroads and the telegraph greatly increased the number of disputes with connections to more than one state. This change increasingly forced courts to deal with choice of law matters.

At first, choice of law rules developed solely in the courts. The first real attempt to codify the rules came in the Restatement (First) of Conflict of Laws, released in 1934 [hereinafter the First Restatement]. The First Restatement rules were built on a particular axiom regarding choice of law, an axiom that was heavily based on one leading political-legal theory of the period. The First Restatement focuses on political boundaries. It essentially attempts to isolate a single event that defines when the right in question “vests”. Once that event is identified, the choice of law

determination turns on ascertaining *where* that event occurred. As a result, the First Restatement is often referred to as the “vested rights” approach. Because the crucial event differed depending on whether the claim or defense sounded in contract, tort, property, or other area, the governing rules differed by subject matter. The following discussion briefly sets out the approaches for tort, contract, property, marriage, and procedural questions, and then turns to some of the problems and “escape devices” employed by the courts to avoid strict application of the rules.

1. TORT

EX PARTE U.S. NATIONAL BANK ASSOC.

148 So.3d 1060 (Al. 2014)

BOLIN, J.

U.S. Bank National Association and U.S. Bancorp (hereinafter collectively referred to as “U.S. Bank”) seek a writ of mandamus ordering the Jefferson Circuit Court to dismiss the malicious-prosecution case filed against them by Sterne, Agee & Leach, Inc. (“Sterne Agee”), that arose out of a lawsuit prosecuted by U.S. Bank entirely in the State of Washington.

FACTS AND PROCEDURAL HISTORY

In 2002, Sterne Agee, a Delaware corporation with headquarters in Alabama and offices in Seattle, Washington, acted as the underwriter in Washington for securities offered by a Washington business entity. Under the Washington State Securities Act, Sterne Agee was a “seller” of the securities. In 2004, in federal district court in Washington, U.S. Bank sued Sterne Agee, among others, alleging that the defendants had violated the Washington State Securities Act through a series of material omissions in the securities offering. U.S. Bank obtained default judgments or entered into settlement agreements with all the defendants except Sterne Agee. . . . [T]he federal district court entered a judgment in favor of Sterne Agee. U.S. Bank appealed, and the Court of Appeals for the Ninth Circuit affirmed the judgment in 2011.

On July 1, 2011, Sterne Agee sued U.S. Bank in the Jefferson Circuit Court [in Alabama], alleging malicious prosecution arising out of the lawsuit prosecuted by U.S. Bank in Washington. . . . On January 31, 2013, U.S. Bank filed a motion to dismiss, arguing that under Alabama’s choice-of-law rules applicable when two or more jurisdictions have an interest in the outcome of a dispute, Alabama would apply the law of the state where the injury occurred. Because this is a malicious-prosecution action, U.S. Bank argued, the injury was forcing U.S. Bank to defend an allegedly malicious securities action in Washington state and the injury thus occurred in Washington state. . . . [After the appellate court denied

interlocutory relief], U.S. Bank petitioned this Court for a writ of mandamus.

...

DISCUSSION

The principle that governs which state's substantive law applies to tort claims in a conflict-of-laws analysis is well settled: "*Lex loci delicti* has been the rule in Alabama for almost 100 years. 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." *Fitts v. Minnesota Min. & Mfg. Co.*, 581 So.2d at 820. Accordingly, our review of the denial of the motion to dismiss this malicious-prosecution action is based upon the principle of *lex loci delicti*.

The parties agree that under the principle of *lex loci delicti* the governing law is the law of the jurisdiction where the injury occurred. The parties disagree, however, as to where an injury occurs for purposes of a malicious-prosecution claim. U.S. Bank argues that the injury in a malicious-prosecution action occurs in the state where the defense of the allegedly malicious prosecution occurred. It reasons that because "injury" is the last element of a cause of action for any tort, including malicious prosecution, the injury resulting from malicious prosecution occurs where the last event necessary to make the actor liable for the alleged tort takes place. In this case, it argues, the last event necessary occurred in Washington when the securities action was terminated in favor of Sterne Agee. Sterne Agee argues that because the injury suffered in a malicious-prosecution action is financial, the injury occurs where the financial harm was felt. In this case, it argues, the financial harm was felt, and thus the injury occurred, at its corporate headquarters in Alabama.

Unlike Alabama, Washington follows the "English rule" for malicious-prosecution claims, which requires a plaintiff to plead arrest or seizure of property. Because no arrest or seizure has occurred in this situation, U.S. Bank argues that, under Washington law, Sterne Agee cannot state a malicious-prosecution claim.

For the reasons below, we find that injury in a malicious-prosecution action occurs in the state where the allegedly malicious lawsuit was terminated in favor of the complaining party. Therefore, the principle of *lex loci delicti* requires that the law of the state in which the antecedent lawsuit was litigated governs a claim of malicious prosecution.

Alabama continues to follow the traditional view of the Restatement (First) of Conflicts of Law, . . . which looks to the *lex loci delicti* in tort claims, "in the state where the last event necessary to make an actor liable for an alleged tort takes place." Restatement (First) of Conflict of Laws § 377 (1934). This interpretation adheres to the holding of the seminal *lex loci delicti* case in Alabama, *Alabama Great S. R.R. v. Carroll*, 97 Ala. 126,

11 So. 803 (1892). In *Carroll*, the plaintiff resided in Alabama and was employed by an Alabama corporation as a brakeman on the corporation’s railroad. The plaintiff was injured when a link between two freight cars broke in Mississippi. However, two employees in Alabama had failed to inspect the link before the train left for Mississippi. Although Alabama law recognized a cause of action for injuries caused by the negligence of fellow employees, Mississippi law did not. Following the traditional rule, the Alabama Supreme Court applied the law of the place of the injury (Mississippi), despite the facts that the acts giving rise to the plaintiff’s injuries occurred in Alabama and that the plaintiff was employed in Alabama. The Court stated that negligence without injury will not support recovery.

Up to the time [this] train passed out of Alabama no injury had resulted. For all that occurred in Alabama, therefore, no cause of action whatever arose. The fact which created the right to sue, the injury without which confessedly no action would lie anywhere, transpired in the State of Mississippi. It was in that State, therefore, necessarily that the cause of action, if any, arose; and whether a cause of action arose and existed at all or not must in all reason be determined by the law which obtained at the time and place when and where the fact which is relied upon to justify a recovery transpired.”

Carroll, 97 Ala. at 134, 11 So. at 806. Therefore, the place of injury is in the state where the “fact which created the right to sue” occurs.

In the present case, the “fact which created the right to sue” was the termination of the allegedly malicious lawsuit in favor of Sterne Agee, which occurred in Washington. Thus, the principle of *lex loci delicti* requires that Washington law govern Sterne Agee’s malicious-prosecution claim.

We note that in support of its “feel the financial harm” argument for malicious-prosecution claims, Sterne Agee cites several decisions from federal district courts, sitting in Alabama, holding that where the alleged injury is financial, the location where the financial injury was felt is determinative. [Discussion of cases omitted.] . . .

For a malicious-prosecution claim, the event creating the right to sue is not the expenditure of financial resources in order to defend a lawsuit. Such expenses would be made even if the antecedent lawsuit was ultimately terminated in favor of the defendant. It is the determination that such expenses were required to defend an allegedly malicious prosecution (by termination in favor of the complaining party) that creates the right to sue.

Alabama courts’ application of the principle of *lex loci delicti* to cases involving the tort of bad-faith failure to defend a lawsuit are more on point

with the present case. Like malicious prosecution, bad-faith failure to defend is based on injury resulting from an antecedent lawsuit, and the injury often involves more than mere financial harm. In *Lifestar Response of Alabama, Inc. v. Admiral Insurance Co.*, 17 So.3d 200 (Ala.2009), this Court applied Alabama law to a claim of bad-faith failure to defend a lawsuit filed in Alabama. In that case, Lifestar, an Alabama corporation with headquarters in New York, sued its insurer alleging negligence and bad faith based on the insurer's failure to defend Lifestar in a lawsuit filed in Alabama that resulted in a \$5 million default judgment against it. Although Lifestar undoubtedly "felt the financial harm" of the alleged failure to defend in New York, where its headquarters were located and the state from which it paid the judgment, this Court applied the principle of *lex loci delicti* and held that Alabama law applied because the alleged injury occurred in Alabama.

...

In short, Sterne Agee's reliance on cases involving fraud and tortious interference in support of its argument is misplaced, and we decline to apply the "feel the financial harm" analysis to a malicious-prosecution claim. Like *Lifestar*, . . . Sterne Agee's malicious-prosecution claim is based on injury allegedly resulting from an antecedent lawsuit. Accordingly, the principle of *lex loci delicti* likewise requires that the governing law come from Washington, the state of the antecedent lawsuit.

CONCLUSION

The principle of *lex loci delicti* requires that the law of the state in which the antecedent lawsuit was terminated in favor of the complaining party governs a malicious-prosecution claim. Thus, Washington law governs Sterne Agee's claim of malicious prosecution. Accordingly, U.S. Bank's petition for writ for mandamus is granted, and the circuit court is ordered to dismiss Sterne Agee's malicious-prosecution case.

[The concurring opinions of Justices SHAW and BRYAN, and the dissenting opinions of Chief Justice MOORE and Justice MURDOCK, are omitted. These opinions all deal with the propriety of mandamus relief, not the choice of law issue.]

NOTES AND QUESTIONS

1. Use of the adjective "traditional" to describe the First Restatement's choice of law rules may lead one to believe the approach is no longer in use. That belief would be a mistake. The main case is a 2014 decision, and yet the court applies the traditional approach. Nor is use of the First Restatement confined to Alabama. Several other states also use the approach in certain types of cases. The number of states that use the vested rights approach varies depending on the type of case. While about 10 states follow the approach in

tort cases, and a dozen or so in contract cases, many states continue to apply the traditional rules in cases involving real property.

So how does one determine what approach a particular state uses on a given topic? The leading Conflicts Hornbook contains tables listing the approaches used by each state in tort and contract matters. PETER HAY, PATRICK J. BORCHERS, AND SYMEON C. SYMEONIDES, *CONFLICT OF LAWS* (5th ed.) pp. 94–95.

2. Although it may sound tautological, it is important to remember that there is no conflict of laws problem in a case unless the potentially applicable laws conflict in some way that could affect the outcome. What was the clash between the Alabama and Washington laws in *U.S. Bank*?

3. As noted in the Introduction, the First Restatement identifies one crucial event, and chooses the governing law based on where that event occurred. Why do the rules governing tort use the place where the injury is suffered? Why not the place where the wrongful conduct occurred? In this regard, consider the *Carroll* case discussed in the *U.S. Bank* opinion. There, an Alabama employee was injured while on a train, and sued his Alabama employer. The journey on which the injury occurred was mainly in Alabama. The negligent conduct occurred in Alabama. However, the effects of that conduct were not felt until the train crossed into Mississippi, when a link on the train broke. Does it make any sense to apply Mississippi law to such a case based on the fortuity of the link happening to break in that state?

Numerous courts and commentators have explained the theory underlying the First Restatement approach. Consider the following analysis by the Supreme Court of Delaware:

The vested rights doctrine is a common law theory first discussed in Justice Storey’s [sic] classic treatise *COMMENTARIES ON THE CONFLICT OF LAWS, FOREIGN AND DOMESTIC* (1834). The vested rights theory is founded on the respect for a state’s *territorial* sanctity and evolves from a series of “logical” postulates. Basically, the vested rights theory assumes: (1) that the laws of a jurisdiction have no “intrinsic force” beyond its territorial boundaries, and (2) the laws of every state bind all property and persons within its territorial jurisdiction. Beale summarized from these two basic postulates that:

It is impossible for a plaintiff to recover in tort unless he has been given by some law a cause of action in tort; and this cause of action can be given only by the law of the place where the tort was committed.

2 J. BEALE, *THE CONFLICT OF LAWS* § 378.1 at 1288 (1935). The vested rights theory thus posits that states must uniformly respect the laws of the territory where the tort “right” first came into existence.

Travelers Indem. Co. v. Lake, 594 A.2d 38 (Del. 1989). Does this adequately answer the questions posed above?

4. Suppose plaintiff in the main case had prevailed at trial and used the judgment to seize of defendant's property in Alabama. The judgment is then overturned on appeal. Would that fact make Alabama law apply? But what of the fact that under Alabama law, seizure is not an element of the tort? Would the court then refer back to Washington because under Alabama law the last event would be termination of the action?

5. The exclusive focus on the event causing the right to "vest" means courts do not consider other factors that could in theory prove useful in the choice of law calculus. More particularly, courts are not supposed to consider where the parties reside (which might have made a difference in *Carroll*). Nor should they consider the *content* of the laws being considered (except insofar as necessary to determine that a conflict truly exists). In *U.S. Bank*, then, the court would in theory have applied Washington law even if neither party had any connection with that state (other than the first action), and regardless of whether Washington law helped or hurt a party.

In practice, of course, neither courts nor litigants put on these sorts of "blinders." An attorney will always consider which state's law is more favorable to her client, and come up with an argument for that law to apply. Most courts will also consider the content of the law.

6. The First Restatement was very successful, and was adopted for a while in virtually every state. Due to this widespread acceptance, as well as the factors listed in the prior note, U.S. choice of law in the first half of the twentieth century was relatively uniform. Most importantly, because of the focus on a single defining event, the outcome of a choice of law dispute was often the same *regardless of which jurisdiction heard the case*. This feature minimized the effects of "forum shopping".

7. *Intentional torts exception*. Some courts applying the traditional rules recognize an exception in cases involving intentional torts. The exception applies when the conduct and injury occur in different states. Under this exception, courts apply the law of the state of the conduct, not the injury. The exception works only one way: it applies exclusively when the conduct state would allow recovery, and the state of injury would not. (Although that was the situation in the *Carroll* case discussed in *U.S. Bank*, that case did not involve an *intentional* tort, and so the exception did not apply.)

What is the rationale underlying this exception? One problem is that the exception is inconsistent with the core theory underlying the traditional rules. It requires the court to consider the content of the competing laws, and base its decision on that content. Is it fair for the exception to work only "one way"; that is, when it benefits a plaintiff who would lose if the law of the state of the injury were applied?

Is it relevant that many intentional torts are also criminal acts? After all, the state of conduct may also have an interest in punishing an intentional act that occurred in that state even if the harm occurred elsewhere. On the other hand, choice of the law of the state of injury in a *civil* case would not bar the

state from imposing *criminal* sanctions against the tortfeasor in a separate proceeding.

8. As noted above, another defining feature of the traditional rules is *characterization*. The territorial approach uses different controlling events depending on the type of dispute in question. For many questions involving land and other real property, for example, the rules typically dictate use of the law of the state where the property is located. Therefore, to ascertain which event to use, a court must label the issue a tort, contract, property, procedural, or some other type of issue. While in some cases this characterization is obvious, in others it is not so clear. Is the validity of a contract waiving liability for intentional harms a question of tort or contract law? Is the statute of limitations for trespass a question of property or procedural law? (After all, the property law doctrine of adverse possession is at its core a statute of limitations issue.)

Differences in how states characterize a given issue can reduce uniformity among the states. If one state characterizes an issue as one in tort, while another considers it a contract question, the two states will consider two different crucial events, which may result in different outcomes.

9. As you may already have observed, choice of law terminology borrows many words from Latin and French. Two other terms also warrant brief mention, as they reflect key notions in choice of law thinking.

Depechage. While some cases turn on a single issue, many others involve multiple matters. A court conducts *depechage* when it engages in a separate choice of law analysis for each of the issues. Note that *depechage* may mean the laws of different states may apply to various issues in a single case.

While applying multiple laws in a case ordinarily presents no problem, in some instances it can lead to anachronistic outcomes. To illustrate, reconsider the Introductory Problem to this chapter. If either the law of Alpha or Beta applies to all issues, Wife will lose (albeit for different reasons). But if the court applies Alpha law to the marriage and the validity of the contract, but Beta law to the question of breach and limitations, Wife may well win the case . . . a result that would not be possible under either Alpha or Beta law, standing alone.

Renvoi. When a court applies the law of another state, it applies only that state’s *substantive* law. It rarely applies the other state’s procedural law. Nor should a court consider the other state’s choice of law rules. *Renvoi* is the practice of considering the other state’s choice of law rules in the process of determining whether that other state’s law applies. If the other state would select *forum* law, the forum may decide to use its own law in the action.

In theory, *renvoi* had no place under the First Restatement. However, courts did occasionally engage in the practice. In many cases *renvoi* was an “escape device” that allowed the court to avoid a result it found troubling. Escape devices are discussed below.

While still frowned upon, *renvoi* may actually have a place under the modern interest-based approaches to choice of law. You will see an example of this in the *Sutherland* case in pt. C.4 of this Chapter.

2. CONTRACT

LAYNE CHRISTENSEN CO. V. ZURICH CANADA

30 Kan.App.2d 128 (2002)

BEIER, J.

This appeal arises out of a truck accident in California which injured a 6-year-old. We must determine whether the primary insurance policy's coverage limit was stated in Canadian or United States dollars, and, if Canadian, whether either or both of two other policies come into play. . . .

Factual Background

The Parties

Layne Christensen Company (Layne) is a Delaware corporation with its principal place of business in Johnson County, Kansas. Elgin Exploration Company, Limited (Elgin) was incorporated in and has its principal place of business in the province of Alberta, Canada. In December 1995, Layne acquired Elgin when it purchased Elgin's then-parent corporation, Christensen Boyles Corporation (CBC).

At all relevant times, Elgin and/or Layne were covered by automobile insurance policies issued by several different carriers, including the three involved in this case. Zurich Canada (Zurich), is a Canadian insurance company with its principal place of business in Ontario. TIG Insurance Company (TIG) is a California corporation with its principal place of business in Texas. Reliance National Indemnity Company (Reliance) is a Wisconsin corporation with its principal place of business in Pennsylvania. [The premiums under all three policies were paid in Canadian dollars. All claims were likewise paid in Canadian dollars, although there was no evidence of any claims arising out of accidents in the United States until the one in this case.]

The Underlying Suit

In 1996, Elgin was working on a project in California. On August 26, 1996, an Elgin employee from the project was driving a truck rented by Elgin when he struck Devin Wallen, the 6-year-old child. Wallen was seriously injured.

Wallen and his mother filed suit in California state court against Elgin and the driver shortly after the accident. The Wallen suit was settled by Elgin in July 1997 for \$2 million in United States dollars. Representatives of Zurich, TIG, and Reliance approved the settlement. Zurich contributed \$1,456,133.96, the equivalent of \$2 million Canadian dollars, toward the

settlement. TIG and Reliance each paid \$146,933.02, and Layne/Elgin contributed \$250,000, all in United States dollars. . . .

[Elgin operated primarily in Canada, but also operated three trucks in the United States. The policies covered liability in both nations.]

The Current Litigation

On August 20, 1997, Layne and Elgin (referred to collectively as “plaintiffs”) filed this declaratory judgment action against Zurich, TIG, and Reliance in Johnson County District Court, seeking a declaration that they were fully covered by one or more of the policies for the Wallen accident. Plaintiffs claimed that Zurich’s policy limit was based on United States dollars and that Zurich’s policy was primary over the policies of TIG and Reliance.* . . .

All of the parties filed summary judgment motions on the issue of Zurich’s policy limits. The court heard arguments and, on January 29, 1999, issued a memorandum and order. It concluded that the Zurich policy was made in Canada and that the law of Alberta, Canada, should control. Looking at Canadian law, the court concluded the coverage limit was stated in Canadian dollars. The court concluded the term “dollars” was not ambiguous as a matter of law and the parties’ intent could be ascertained from their actions. . . .

Discussion

. . .

Governing Law

In interpreting Zurich’s policy, the district court applied Canadian law, finding that the rule of *lex loci contractus* should apply and that the contract was made in Alberta, Canada. Both Reliance and TIG claim this was error, but for different reasons. Reliance contends Kansas law should apply because Zurich’s policy covering the California trucks was made in Kansas. TIG argues California law should apply because that was where Zurich was obligated to perform its contract—i.e., pay for the loss.

There appears to be some differences between Kansas law and California law on one hand and Canadian law on the other. A choice-of-law analysis is therefore necessary. When addressing choice-of-law issues, the Kansas appellate courts follow the *Restatement (First) of Conflict of Laws* (1934).

The *Restatement (First)* contains two general principles for contracts cases. The primary rule, *lex loci contractus*, calls for the application of the law of the state where the contract is made. *Restatement (First) of Conflict*

* If Zurich’s policy was “primary”, payments would be taken first from that policy, and the other policies would only cover any difference between the total payout and the policy limits. Therefore, if the Zurich policy was in U.S. dollars, it would cover the entire settlement amount, and the other insurers would owe nothing. *Eds.*

of *Laws*, § 332 (1934). The second rule provides that the law of the place of performance determines the manner and method of performance. § 358.

Courts have struggled on occasion to determine whether the issues in a particular case are governed by *lex loci contractus* or the law of the place of performance.

Even the *Restatement* itself acknowledges that the line between the two principles is not a bright one:

[T]here is no logical line which separates questions of the obligation of the contract, which is determined by the law of the place of contracting, from questions of performance, determined by the law of the place of performance. There is, however, a practical line which is drawn in every case by the particular circumstances thereof. When the application of the law of the place of contracting would extend to the determination of the minute details of the manner, method, time and sufficiency of performance so that it would be an unreasonable regulation of acts in the place of performance, the law of the place of contracting will cease to control and the law of the place of performance will be applied. On the other hand, when the application of the law of the place of performance would extend to a regulation of the substance of the obligation to which the parties purported to bind themselves so that it would unreasonably determine the effect of an agreement made in the place of contracting, the law of the place of performance will give way to the law of the place of contracting.

Restatement (First) of Conflicts of Law, § 358, Comment b (1934).

Some pre-*Restatement* cases seem to follow the rule that payments under a contract should be made in the currency of the country where the payment is to be made. If the currencies of the relevant countries bear the same name but have different value, the currency of the country where the money is payable is presumed to be intended by the parties. These cases seem to apply the place of performance rule.

However, in our view, this case calls more for an interpretation of the original contract. The question of the meaning of the coverage limit goes to the substance of the obligation rather than the manner of performance. It also makes more sense that the policy limit should remain constant regardless of where a covered accident occurred, i.e., where performance turned out to be required, unless the parties have been explicit in their intention that the limit be malleable. We conclude that *lex loci contractus* applies in this situation.

The issue then becomes: Where was the contract made? The district court decided this issue based on the parties' stipulations, as well as affidavits and documents, meaning this court is in as good a position as the

district court was to answer this question. We therefore exercise plenary review on this issue.

. . . Generally the party seeking to apply the law of a jurisdiction other than the forum has the burden to present sufficient facts to show that other law should apply. Failure to present facts sufficient to determine where the contract is made may justify a default to forum law. Here, under a *de novo* standard of review, Zurich would have the burden of proving that the contract was made in Canada and that Canadian law should therefore control.

A contract is made where the last act necessary for its formation occurs. In cases involving insurance policies, our courts have repeatedly held the contract is made where the policy is delivered. . . .

In this case, the original policy apparently was issued and delivered in Canada. Although the stipulations are vague, they indicate Elgin, based in Alberta, was seeking a policy independent of its United States parent corporation. The insurance broker involved with obtaining the original policy in 1993 and the renewals through April 1996 was based in Alberta. The premiums were paid to the Alberta broker and forwarded to Zurich.

Reliance argues the contract was made in Kansas because the 1996 endorsements, which extended the coverage date and provided coverage for the California truck at issue, were delivered in Kansas. It assumes delivery occurred when the endorsements were received in Kansas, and it assumes the endorsements constituted a new or separate contract for purposes of determining where the contract was made. Neither assumption is correct.

Zurich delivered the 1996 endorsements to M & M, [in Canada] who, in turn, forwarded them either to Elgin or to Lockton. M & M was Elgin’s agent for purposes of obtaining the insurance. As a broker, it was acting on behalf of the insured in procuring the insurance coverage and acting on behalf of the insurer for other purposes.

The *Restatement (First) of Conflicts of Law* also provides some guidance. Section 318 recognizes that when an insurance policy becomes effective on delivery through an insurance company’s agent, the place of contracting is where the policy is delivered to the insured. When a policy is requested through a broker acting for a client and the policy is effective on delivery, the place of contracting is where the policy is posted or delivered to the broker. . . .

Application of Canadian Law

Reliance and TIG argue alternatively that, even if Canadian law applied, the district court misinterpreted and misapplied it. Zurich and the district court relied on a statute contained in the Alberta Insurance Act and an appellate court decision interpreting a similar Ontario statute to

find that the policy limit at issue here was unambiguously stated in Canadian dollars. . . .

Section 206 of the Alberta Insurance Act, R.S.A. (1980), ch. I-5 § 1 et seq., provides: “Insurance money is payable in Alberta in lawful money of Canada.” . . .

None of the parties cites to any published decision in Alberta or from the Canadian Supreme Court interpreting Section 206. We have also been unsuccessful in finding any Canadian authority interpreting this provision. . . . [Discussion of precedent omitted.]

In view of this weak authority for the contrary proposition, we conclude that the plain language of Section 206 of the Alberta Insurance Act speaks only to the form in which payments on insurance policies are to be made, not to the manner in which their value is to be determined. The statute does not regulate the type of currency that determines the amount of the payments, only the currency in which the insured receives the amount determined.

This conclusion spurs us to look to Canadian common law for assistance in determining whether the district court erred in concluding that the policy limit was stated unambiguously in Canadian dollars.

Under general Canadian legal principles, construction of an insurance contract (as with any other contract) is a two-step process. First, Canadian courts will attempt to ascertain the intent of the parties based upon the words they have used in the contract. As part of that process, Canadian courts will apply other rules of construction to search for an interpretation, from the whole of the contract, that would appear to promote or advance the true intent of the parties. In divining the true intent of the parties, Canadian courts consider “the time of entry into the contract, that is, the commercial atmosphere in which the insurance was contracted.” *Whissell Ventures Ltd. v. Royal Insurance Co. of Canada*, 74 A.C.W.S.3d 476, 496 (Alberta QB 1997). If this first step fails, Canadian courts go to the second step and apply the rule of *contra proferentem*, construing the language in a manner favorable to the insured. When doubt exists as to the meaning of a limiting term, the insurer is obligated to protect itself against liability to which it would be subject. Later court decisions refer to this process as the “law of reasonable expectations” doctrine.

We conclude that this contract, when viewed in the “commercial atmosphere” Canadian law requires us to examine, unambiguously states the policy limit in Canadian dollars. Like the district court, we are persuaded by the fact that all parties to the original contract were Canadians, as well as the location of nearly all of the insured risks in Canada. The California rental truck involved in the accident in this case was a geographic anomaly, when the risks insured by the policy are considered as a group. In addition, all premiums . . . were paid in Canadian

currency. There is no evidence in the record that Zurich ever sought additional payments to bring the premiums in line with a United States currency interpretation

In sum, we depart from the district court on some of its reasoning but not from its result. As the district judge observed: “Had the underlying accident occurred in Canada, it is impossible to fathom how ambiguity could even be argued. The site of an accident giving rise to a claim under an insurance contract should not control the construction of that contract.” Therefore, we agree that Zurich’s \$ 2 million policy limit was stated in Canadian dollars.

Conclusion

For all of the forgoing reasons, we hold: . . . (2) we must apply Canadian law to interpret Zurich’s policy; [and] (3) Zurich’s policy unambiguously stated the \$2 million policy limit in Canadian dollars. . . .

NOTES AND QUESTIONS

1. Unlike tort cases, the First Restatement provides *two* rules for contract disputes. Be ready to identify the two rules and when they apply.

2. Is the First Restatement’s approach to contract cases consistent with the “vested rights” theory undergirding the traditional rules? The “performance” rule certainly accords with this theory. Until one of the parties to the contract has failed to perform, there is no cause of action for breach of contract.

But what about the *lex loci contractus* rule? That rule governs issues such as the validity and basic parameters of the contract. Do any rights “vest” on mere formation of the contract? What about the fact that a party who thinks a contract is invalid (because of lack of consideration, infancy, insanity, statute of frauds, or other defense) could bring an action immediately (that is, before performance is to occur) to rescind the contract? In that sense, isn’t the right to challenge validity “vested” at the point of contract formation?

3. Do you agree with the court’s conclusion that the question in the case is governed by the *lex loci contractus* rule? Why isn’t the issue the currency in which the insurance company must “perform” its obligations?

4. Note 7 of the torts section discussed an intentional torts “exception” used by some courts. Some courts also recognize an analogous “performance exception” in contract law. This exception applies to issues of contract validity. While such issues are usually governed by the law of the place the contract was made, under the exception courts will apply the law of the place of performance to determine validity. Like the intentional torts exception, the performance exception is one-way—it applies only when the contract would be *invalid* under the law of the place of contracting, but *valid* under the law of the place of performance. Many courts justify the exception as a rule that better respects the parties’ intent. After all, parties do not ordinarily go to the time and

expense of entering into an agreement if that agreement is not enforceable. On the other hand, aren't rules declaring that agreements have no legal effect—such as rules governing infancy and statute of frauds—designed to ignore the intent of the parties?

5. When discussing where the insurance contract was made, the *Layne Christiansen* court suggests it would make a difference whether the contract was delivered by an agent (in which case delivery occurs only on receipt) or by mail (in which case delivery would occur when the letter was posted). Do you understand why there should be a difference? The First Restatement contained numerous rules of this sort, most of which all turn on the same basic principle.

6. *Failure to prove foreign law.* The *Layne Christiansen* court also indicates that the party asking the court to apply “foreign” law (in choice of law parlance, “foreign” law is any law other than forum law, even if it is the law of another U.S. state) has the burden of proving the content of that law. The need to prove foreign law was historically a major issue in choice of law cases. Before the advent of WESTLAW and LEXIS, many courts had no access to the statutes and case reports of other jurisdictions. Most courts today have full access to these sources, at least for the common-law nations.

What does a court do when a party with the burden of proving foreign law fails to meet its burden? Precedent indicates several options, including (a) dismissing the case, (b) applying forum law, and (c) assuming foreign law follows the same basic principles as forum law, even if it may differ in certain particulars. Are any of these approaches preferable? What if defendant has asserted a defense, and fails to offer proof as to what foreign law is regarding that defense?

3. PROPERTY

The traditional rules governing property are relatively simple. For both real and personal property, courts generally apply the law of the place where the property is situated. In the case of tangible property, this rule is easy to apply. Determining the situs of intangibles like stock or intellectual property rights, however, can prove more difficult.

One significant exception to the situs rule involves disposition of personal property by will or intestate succession, where courts apply the domicile of the owner at the time of death. This result stems from characterization, as the traditional rules consider these issues of family law and decedents' estates, not property (even though other dispositions of property are governed by the situs rule). As you should learn if you take a course in wills, this rule can complicate the administration of estates. While the law of the decedent's domicile at death governs disposition of personalty, the law of the situs governs disposition of real property.

Many states have replaced the traditional rules with one or more of the “modern” approaches. However, it is worth noting that even in these states situs remains a crucial factor for questions of property law. Using

the law of the situs provides a degree of certainty that may be especially important in determining interests in property.

4. MARRIAGE

EXCERPTS FROM FIRST RESTATEMENT OF CONFLICT OF LAWS (1934)

§ 121. Law Governing Validity of Marriage

Except as stated in §§ 131 and 132, a marriage is valid everywhere if the requirements of the marriage law of the state where the contract of marriage takes place are complied with.

§ 122. Requirements of State of Celebration

A marriage is invalid everywhere if any mandatory requirement of the marriage law of the state in which the marriage is celebrated is not complied with.

§ 132. Marriage Declared Void by Law of Domicil

A marriage which is against the law of the state of domicil of either party, though the requirements of the law of the state of celebration have been complied with, will be invalid in the following cases:

- a) polygamous marriage,
- b) incestuous marriage between persons so closely related that their marriage is contrary to a strong public policy of the domicil, . . .

Parties married in one state frequently move to another. As § 121 indicates, the new state will typically honor the marriage as long as it was valid under the law of the state where celebrated. The place of celebration rule applies regardless of whether the parties resided in the jurisdiction where they were married, and even if the parties visited the other state to avoid the requirements of their state of domicile. First Restatement § 129. Marriage before non-state sovereigns such as Indian tribes are similarly recognized, as long as one of the spouses is a member of the tribe.

The most important exception to the place of celebration rule is § 132, which indicates that a state need not recognize certain marriages that violate the law of the domicile of either party. While the rule applies to all polygamous marriages (again assuming it violates the law of one of the parties' domiciles), it only applies to incestuous marriages when the parties are so closely related that the marriage would violate the policy of the state in which the parties are domiciled. Are there any incestuous marriages that would violate the *law* of the state of domicile, but not violate a strong public policy of that state?

PROBLEMS

1. In 2010, Alpha and Beta were married in a church ceremony in North Dakota. A few years later they move to California, and file a joint state tax return (an option available only for those legally married). The state declares the marriage invalid because Alpha and Beta never obtained an official state marriage license from North Dakota. Is the state correct? What more do you need to know?

2. Same facts as Problem 1, except assume Alpha and Beta were domiciled in California when they celebrated the marriage.

3. In 2010, Alpha and Beta were married in a civil ceremony in Idaho. At the time, however, they were citizens of California. The parties chose to get married in Idaho because that state charges only \$5 for a marriage license, while California charges \$250. Must California recognize the marriage?

4. In 2010, Alpha and Beta were married in a civil ceremony in Hawaii. At the time, however, they were residents of California. The parties chose to get married in Hawaii because that state does not require a blood test of those who seek to be married. California, by contrast, requires a blood test, reflecting a strong state policy of detecting incompatibilities in blood type that can be very dangerous for offspring. Under California law, marriages performed without a blood test are invalid. Must California recognize the marriage?

5. In 2010, Alpha and Beta were married in a civil ceremony in Maine. At the time, however, they were domiciled in California. Alpha and Beta are first cousins. Marriage between first cousins is valid in Maine, but invalid in California. Must California recognize the marriage?

6. In late 2016, Alpha and Beta were married in India. Alpha and Beta are a same-sex couple residing in California. India does not recognize same-sex marriage, while all bans on same-sex marriage in the United States were declared unconstitutional by the Supreme Court. May California recognize the marriage?

5. PROCEDURE**EXCERPTS FROM FIRST RESTATEMENT
OF CONFLICT OF LAWS (1934)****§ 584. Determination of Whether an Issue is One of Procedure**

The court at the forum determines according to its own Conflict of Laws rule whether a given question is one of substance or procedure.

§ 585. What Law Governs Procedure

All matters of procedure are governed by the law of the forum.

§ 588. Parties

The law of the forum determines who may and who must sue and be sued.

§ 597. Evidence

The law of the forum determines the admissibility of a particular piece of evidence.

Like the rules governing property, the First Restatement rules governing matters of procedure are remarkably consistent: in most cases the forum applies its own law. While perhaps not perfectly aligned with the “vested rights” theory, use of forum law offers many practical advantages. After all, the forum is used to its own way of conducting trials, and might find it difficult to employ a different set of procedural rules whenever a case is governed by foreign law.

However, what do we mean by a rule of “procedure?” While procedural rules dictate the course of the litigation process, they can also have a significant effect on the rights of the parties.

GRANT V. MCAULIFFE

41 Cal.2d 859, 264 P.2d 944 (1953)

TRAYNOR, J.

On December 17, 1949, plaintiffs W. R. Grant and R. M. Manchester were riding west on U. S. Highway 66 in an automobile owned and driven by plaintiff D. O. Jensen. Defendant’s decedent, W. W. Pullen, was driving his automobile east on the same highway. The two automobiles collided at a point approximately 15 miles east of Flagstaff, Arizona. Jensen’s automobile was badly damaged, and Jensen, Grant, and Manchester suffered personal injuries. Nineteen days later, on January 5, 1950, Pullen died as a result of injuries received in the collision. Defendant McAuliffe was appointed administrator of his estate and letters testamentary were issued by the Superior Court of Plumas County. All three plaintiffs, as well as Pullen, were residents of California at the time of the collision. After the appointment of defendant, each plaintiff presented his claim for damages. He rejected all three claims, and on December 14, 1950, each plaintiff filed an action against the estate of Pullen to recover damages for the injuries caused by the alleged negligence of the decedent. . . .

The basic question is whether plaintiffs’ causes of action against Pullen survived his death and are maintainable against his estate. The statutes of this state provide that causes of action for negligent torts survive the death of the tortfeasor and can be maintained against the administrator or executor of his estate. Defendant contends, however, that

the survival of a cause of action is a matter of substantive law, and that the courts of this state must apply the law of Arizona governing survival of causes of action. There is no provision for survival of causes of action in the statutes of Arizona, although there is a provision that in the event of the death of a party to a pending proceeding his personal representative can be substituted as a party to the action, if the cause of action survives. The Supreme Court of Arizona has held that if a tort action has not been commenced before the death of the tortfeasor a plea in abatement must be sustained.

Thus, the answer to the question whether the causes of action against Pullen survived and are maintainable against his estate depends on whether Arizona or California law applies. In actions on torts occurring abroad, the courts of this state determine the substantive matters inherent in the cause of action by adopting as their own the law of the place where the tortious acts occurred, unless it is contrary to the public policy of this state. . . . But the forum does not adopt as its own the procedural law of the place where the tortious acts occur. It must, therefore, be determined whether survival of causes of action is procedural or substantive for conflict of laws purposes.

This question is one of first impression in this state. The precedents in other jurisdictions are conflicting. In many cases it has been held that the survival of a cause of action is a matter of substance and that the law of the place where the tortious acts occurred must be applied to determine the question. The Restatement of the Conflict of Laws, section 390, is in accord. It should be noted, however, that the majority of the foregoing cases were decided after drafts of the Restatement were first circulated in 1929. Before that time, it appears that the weight of authority was that survival of causes of action is procedural and governed by the domestic law of the forum. Many of the cases, decided both before and after the Restatement, holding that survival is substantive and must be determined by the law of the place where the tortious acts occurred, confused the problems involved in survival of causes of action with those involved in causes of action for wrongful death. The problems are not analogous. A cause of action for wrongful death is statutory. It is a new cause of action vested in the widow or next of kin, and arises on the death of the injured person. Before his death, the injured person himself has a separate and distinct cause of action and, if it survives, the same cause of action can be enforced by the personal representative of the deceased against the tortfeasor. The survival statutes do not create a new cause of action, as do the wrongful death statutes. . . .

Defendant contends, however, that the characterization of survival of causes of action as substantive or procedural is foreclosed by *Cort v. Steen*, 36 Cal.2d 437, 442, 224 P.2d 723, where it was held that the California survival statutes were substantive and therefore did not apply

retroactively. The problem in the present proceeding, however, is not whether the survival statutes apply retroactively, but whether they are substantive or procedural for purposes of conflict of laws. " 'Substance' and 'procedure,' . . . are not legal concepts of invariant content." *Black Diamond Steamship Corp. v. Robert Stewart & Sons*, 336 U.S. 386, 397, 69 S.Ct. 622, 628, 93 L.Ed. 754, and a statute or other rule of law will be characterized as substantive or procedural according to the nature of the problem for which a characterization must be made.

Defendant also contends that a distinction must be drawn between survival of causes of action and revival of actions, and that the former are substantive but the latter procedural. On the basis of this distinction, defendant concludes that many of the cases cited above as holding that survival is procedural and is governed by the domestic law of the forum do not support this position, since they involved problems of "revival" rather than "survival." The distinction urged by defendant is not a valid one. Most of the statutes involved in the cases cited provided for the "revival" of a pending proceeding by or against the personal representative of a party thereto should he die while the action is still pending. But in most "revival" statutes, substitution of a personal representative in place of a deceased party is expressly conditioned on the survival of the cause of action itself. If the cause of action dies with the tortfeasor, a pending proceeding must be abated. . . .

Since we find no compelling weight of authority for either alternative, we are free to make a choice on the merits. We have concluded that survival of causes of action should be governed by the law of the forum. Survival is not an essential part of the cause of action itself but relates to the procedures available for the enforcement of the legal claim for damages. Basically the question is one of the administration of decedents' estates, which is a purely local proceeding. The problem here is whether the causes of action that these plaintiffs had against Pullen before his death survive as liabilities of his estate. . . . Civil Code section 956 provides that "A thing in action arising out of a wrong which results in physical injury to the person . . . shall not abate by reason of the death of the wrongdoer . . .," and causes of action for damage to property are maintainable against executors and administrators under section 574 of the Probate Code. Decedent's estate is located in this state, and letters of administration were issued to defendant by the courts of this state. The responsibilities of defendant, as administrator of Pullen's estate, for injuries inflicted by Pullen before his death are governed by the laws of this state. This approach has been followed in a number of well-reasoned cases. It retains control of the administration of estates by the local legislature, and avoids the problems involved in determining the administrator's amenability to suit under the laws of other states. . . . Today, tort liabilities of the sort involved in these actions are regarded as compensatory. When, as in the present case, all of the parties were residents of this state, and the estate of the deceased

tortfeasor is being administered in this state, plaintiffs' right to prosecute their causes of action is governed by the laws of this state relating to administration of estates.

The orders granting defendant's motions to abate are reversed, and the causes remanded for further proceedings.

[The dissenting opinion of Justice Schaeur is omitted.]

NOTES AND QUESTIONS

1. Is there a bright-line test to distinguish rules of substance and rules of procedure? Do you agree with the court that the rule governing survivability is a rule of procedure?

2. One of the important aspects of Justice Traynor's opinion is his emphasis on how the answer to whether a particular rule is one of substance or procedure depends on the context in which the issue arises. Thus, precedent dealing with whether a change in law applies retroactively to events that occurred before the change (substantive changes are usually not applied retroactively, while procedural changes are) may not be relevant to the question of whether the same rule is substantive for purposes of choice of law. Keep this basic concept in mind throughout your law school career. As another example, if you have studied the *Erie* doctrine, you will see that the meanings of substance and procedure under that doctrine differ significantly from the meanings in horizontal choice of law.

3. Do you understand the court's distinction between survival of a cause of action (the issue in this case) and wrongful death actions? Why does it matter that a wrongful death action is a recent legislative creation involving a new cause of action, while survival deals with how long a pre-existing tort claim remains enforceable?

4. In the penultimate sentence of the opinion, the court suggests its holding may be limited to situations where the parties are all residents of the forum state, and the estate is being administered in that state. Why would that matter? If the rule is "procedural", shouldn't forum law apply to a mirror image case, such as where all the parties are from Arizona, but the dispute is being litigated in California?

Does that language in the opinion suggest that there is something else—something tacit—going on here? If you were a judge, would you be comfortable applying Arizona's no survivorship rule to this case? If so, why? In fact, *Grant* is often cited as a case in which the court "recharacterized" the rule to allow it to apply some other law. Recharacterization is discussed in more depth below.

By the way, if you *are* uncomfortable with Arizona law, you may already have identified the sorts of concerns that led to the development of the newer choice of law approaches discussed in Part C of this Chapter. (And if you aren't uncomfortable, don't worry—as indicated above, you can find plenty of judges who would agree with you.)

6. PROBLEM ISSUES AND "ESCAPE DEVICES"**a. Statutes of Limitations****EXCERPTS FROM THE FIRST RESTATEMENT
OF CONFLICT OF LAWS (1934)****§ 603. Statute of Limitations of Forum**

If action is barred by the statute of limitations of the forum, no action can be maintained though action is not barred in the state where the cause of action arose.

§ 604. Foreign Statute of Limitations

If action is not barred by the statute of limitations of the forum, an action can be maintained, though action is barred in the state where the cause of action arose.

§ 605. Time Limitations on Cause of Action

If by the law of the state which has created a right of action, it is made a condition of the right that it shall expire after a certain period of limitation has elapsed, no action begun after the period has elapsed can be maintained in any state.

NOTES AND QUESTIONS

1. Could §§ 603 and 604 be combined and condensed into a single sentence?

2. As written, do §§ 603 and 604 violate one of the tenets of the traditional rules; namely, that choice of law analysis usually does not consider the content of the rules being considered?

3. Is § 603 fair? If the only connection the forum has with the dispute is that plaintiff happened to file the case there, is it fair for the court to dismiss the action under its own, shorter, limitations period? Is this a draconian sanction for forum shopping? The rule is ameliorated by the fact that dismissals based on statute of limitations are in most states not decisions on the merits. Therefore, plaintiff is free to file again in a state with a longer limitations period that has not yet expired.

4. § 605 deals with the so-called "built-in" statute of limitations. If the legislature creates a new claim and includes in the statute a specific limitations period to bring the claim, a court may consider the special limitations period to be an integral part of the new statutory claim, and accordingly apply the limitations period on the statute in lieu of forum law. The case law dealing with this issue is unfortunately quite muddled. Even if the limitations period is written into the statute, a court might not consider it a "condition" of the right depending on how it is worded. Note too that while

§ 605 only applies when the built-in limitations period is shorter than the forum's, a few courts will also borrow longer built-in limitations periods.

5. The logic underlying § 605 is that when a legislature creates a right, it can specify how long that right remains in force. Can a legislature define other parameters of a right? What if State X creates a new right, but provides the right may only be enforced in the courts of State X, not elsewhere. If plaintiff ignores that limit and sues in State Y, may the court hear the case? Does the legislature of State X have any power to define the subject-matter jurisdiction of the courts of State Y? See *Tennessee Coal, Iron & R.R. Co. v. George*, 233 U.S. 354 (1914).

Of course, Congress may divest the state courts of jurisdiction over federal claims. States may also limit claims against the sovereign to a particular court, although as we will see later states may be able to adjudicate claims against other states.

6. *Borrowing statutes.* Several states have enacted laws that require a court deciding a claim under foreign law to “borrow” the foreign limitations period for that claim. These statutes require borrowing even if the limitations period is not built in to the claim (as would be the case with a common law tort or contract claim). Like § 605, borrowing statutes usually require the court to borrow a foreign limitations period only when it is shorter than that of the forum. Why do both § 605 and these statutes work in a way that mainly benefits defendants?

b. Characterization (and Recharacterization)

Characterization of the issue is a crucial initial step in the First Restatement analysis. Under the vested rights paradigm, the rules governing torts, contracts, property, family law, and procedure often looked to different “vesting events.” Because not all issues can easily be characterized into a particular category, decisions from different states were sometimes inconsistent, reducing the uniformity that was intended under the traditional rules.

Further complicating matters was that courts sometimes used characterization as an “escape device.” In choice of law parlance, an escape device is a tool a court can use when it wants to avoid a result dictated by a particular choice of law rule. Thus, if a tort choice of law rule would require application of the law of State X, a court in State Y might be able to apply its own law by “recharacterizing” the issue as one of procedure or remedy. The court in *Grant v. McAuliffe* in pt. 5 may well have been engaged in recharacterization of this sort. In addition to recharacterizing issues as procedural, see also *Kilberg v. Northeast Airlines*, 9 N.Y.2d 34, 172 N.E.2d 526 (1961), courts could treat a tort as an implied contract, and avoid the law of the place of injury. *Levy v. Daniels' U-Drive Auto Renting Co.*, 108 Conn. 333, 143 A. 163 (1928).

There are undoubtedly many reasons why courts might want to “escape” the literal application of a choice of law rule. Some reasons are valid, others perhaps less so. The problem with recharacterization, however, is that the court often does not explain exactly why it is bothered by the outcome dictated by the rule. In some cases, the problem seems to be that the state chosen by the traditional rules has no meaningful connection with the dispute or issue. Thus, if two parties from State X enter into a contract that was negotiated and to be performed entirely in State X, it might seem disconcerting for the validity of that contract to be governed by the law of State Y merely because the accepting party happened to mail its letter of acceptance while visiting that State.

In other cases, the court may be troubled by the *content* of the law selected under the traditional rules. For many years, Mexico placed severe limits on the damages recoverable in certain tort cases. If two citizens of State X were involved in an automobile accident in Mexico, the courts of State X might consider it unjust to apply that damages limit in the case, even though Mexico is the *lex loci delicti*. This second situation might also justify use of the public policy exception, discussed just below.

c. Public Policy

FLEMMMA V. HALLIBURTON ENERGY SERVICES, INC.

303 P.3d 814 (N.M. 2013)

VIGIL, J.

This case presents a conflict of laws issue that requires us to determine whether enforcement of an arbitration agreement, formed in the State of Texas, would offend New Mexico public policy to overcome our traditional choice of law rule, which requires that we apply the law of the jurisdiction in which the contract was formed. We conclude that the agreement formed in Texas would be unconscionable under New Mexico law, and it therefore violates New Mexico public policy. Thus, we apply New Mexico law and conclude that no valid agreement to arbitrate exists between the parties because Halliburton’s promise to arbitrate is illusory. . . .

I. BACKGROUND

Defendant Halliburton Energy Services (Halliburton) hired Plaintiff Edward Flemma (Flemma) to work as a cement equipment operator in Houma, Louisiana, in January of 1982. During his twenty-six years of employment with Halliburton, Flemma was promoted several times and worked for the company in Louisiana, Texas, Angola, and New Mexico. The last position he held was as district manager in Farmington, New Mexico, where he worked from 2006 until the time of his termination in 2008.

As district manager, Flemma was involved in a company initiative to consolidate three Farmington facilities into one suitable facility.

Halliburton considered two locations for the consolidated facility: Troy King, located within the Farmington city limits, and Crouch Mesa, located outside the city limits. The company preferred the Troy King location partly due to tax incentives offered by the city. Flemma opposed the Troy King facility for various reasons, including concerns about the safety of the general public.

Flemma alleged that in August 2006, he and Defendant Karl Madden, a district sales manager for Halliburton, received a warning from Defendant Richard Montman, Flemma's supervisor, that "if you value your career, you will keep your mouth shut about the Troy King property." The day after this warning, Rick Grisinger, a Vice President of Halliburton, told Flemma to stop making "negative comments" regarding the Troy King location. Flemma did not heed Grisinger's warning, and in July 2007, Flemma continued to express his concerns when he prepared an executive summary comparing the two locations and reiterating the public safety issues at the Troy King location.

In April 2008, Montman informed Flemma, "Today is your last day with the company, you are not meeting my expectations." Montman gave Flemma the option of signing a resignation, general release, and settlement agreement, as well as accepting twelve weeks of base salary, or being terminated. Flemma refused to sign the documents and was terminated. He stated in an affidavit that he was terminated in retaliation for "not keeping [his] mouth shut" about his concerns related to the Troy King facility. As a result, Flemma filed a complaint in district court on December 22, 2008, against Halliburton and others for wrongful and retaliatory discharge.

After answering Flemma's complaint, Halliburton filed a motion to compel arbitration, alleging that Flemma agreed to a binding arbitration provision in the company's Dispute Resolution Program (DRP), which was adopted in 1997. In support of its motion, Halliburton attached documentary evidence that on four separate occasions, Halliburton mailed Flemma materials notifying him that continued employment with the company constituted his acceptance of the terms of the DRP. According to Halliburton, the four mailings were essentially identical and expressly stated that continuing employment with Halliburton would constitute an agreement with Flemma to abide by the DRP.

The first two alleged notifications occurred in December 1997 and spring 1998 while Flemma was working in Texas. The third alleged notification occurred in the summer of 1999 while Flemma was working in Louisiana. The fourth alleged notification occurred in October 2001 while Flemma was again working in Texas. . . .

Flemma responded to Halliburton's motion to compel, arguing that he was not bound by the DRP's arbitration provisions pursuant to *DeArmond v. Halliburton Energy Services, Inc.*, 2003-NMCA-148, ¶ 14, 134 N.M. 630,

81 P.3d 573, which requires proof that an employee have actual knowledge of both the employer’s offer and its invitation that the offer be accepted by performance. Flemma’s affidavit stated that he did not remember seeing, receiving, opening, or reading the DRP material and that his ex-wife may have disposed of it. Flemma also argued that the DRP is invalid because Halliburton’s promise to arbitrate is illusory, as it allows Halliburton to amend or terminate the DRP after a claim accrues.

After briefing by the parties and a hearing, the district court denied Halliburton’s motion to compel arbitration. The district court’s order gave little explanation of its reasoning for the denial. However, during the hearing on the motion to compel, the district court gave two reasons for its ruling. First, the district court stated that the arbitration agreement was unenforceable because under New Mexico law it would be illusory, in that there cannot be a change to the arbitration agreement after a claim accrues. Second, the district court declined to apply Texas law on the basis that Texas law offends New Mexico public policy. The district court reasoned that enforcing an agreement solely on the basis of the mailings without affirmative evidence of acceptance or mutual assent would be contrary to public policy.

After it failed to move the district court to reconsider its motion to compel arbitration, Halliburton appealed the denial of its motion to the Court of Appeals. In a split decision, the Court of Appeals reversed the district court. The Court of Appeals framed the issue as “whether the district court correctly applied the public-policy exception in refusing to apply Texas law on the acceptance and assent issue when the sole conflict between Texas and New Mexico law involves only evidentiary requirements of contract formation.” Concluding that the agreement to arbitrate was enforceable under Texas law, the Court of Appeals reasoned that “[t]he mere differences between Texas and New Mexico in terms of the evidence required to prove acceptance of and assent to an agreement are not sufficient to overcome the place-of-formation rule on public-policy grounds.” Judge Bustamante dissented, stating that the difference between Texas and New Mexico law is “not merely an evidentiary requirement, but instead a reflection of New Mexico public policy protecting workers from contractual obligations they are not aware of and to which they never agreed.”

Flemma appealed the Court of Appeals’ opinion and argues that New Mexico’s requirement of proof of actual knowledge and conscious assent is a reflection of public policy protecting workers from contractual obligations of which they are not aware and to which they never agreed. He also argues that Halliburton’s ability to modify the terms of the arbitration agreement after a claim has accrued, but before an arbitration proceeding has been initiated, renders the arbitration agreement illusory and thereby unenforceable. We agree with Flemma on the latter, and thus, we decline

to enforce the arbitration agreement under Texas law. Applying New Mexico law, we conclude that there is no valid agreement to arbitrate due to a lack of consideration since Halliburton's ability to revoke its promise to arbitrate after a claim has accrued makes the promise illusory.

II. DISCUSSION

At the heart of this dispute is whether the parties have validly agreed to arbitrate Flemma's wrongful and retaliatory discharge claims. In order to determine whether such an agreement exists, we must navigate the arterial corridors of our conflict of laws rules, as well as our laws of contract formation. To determine which state's laws govern our inquiry, we employ a conflict of laws analysis. If the law of a foreign jurisdiction governs, then we look to whether its application would offend a tenet of New Mexico public policy. If the application of the foreign law offends our public policy, we may apply New Mexico law. In this case, the arbitration agreement was formed in Texas, where Flemma worked when the DRP was offered, and where Halliburton argues Flemma accepted its terms. Therefore, we analyze whether enforcing the agreement under Texas law would offend New Mexico public policy. Concluding that it does, we apply New Mexico law and conclude that no valid agreement to arbitrate exists.

...

B. NEW MEXICO CHOICE OF LAW

"As a general proposition of law, it is settled that the validity of a contract must be determined by the law of the state in which it was made." *Boggs v. Anderson*, 72 N.M. 136, 140, 381 P.2d 419, 422 (1963). . . . New Mexico follows the Restatement (First) of Conflict of Laws when analyzing choice of law issues. According to the Restatement (First) of Conflict of Laws § 332(c) (1934), "The law of the place of contracting determines the validity and effect of a promise with respect to . . . consideration, if any, required to make a promise binding. . . ."

Essentially, Halliburton has alleged that its DRP is a unilateral contract. "In a unilateral contract, the offeree accepts the offer by undertaking the requested performance." *Strata Prod. Co. v. Mercury Exploration Co.*, 1996-NMSC-016, ¶ 14, 121 N.M. 622, 916 P.2d 822. Therefore, Halliburton's mailing of the DRP materials constituted an offer, the terms of which Flemma allegedly accepted by continuing his employment with Halliburton. "In the case of an informal unilateral contract, the place of contracting is where the event takes place which makes the promise binding." Restatement (First) of Conflict of Laws § 323.

Under the Restatement (First) of Conflict of Laws, the event that would make the promise binding is Flemma's continued employment. Halliburton last sent notice of the DRP to Flemma when he was working in Texas in October 2001. Flemma stated that no DRP materials were sent to him while he was working in New Mexico. Therefore, Flemma's

continued employment with Halliburton in Texas after it mailed the notice in October 2001 would have been the event that made Halliburton’s DRP binding upon Flemma. Although Flemma was working in New Mexico when he was terminated, “[w]here the offer invites acceptance through performance, rather than in writing, the beginning of invited performance is an implied acceptance.” *DeArmond*, 2003-NMCA-148, ¶ 11, 134 N.M. 630, 81 P.3d 573 (emphasis added). In this case, the beginning of the invited performance occurred in Texas. Therefore, under our choice of law rule, the place of contracting was Texas, which means that Texas law should be used to determine whether a valid agreement to arbitrate exists.

The Court of Appeals correctly concluded that under Texas law, an agreement to arbitrate existed between Halliburton and Flemma. Because we agree with the Court of Appeals on this issue, we need not repeat its creditable analysis of Texas law here. Nevertheless, we may decline to enforce Texas law if it would violate New Mexico public policy, which is what the district court chose to do. The Court of Appeals reversed that decision, concluding that Texas law did not offend New Mexico public policy. We disagree.

C. ENFORCING THE AGREEMENT UNDER TEXAS LAW
 VIOLATES NEW MEXICO PUBLIC POLICY

“New Mexico . . . has a strong public policy of freedom to contract that requires enforcement of contracts unless they clearly contravene some law or rule of public morals.” *Berlangieri v. Running Elk Corp.*, 2003-NMSC-024, ¶ 20, 134 N.M. 341, 76 P.3d 1098 “To overcome the rule favoring the place where a contract is executed, there must be a countervailing interest that is fundamental and separate from general policies of contract interpretation.” *State Farm Mut. Auto. Ins. Co. v. Ballard*, 2002-NMSC-030, ¶ 9, 132 N.M. 696, 54 P.3d 537.

We conclude that enforcing the Texas agreement would violate New Mexico public policy because, under New Mexico law, the agreement is unconscionable. Unconscionability is a principle born of public policy, and it is a means of invalidating an otherwise valid contract. A contract can be substantively unconscionable, procedurally unconscionable, or both. “Substantive unconscionability concerns the legality and fairness of the contract terms themselves.” *Rivera*, 2011-NMSC-033, ¶ 45, 150 N.M. 398, 259 P.3d 803. “Contract provisions that unreasonably benefit one party over another are substantively unconscionable.” *Id.* ¶ 25.

This Court has previously found various agreements to arbitrate unconscionable because they were unreasonably one-sided. . . .

In this case, we find the arbitration agreement to be substantively unconscionable because it is unreasonably one-sided in that it favors Halliburton in the employment dispute. The relevant provisions of the agreement read as follows:

6. Amendment

A. This Plan may be amended by [Halliburton] at any time by giving at least 10 days notice to current Employees. . . .

B. [Halliburton] may amend the Rules at any time. . . .

7. Termination

This Plan may be terminated by [Halliburton] at any time by giving at least 10 days notice of termination to current Employees. However, termination shall not be effective as to Disputes for which a proceeding has been initiated pursuant to the Rules prior to the date of termination.

. . . In effect, Halliburton could change the rules of the game just before it starts. For example, an employee who has been terminated may later find out, prior to initiating a case, that the terms of arbitration have become more restrictive. Halliburton can do this at any time and only give notice to current employees. Therefore, the employees most likely to use the DRP, i.e., terminated employees, would not even get notice of changes to the DRP, which could negatively affect their claims.

For these reasons, the DRP is unconscionable, and enforcing it would offend our public policy. Accordingly, we decline to enforce the agreement under Texas law, and we analyze whether a valid agreement to arbitrate exists under New Mexico law. . . . [The court held the agreement to arbitrate was not enforceable under New Mexico law because the promise was illusory.]

III. CONCLUSION

We conclude that the district court did not err in refusing to compel arbitration in this case. Flemma and Halliburton did form a valid agreement to arbitrate in the State of Texas, and under our traditional conflict of laws rule, we would apply Texas law to determine whether the agreement compels arbitration. However, the agreement would be unconscionable under principles of New Mexico law, and enforcing it would violate our public policy. As such, we invoke the public policy exception to the conflict of laws rule and apply New Mexico law in this case.

Under New Mexico law, we conclude that no valid agreement to arbitrate exists, as the agreement lacks consideration because Halliburton can unilaterally amend or revoke its promise to arbitrate after a claim has accrued. . . .

Accordingly, we reverse the Court of Appeals and affirm the district court's denial of the motion to compel arbitration. We remand this matter to the district court for further proceedings on Flemma's employment claims.

* * *

PAUL V. NATIONAL LIFE, 352 S.E.2d 550 (W. Va. 1986). Two residents of West Virginia, traveling together in an automobile, were killed in a one-car accident in Indiana. The estate of the passenger sued the estate of the driver in a West Virginia court. Indiana had a guest statute that would bar recovery. West Virginia did not. The court applied the *lex loci delicti* rule, but held that application of the Indiana guest statute would violate West Virginia policy:

However, we have long recognized that comity does not require the application of the substantive law of a foreign state when that law contravenes the public policy of this State. West Virginia has never had an automobile guest passenger statute. It is the strong public policy of this State that persons injured by the negligence of another should be able to recover in tort. . . . Today we declare that automobile guest passenger statutes violate the strong public policy of this State in favor of compensating persons injured by the negligence of others. Accordingly, we will no longer enforce the automobile guest passenger statutes of foreign jurisdictions in our courts.

However, at the end of this quoted passage, the court added an important qualification in footnote 14:

Although we intended this to be a rule of general application, we do not intend it as an invitation to flagrant forum shopping. For example, were a resident of a guest statute jurisdiction to sue another resident of a guest statute jurisdiction over an accident occurring in a guest statute jurisdiction, the simple fact that the plaintiff was able to serve process on the defendant within our State borders would not compel us to resist application of any relevant guest statute. This State must have some connection with the controversy above and beyond mere service of process before the rule we announce today will be applied. . . .

NOTES AND QUESTIONS

1. The First Restatement rules are grounded in notions of mutually exclusive sovereignty. If a state lacks sovereignty over a dispute because the right in question vests elsewhere, how can the state justify applying its policy to displace the other state’s laws with its own?

2. Does the answer to the question in the prior note lie in how the court disposes of the case? Suppose P sues D in State X on a claim that violates State X policy—such as a claim for breach of a gambling contract that is legal where the contract was made. Can’t the State X court simply dismiss the claim without prejudice? While P could possibly file again in a forum more friendly to gambling debts, at least the courts of State X would not have to sully their hands with enforcing a contract that violated state policy. Would that same tactic be an option in *Flemma*? In *Paul*?

3. Consider footnote 14 in *Paul*. Why would application of a guest statute violate West Virginia policy when the parties were from West Virginia, but not when they were from Indiana? Doesn't West Virginia have a problem with the very concept of guest statutes, regardless of where the parties to a particular case happen to reside? What about a case where plaintiff and defendant were from Kentucky, which like West Virginia has no guest statute?

C. THE “MODERN” INTEREST-BASED APPROACHES

As noted earlier, only about twenty percent of states still use the traditional rules in tort and contract cases. The remainder have abandoned those rules in favor of one of the modern approaches. The label “modern approaches” deserves further elaboration. First, and most obviously, there is not a single approach, but several. However, all these approaches stem from the same basic premises. Second, the modern approaches are not collections of hard-and-fast rules, but instead *methods* calling for the application of various principles. You will immediately see that the modern approaches lack the certainty inherent in the First Restatement. While some modern approaches do contain rules—especially the *Neumeier* variant of interest analysis used in New York (subpart 1) and the Second Restatement (subpart 2)—these rules are far less categorical than those of the First Restatement.

What basic premises do the modern approaches share? The most important notion is that choice of law analysis needs to take into account the *purpose* underlying each state's law. In most situations, a court applying a modern approach will consider applying the law of State X only if, under the facts at hand, application of that law would further the policies State X was trying to advance when it adopted that law. If application of State X law would further those policies, State X is said to have an *interest* in having its law applied—hence the moniker “interest-based” approaches. You will begin to practice this interest-based analysis in subpart 1, which deals with the original, and in some cases most ideologically pure, of the interest-based approaches.

Before delving into the particulars, however, it may be helpful to note some other features of the modern approaches. At the risk of oversimplification, the approaches share five features.

1. *A unilateral, rather than multilateral, approach.* The traditional rules represent a multilateral approach to choice of law. In essence, they attempt to define clear political boundaries between states, and give one state exclusive authority over all issues falling in that state's “borders.” The modern approaches, by contrast, are unilateral. They recognize that in many cases states will share sovereignty over a particular transaction or occurrence. In these areas of shared authority, the modern approaches attempt to determine whether each state intended its rule to apply to the

situation at hand. While in some cases only one state will have an interest (in which case its law will usually apply), in others multiple states may have an interest. It is also possible that *no* state would have its policies furthered by application of its law to the facts, which creates one of the most vexing analytical problems in modern choice of law thinking.

2. *Rule based, not sovereign based.* The traditional rules select which sovereign has authority. Under the modern approaches, a court selects a rule, not a sovereign. While this distinction may seem hyper-technical or academic, it is important to keep it in mind. In some situations—such as when two or more contending states have the same rule—the notion that the court’s task is to pick a rule rather than a sovereign proves quite useful. For example, if a claim would be barred by the 1-year limitations period of the forum and the 2-year limitations period of State X, it makes no meaningful difference which period the court selects. Either way, the claim is dismissed.

3. *The content of the laws is crucial.* Under the traditional rules, the content of the laws was usually supposed to be of scant relevance. (Some exceptions, including statutes of limitation and the intentional torts, performance, and public policy exceptions, have been noted). Under the modern rules content is everything. A court must consider the content of a law to determine the purpose underlying the law. Indeed, in most situations the content of the law may be the only evidence the court has as to purpose. Because most states (unlike the federal government) do not publish legislative history, a court must engage in teleological reasoning, using the content of the law to deduce the purpose of the law.

4. *Reasoning is fact and rule specific.* The purposeful analysis used in the modern approaches applies on a case-by-case basis. For example, while it might advance the purposes of a state’s immunity to apply it to a charity based in or acting in that state, it would likely not further those purposes to apply it to a charity that lacks any connection with the state. Every case therefore turns on the particular facts and rules before the court. This *ad hoc* feature in turn limits the precedential value of cases applying one of the modern approaches.

5. *Subject-based, not object-based.* The traditional rules focus heavily on the objects of litigation: where the tort or contract was completed, or the situs of property. While objects are also relevant in the modern approaches, you will notice that the residence of the litigants (or sometimes the real parties in interest) is also a crucial factor. Indeed, in cases where the parties reside in the same state, that common residence can be a controlling factor.

That fifth feature leads to one final observation. Courts and commentators generally refer to the approaches discussed in this section as “modern.” Historically, however, that description is misleading. While the specifics of the approaches may be of modern vintage, in other more

basic ways the modern approaches are a throwback to earlier times. Choice of law has a long heritage. Originally, however, it was almost exclusively subject-based and largely unilateral. A person was a member of a tribe, or clan, or later a citizen of a city state or Rome. In many of these situations, the person's rights and obligations were governed by the law of his "nation." The multilateral notions underlying the so-called "traditional" rules were a much later development, evolving in the Netherlands during the time of Spanish rule. Thus, as a purely historical matter, the traditional rules are, at their core, more modern than the modern rules.

1. INTEREST ANALYSIS AND ITS VARIATIONS

INTRODUCTORY PROBLEM

You may not have noticed, but a college education has become wicked expensive. To deal with ballooning student debt, State X enacts a new statute capping at 3% per annum the interest rate a lender may charge on student loans. If a lender charges more than the allowable rate, the student can have the debt cancelled.

Stu Student has borrowed \$75,000 from the Snidely Whiplash Bank at an interest rate of 20% per annum. Stu sues to have the debt cancelled. Would the State X legislature want its law applied if:

- a. Stu is from State X, while the bank is from State Y?
- b. Stu is from State Y, while the bank is from State X?
- c. Both Stu and the bank are from State X?
- d. Both Stu and the bank are from States other than X?
- e. Both Stu and the bank are from State Y, but State Y has a law identical to that of State X?
- f. Stu is from State Y and the bank is from State X, but the law of Y has a similar statute making the debt cancellable?

In all of these situations, assume the court has the authority to apply any of the listed laws (the constitutional limits on choice of law are discussed later in this chapter).

a. The Basic Approach

The Introductory Problem did not directly involve choice of law. But it did involve the sort of thinking underlying the modern choice of law approaches. You may well have concluded that in some situations it would serve the purposes of the legislation to apply the rate cap, while in others it would not. In the former situation, the state would be said to have an interest in having its law applied.

Modern choice of law methods simply extend this sort of reasoning to the multistate context. The court looks at the laws of all contending states,

and determines which of them has an interest. That analysis can lead to several different outcomes.

ABRAHAM V. WPX ENERGY PROD., LLC, 20 F. Supp.(3d) 1244 (D. N.M. 2014). In deciding whether New Mexico would retain the “traditional” choice of law rules, the court succinctly discussed the development of the newer interest based approaches:

Dissatisfaction with the fixed and mechanical rules of the *First Restatement* produced new suggestions—a “revolution”—in American conflicts law. See Peter Hay, Patrick J. Borchers, Symeon C. Symeonides, *Conflict of Laws* 27 (5th ed.2010). One approach stands out—Brainerd Currie’s governmental interest theory. In Currie’s view, when a court confronted with a case with foreign connections is asked to apply another state’s laws, the court “should first inquire into the policies expressed in the laws of the involved states and into the circumstances in which it is reasonable for each state to assert an interest in the application of these policies.” Hay, *supra*, at 30.

This inquiry may lead to three possibilities that correspond to three categories of conflicts: (i) only one of the involved states is interested in applying its law—the “*false conflict*” pattern; (ii) more than one state is interested—the “*true conflict*” pattern; or (iii) none of the states are interested—the “no-interest” pattern or “*unprovided-for*” case. False conflicts also include cases in which the laws of the involved states are identical or produce identical results. This aspect of the “false conflicts” concept does not, however, add much, because parties will rarely seek the application of foreign law when it is *identical* with local law, especially when the use of foreign law may leave them with the burden of proving it. Elimination of foreign law in this category of case is said to guard against a Constitutional-law objection to the application of the *lex fori* by an unconnected forum, but such instances are rare.

In a nutshell, Currie argued that, subject only to constitutional restraints, the forum is entitled to and should apply its law to all three categories of cases, except to a few false conflict and unprovided-for cases. In false conflicts cases, Currie’s analysis applies the law of the only interested state, which, “in the great majority of cases,” is likely the forum state. False-conflicts analysis examines the underlying policies both of forum law and of the other interested state or states. If the foreign law’s policy does not call for its application, forum law will apply. The principal contribution of this concept to conflict-of-laws methodology is the introduction of policy analysis and the concomitant possibility of conflict avoidance. Currie recognizes—

through the “false conflict” concept—that analysis should focus on underlying policies. “This part of Currie’s analysis is neither controversial nor controvertible, at least for those who subscribe to the view that consideration of state interests is a proper starting point for resolving conflicts of law.” Hay, *supra*, at 31.

The traditional theory’s “failure to inquire into state interests resulted in randomly sacrificing the interests of other states without promoting the interests of the state,” Hay, *supra*, at 31–32; Currie, *Selected Essays on the Conflict of Law* 191, 589–90 (1963); in contrast, Currie’s solution to a false conflict results in applying the law of the interested state, without sacrificing any policies of the uninterested state, *see* Hay, *supra*, at 31–32. “In this sense, the concept of a false conflict is an important breakthrough in American choice-of-law thinking and has become an integral part of all modern policy-based analyses.” Hay, *supra*, at 32.

FELDMAN V. ACAPULCO PRINCESS HOTEL

137 Misc.2d 878, 520 N.Y.S.2d 477 (Sup. Ct. 1987)

KRISTIN BOOTH GLEN, JUDGE.

This case presents a simple question of first impression and broad application whose resolution requires exegesis of an exceptionally complicated body of law. The question is whether, absent extraordinary circumstances, the law of the place of a tort governs the issue of damages in a personal injury action arising out of that tort. The answer requires a close reading not only of New York cases, . . . but also of scholarly controversy which has arisen out of the “conflicts of law revolution” which began with the New York Court of Appeals decision in *Babcock v. Jackson*, 12 N.Y.2d 473, 240 N.Y.S.2d 743, 191 N.E.2d 279 (1963).

FACT AND PROCEDURAL POSTURE OF THE CASE

Plaintiff George Feldman sues for damages incurred as a result of an accident which he sustained using a slide into the salt-water pool of the Acapulco Princess Hotel in February, 1981. In addition to damages for pain and suffering and lost income, Feldman alleges special damages for hospital and medical costs in excess of \$29,000.00. Plaintiff Delores Feldman, his wife asserts a derivative claim. Both plaintiffs are residents of the state of New York, and the defendants are residents of, and incorporated under the laws of Mexico.

Prior to jury selection, the parties were requested to brief the choice of law questions presented as to both liability and damages in this case. All parties have agreed that, as to liability, the law of Mexico must be applied. There is, however, sharp dispute as to whether the law of New York or the law of Mexico should control as to damages.

Applicable Mexican law . . . provides for limitations on damages for disability and for pain and suffering (denominated “moral damages” under Mexican law) which in this case would limit the plaintiff to recovery in the amount of \$5,256.00. Under New York law there is no limitation on recovery either for permanent disability or for pain and suffering. Defendants argue that the law of the place of the tort controls the issue of damages, citing several New York cases. Plaintiff argues that a limitation of the amount which would be imposed in this case is contrary to New York’s policy of justly compensating its residents for injury, and cites federal cases applying New York law for that proposition.

Based on the papers submitted by both sides on this in limine motion, . . . separate analysis will be made of the cited New York decisions, the trends in New York choice of law doctrine since *Babcock*, federal decisions from the Southern District and the Second Circuit concerning damages in tort cases, and the result of almost twenty-five years of judicial and scholarly controversy as to choice of law questions. The result of this analysis compels the principled and consistent application of a set of clearly defined rules which have been proposed by our highest court during this period of confusion, experimentation, and creativity.

NEW YORK CASES

The Court of Appeals has decided several post-*Babcock* cases in which a choice-of-law question as to compensatory damages was raised in a non-tort setting. Leading among these is *James v. Powell*, 19 N.Y.2d 249, 279 N.Y.S.2d 10, 225 N.E.2d 741 (1967) which involved the alleged fraudulent conveyance of property in Puerto Rico for purposes of frustrating enforcement of a judgment. In broad strokes the Court wrote

[I]t is clear that the measure of compensatory damages is determined by the same law under which the cause of action arises. . . . [A]n award of compensatory damages depends upon the existence of wrong doing—in this case an issue for resolution under the *lex situs* of the property alleged to have been fraudulently conveyed.

Id., p. 259 [279 N.Y.S.2d 10, 225 N.E.2d 741]

In *Hacohen v. Bolliger, Ltd.*, 108 A.D.2d 357, 489 N.Y.S.2d 75 (1st Dept.1985), the First Department also applied the law of the state whose law gave rise to liability to determine the measure of damages. In that case, involving warehouse bills of lading and the liability of a bailee for loss of property, the court first found that the law of Connecticut applied to the issue of liability. After granting partial summary judgment to the plaintiff based on its reading of Connecticut law, it proceeded, without discussion, to hold that the Connecticut law of damages would also apply.

Both of these cases, holding that the law by which liability is determined also governs damages, would appear to strongly support the

finding that Mexican law as to damages governs in the instant action. However, since the cases do not involve tortious accidents, since there is language in other New York cases which could be read to indicate that New York has a strong policy in insuring complete recovery for its residents, and because there are federal cases to the contrary, a review of the development of choice-of-law over the past twenty-five years, with particular emphasis on New York, must be undertaken so as to ground more firmly the choice of law reached here.

THE DEVELOPMENT OF MODERN CHOICE OF LAW JURISPRUDENCE

Traditional conflict-of-law theory in the United States reflected the tension between the doctrine of comity, associated particularly with the writings of Justice Story, and the notion of “vested rights” developed in large part by Joseph Beale during the early 1900’s. Under these theories, the rule of *lex loci*—the law of the place where the act in question occurred—was controlling. With massive industrialization, and rapid advances in transportation and communication, the transactions or activities in which people engaged began frequently to transcend state and even national borders. Under these circumstances, more than one sovereignty might well have an interest in a dispute, and indeed the location of the occurrence giving rise to liability might be little more than fortuitous.

A public policy exception arose in order to ameliorate arbitrary or inappropriate results under the vested rights or comity theories. . . . The public policy exception, however, lacked a clear analytical base, and was subject to criticism by the commentators who struggled to find a new basis which would more adequately reflect both the realities of modern life and the increasing importance of the domicile of the parties.

With the demise of the underpinnings for the vested rights and comity theories of choice-of-law, a bewildering number of new theories, each with its own academic sponsor, arose. Among these were the “governmental interest analysis” first advanced by Professor Brainerd Currie in the late 1950’s, the “in most significant relationship” theory of the Second Restatement, propounded primarily by Professor Willis L.M. Reese, and the “choice-influencing considerations” theory propounded primarily by Professor Robert A. Leflar.

Professor Hill has described the impact of these various theories on the judicial decision making process as follows:

“. . . what has emerged on the judicial plain is chaos. Different courts have had their favorite scholars, with occasional shifting of allegiances, notwithstanding inconsistent views propounded in these writings . . . [W]hat the judges have undertaken, on pain of

academic derision if they clench, is a task comparable to the re-invention of the wheel, only more complicated.”

Hill, *The Judicial Function in Choice-of-Law*, 85 COLUM.L.REV. 1585, 1600 (1985) (“Hill”).

New York was the first state to clearly reject the rigid *lex delicti* rules, initially adopting a “center of gravity” or “grouping of contacts” theory of conflicts in contracts actions, *Auten v. Auten*, 308 N.Y. 155, 160, 124 N.E.2d 99 (1954) and then in torts, *Babcock*, *supra*. A series of subsequent Court of Appeals decisions, all involving choice-of-law questions in guest statute cases, demonstrated disagreement over the meaning of the *Babcock* approach.⁵ In these, and other choice-of-law cases decided at around the same time, it appeared that the test applied by the New York Court, especially under the leadership of Judge Keating, had shifted to Professor Currie’s governmental interest analysis.

In *Neumeier*, *supra*, Chief Judge Fuld, who had dissented in *Dym* and concurred in *Tooker*, noted the difficulties which had arisen from the court’s somewhat meandering post-*Babcock* path. He described the *Babcock* court’s “sacrifice [of] the certainty provided by the old rule” for the “more just, fair, and practical result that may best be achieved by giving controlling effect to the law of the jurisdiction which has the greatest concern with, or interest in, the specific issue raised in litigation”. He acknowledged that the court’s subsequent decisions had, “lacked consistency” and proposed, as he had in his concurrence in *Tooker*, a set of rules which would lead to greater consistency and predictability. He wrote:

The single all-encompassing rule which called, inexorably, for selection of the law of the 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.

Neumeier, *supra* at p. 127 [335 N.Y.S.2d 64, 286 N.E.2d 454].

Judge Fuld proposed the formulation of “a few rules of general applicability, promising a fair level of predictability” which incorporated and codified the governmental interest analysis already developed and applied in the Court’s prior decisions.

Briefly, those rules, commonly denominated “the *Neumeier* rules,” are as follows:

⁵ These were, in chronological order, *Dym v. Gordon*, 16 N.Y.2d 120, 262 N.Y.S.2d 463, 209 N.E.2d 792 (1965), *Macey v. Rozbicki*, 18 N.Y.2d 289, 274 N.Y.S.2d 591, 221 N.E.2d 380 (1966), *Tooker v. Lopez*, 24 N.Y.2d 569, 301 N.Y.S.2d 519, 249 N.E.2d 519 (1969) and *Neumeier v. Kuehner*, 31 N.Y.2d 121, 335 N.Y.S.2d 64, 286 N.E.2d 454 (1972).

(1) In “false conflict” cases, where the guest passenger and host driver have the same domicile, and the car in question is registered in the same state, the law of that state should control.

(2) In the so-called “true conflict” or “split-domicile” cases, where the defendant driver’s domicile and the place of the accident are the same, the law of the place of accident should be applied, but where the plaintiff’s domicile and the place of injury are the same the law of the plaintiff’s domicile should apply.

(3) In those situations where the passenger plaintiff and the defendant driver have different domiciles, the normally applicable rule of decision would be that of the state where the accident occurred “but not if it can be shown that displacing that normally applicable rule will advance the relevant substitute law purposes without impairing the smooth working of the multi-state system or producing great uncertainty for litigants”

Id. p. 128 [335 N.Y.S.2d 64, 286 N.E.2d 454].

Neumeier was the last of the Court of Appeals decisions on guest-statute choice-of-law questions, and virtually the last decision discussing the broad general principles applicable in conflict cases. Although the *Neumeier* rules were directed only at resolving guest statute choice-of-law problems, their adoption signaled a return to the law of *lex loci delicti* in tort cases involving split domiciles. The commentators were predictably divided in their views of the *Neumeier* decision, with Professor Hill, *inter alia*, praising the Fuld approach, writing

“. . . the rule of *lex loci delicti* goes far to advance sensible policies of fairness and accommodation in a community of states. It is unnecessary and wasteful to uproot *lex loci delicti* in its entirety, in order to deal with the excesses resulting from uncritical application of the rule to the all the collateral issues arising in tort litigation.”

Hill, *supra* at 1625.

Thirteen years later, a newly constituted Court of Appeals reaffirmed the *Neumeier* rules and extended their applicability beyond guest statute situations into the broader area of loss-allocation in tort law. *Schultz v. Boy Scouts of America*, 65 N.Y.2d 189, 491 N.Y.S.2d 90, 480 N.E.2d 679 (1985). . . .

SCHULTZ V. BOY SCOUTS OF AMERICA, INC.

Schultz involved a “reverse” *Babcock* situation—which the court characterized as one where New York was the place of the tort (the “forum-locus” state) rather than the jurisdiction of the parties’ common domicile. The question presented was whether New York would apply New Jersey’s

charitable immunity doctrine to bar recovery in a suit between New Jersey domiciliaries for injuries sustained, at least in part, in New York.

The court reviewed its history of guest-statute cases beginning with *Babcock* and ending with *Neumeier*, and reiterated why common domicile requires departure from the laws of *lex loci delicti*. The court also noted that its decisions in those cases, culminating in *Neumeier*, were equally applicable to other tort issues, writing

Nor is there any logical basis for distinguishing guest statutes from other loss-distributing rules because they all share the characteristic of being post-event remedial rules designed to allocate the burden of losses resulting from tortious conduct . . .”

Id. p. 199 [491 N.Y.S.2d 90, 480 N.E.2d 679].

As to the New Jersey defendant, the court found the first, “common domicile” *Neumeier* rule applicable, and went on to explain why it was equally appropriate in this reverse *Babcock* situation. Among the arguments it amassed in favor of the first *Neumeier* common domicile rule were reduction of opportunities for forum shopping, and rebuttal of “charges that the forum-locus is biased in favor of its own laws and in favor of rules permitting recovery” *id.* p. 201,. Finally and significantly the court reiterated Judge Fuld’s concerns, finding that application of the common domicile rule “produces a rule that is easy to apply and brings a modicum of predictability and certainty to an area of the law needing both.” *Id.*

In addition to the primary defendant who was domiciled in New Jersey, an additional defendant was domiciled in Ohio, a third jurisdiction (differing, that is, from both plaintiff’s domicile and the forum-locus state), also with a charitable immunity statute. Here the court explicitly applied the third *Neumeier* rule, displacing the rule of the place of the tort because of its finding that the New Jersey rule would “advance relevant substantive law purposes without impairing the smooth working of the multi-state system or producing great uncertainty for litigants.” *Id.* p. 201, 491 N.Y.S.2d 90, 480 N.E.2d 679.

The *Schultz* opinion clearly reaffirmed the validity and applicability of the *Neumeier* rules and expanded their coverage to all post-event tort loss-distribution questions. In addition, in its careful analysis of the reasons for such rules, the court expressed a clear distaste for bias in favor of the forum’s law, or in favor of a rule solely because it granted or increased recovery. In a second portion of the opinion, having decided the relevant choice-of-law questions, it went on to consider the amorphous public policy exception.

PUBLIC POLICY

Plaintiffs in *Schultz*, as here, argued as a last resort that, having chosen New Jersey loss distribution law under the *Neumeier* choice-of-law

rules, New York should nevertheless refuse to apply that law as contrary to its public policy. The court reviewed the purposes and requirements of the so-called public policy exception, noting

The party seeking to invoke the doctrine has the burden of proving that the foreign law is contrary to New York public policy. It is a heavy burden for public policy is not measured by individual notions of expediency and fairness or by a showing that the foreign law is unreasonable or unwise . . . Public policy is found in the State's Constitution, statutes and judicial decisions and the proponent of the exception must establish that to enforce the foreign law 'would violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal' expressed in them"

Id. p. 202, 491 N.Y.S.2d 90, 480 N.E.2d 679 (citations omitted).

To prevail, the court continued, the party must also establish "that there are enough important contacts between the parties, the occurrence and the New York forum to implicate our public policy and thus preclude enforcement of the foreign law". It reviewed prior public policy cases, including *Miller v. Miller, supra*, and concluded that as there were insufficient contacts present it need not decide whether public policy was so implicated as to require application of the doctrine. The precise status of the public policy exception in New York thus remains unclear.

THE CALL FOR GENERALIZED RULES AND PREDICTABILITY

Before considering the effect of all the previously discussed case law on the instant question, it may be useful to consider the present state of the "choice-of-law revolution" and the increasingly-heard call for more uniform rules and greater predictability.

A survey of the field shows what can charitably be described as chaos. There continues to be enormous scholarly disagreement over virtually everything except rejection of the old vested rights approach, and the states are wildly split in the theories they purport to follow and the consistency with which they apply their chosen theories. Insofar as they reject codification, the "new approaches" produce inconsistent results, make decisions dependent, at least in part, on the forum selected, and thus lead to increased forum shopping and even more litigation of choice-of-law issues.

There is an increasing call for a return to rules which eliminate the absurd results of pre-*Babcock* common domicile cases, incorporate general notions of state interest, and provide uniformity and predictability regardless of the forum chosen. This later point is also important as a general matter of fairness to the parties; the result in a case should not, as a principled matter, depend on who gets to which courthouse first.

In the various formulations which more uniform choice-of-law rules might take, it is important to note the homage paid not only to the original *Babcock* decision, but to our Court of Appeals singularly "valiant attempt at laying down rules of choice-of-law in tort," that is, the *Neumeier* rules. Those rules, although an admittedly early attempt at making sense of chaos, may well, in the light of fifteen years of further litigation, provide the best guide to a fair, reasonable, consistent and constitutional determination of choice-of-law in tort cases.

Other "rules" suggested by those who call for predictability and fairness may differ somewhat in their specifics, but generally reflect the principles upon which the *Neumeier* rules are premised. Professor Korn would have the common domicile of the parties as the pre-eminent choice-of-law rule, with *lex locus delicti* [*sic*] normally applicable in split domicile situations, subject to certain specified exceptions which could require application of the law of a state with substantially greater connection to the parties or transaction involved. Professor Reese would generally apply locus law to liability and to damages (assuming the conduct and injury occurred in the same place) unless, in the case of damages, the parties share a different common domicile and recovery would be greater under that state's law. Neither of these thoughtful formulations is inconsistent with the *Neumeier* rules; all three would compel the application of *lex loci* in the instant case.

THE DECISIONS, RULES AND THE QUESTIONS OF DAMAGES

As can now be seen, both the specific language of the non-tort choice-of-law decision in *Powell* and *Hacohen supra* and the application of the still viable and clearly applicable *Neumeier* rules require that the Mexican law of damages apply to this Mexican accident, allegedly caused by a Mexican domiciliary. Since the second *Neumeier* rule, here controlling, has never been discussed in the fact pattern of an actual case, it may be instructive, following the *Schultz* format, to briefly examine its allocation of governmental interests in this situation.

New York's interests in applying its law of unlimited damages are to maximize recovery for its domiciliaries, ensure that medical creditors in the state will be paid, and avoid the possibility that its injured domiciliaries will become public charges. As in *Schultz*, there is no evidence which would implicate the latter two "interests" in this case; the first reason has been specifically eschewed in opinions of the Court of Appeals.

The second and third interests also seem undercut, particularly in the case of deliberate foreign travel/vacationing, by the widespread availability of traveller's insurance, as well as the medical insurance a majority of New Yorkers obtain through their employment or the employment of family members. Although the expectations of parties are not, per se, considered in New York choice-of-law interest analysis, the ability of the parties to

anticipate and protect against injury or disability occurring during foreign travel further lessens both of the state's alleged fiscal interests.

Mexico's interests are more direct and unambiguous. As defendant argues, Mexico has a strong substantive interest in encouraging the development of a tourist industry. This includes protecting the reasonable and justifiable expectations of commercial and resort entities within its borders from the severe uncertainty of financial liability arising out of suits in the United States and other foreign jurisdictions.

Further, because of its history of domination by colonial powers and the continuing threat of domination of its economy by foreign and multinational capital, Mexico has insisted upon its sovereignty as against claims by foreign nations and foreign nationals. . . . [Mexico has] strong concerns in preventing foreigners from depleting the country's capital and resources. To permit a New York resident vacationing in Mexico to recover hundreds or even thousands of times what a Mexican national, injured in the same accident, would receive under Mexican law would be the most serious possible violation of Mexico's interest and sovereignty in this situation.

In addition, both jurisdictions have an interest in fairness and equality of treatment which is further reflected and incorporated in their interest in discouraging forum shopping. If *lex locus delecti* [*sic*] does not apply when the defendant is domiciled in the same jurisdiction where the wrong occurred, and the plaintiff went there purposely and voluntarily, plaintiffs will be encouraged to seek out forums where, as with New York's legendary jury awards, they can expect the largest possible recovery.

Consideration and balancing of these interests demonstrate the wisdom and continued efficacy of the *Neumeier* rules and, in particular, compel the conclusion that the application of Mexican damages law, mandated by application of the second rule, is entirely appropriate in this case. All that remains, therefore, is determination of whether a public policy exception, left open in *Schultz*, bars its application in this case.

The fact that it is unfavorable to the Feldmans is unfortunate, but arises from application of a neutral rule in which their injuries are compensated at precisely the same rate as if they were Mexican domiciliaries, or domiciliaries of any other state or jurisdiction.

THE PUBLIC POLICY EXCEPTION REVISITED

. . .

Although *Schultz* suggests the continued viability of the public policy exception, that exception to otherwise binding choices-of-law should be narrowly limited to avoid affronts to comity and the "smooth functioning of the international and multi-state order." The courts of our state have recognized, if sometimes only implicitly, that the necessity for the public

policy exception has virtually disappeared with the institution of the governmental interest analysis partially codified in the *Neumeier* rules. Despite language which might locate public policy in statutes or judicial decisions, only foreign statutes directly violating our supreme law, the state Constitution, have been rejected under the public policy exception since the *Babcock* decision.

...

CONCLUSION

The Mexican limitation of damages may be distasteful to many and is surely disadvantageous to the plaintiffs in this case. Nevertheless it violates no New York constitutional provision, while its application furthers Mexico’s most basic constitutional principles. Application of the law of the place of injury and the defendant’s domicile best balances governmental interests and, to the extent foreseeable, fulfills the reasonable expectations of the individual parties involved.

The *Neumeier* rules, of which this is the second, provide predictability, equality of treatment, and ease of application. In the leading tradition of the New York courts they represent the best effort to date to develop a fair and workable system of choice-of-law. As *Schultz* held, they should be generally applied in tort loss distribution cases, subject only to the limited public policy exception described above and not here implicated. The *Neumeier* rules and the cases previously cited require the application of the Mexican law of damages in this case.

NOTES AND QUESTIONS

1. The *Babcock* decision discussed in *Feldman* appears in almost every book dealing with U.S. choice of law. It is a seminal case in interest analysis, and sparked what is often described as a choice-of-law “revolution.” *Babcock*, together with the *Dym*, *Macey*, and *Tooker* cases cited in footnote 5 of *Feldman*, employed what we can refer to as “pure” interest analysis, an approach that considers the question on a case-by-case basis without any rules.

By the time of the *Neumeier* case, the New York courts had come to realize that a purely *ad hoc* approach frustrated the goals of predictability and efficiency. Judge Fuld accordingly crafted the *Neumeier* “rules.” These three rules were both a codification of the results in existing decisions and a suggestion as to how courts should deal with situations where either no state or multiple states had an interest. Although originally couched in terms of guest statutes, by *Schultz* the court made it clear the rules should be applied to all loss-allocating rules.

2. The *Neumeier* rules are one variant on pure interest analysis. In fact, no jurisdiction uses interest analysis in its pure form today. While several states toyed with the analysis, many of these later opted for one of the other modern approaches. Today only about eight states use a form of interest

analysis, and like New York all of these have adopted one of the variants to deal with difficult cases. Other variants are discussed in the section dealing with “tie breakers” below.

3. The *Abraham* excerpt identifies three possible results of interest analysis: a false conflict, a true conflict, or a no interest (sometimes called an “unprovided for”) case. Consider the facts of *Feldman*. Into which of these categories does the case fall?

4. Now consider the three *Neumeier* rules. Which type of case does each describe?

5. Is there any *a priori* reason to use the law of *Mexico* in *Feldman*? Did the Mexican defendant know it had guests from New York? On the other hand, should New Yorkers be entitled to a legal “shield” granted by their home that protects them as they travel from place to place?

6. Suppose the resort in *Feldman* had full coverage under a liability policy issued by a New York insurance company. If plaintiff had brought a direct action against the company rather than suing the resort, the situation would fall within *Neumeier 1*, and New York law would apply. But suppose plaintiff sues only the resort. Given that the real financial effect of a judgment for damages would be felt primarily in New York by the New York insurer rather than by the Mexican defendant, would the court now apply New York law? Should it?

7. The *Feldman* court spends considerable time discussing *Schultz*. The facts of *Schultz* were horrific. Two young boys, from New Jersey, were sexually abused while at a camp in New York. One of the boys subsequently committed suicide. The parents sued the Boy Scouts of America and the Franciscan Order, both of whom had played a role in operating the camp and hiring the abuser. The hiring occurred in New Jersey, where the Boy Scouts were domiciled when the event occurred. The Franciscans were domiciled in Ohio.

New York law would have allowed full recovery. New Jersey, however, recognized a charitable immunity, which meant plaintiffs could not recover. Ohio law also recognized charitable immunity, but would have allowed recovery for negligent hiring of the abuser. No one argued for the application of Ohio law.

The court applied New Jersey law to both defendants. With respect to the Boy Scouts, the court deemed the situation a “common domicile” case governed by *Neumeier 1*. With respect to the Franciscans, the case fell within *Neumeier 3*. Although that rule would default to New York law as the place of the tort, the court found that applying New Jersey law would better “advance the relevant . . . purposes” of the rules. New Jersey, the court found, had an interest in encouraging charities to engage in activities in the state.

The *Schultz* court also considered whether to invoke the public policy exception discussed in pt. B.6.c above. However, it found that because New York had no interest in having its full recovery rule applied, New York’s public policy was not implicated.

Did the *Schultz* court reach the right result?

b. Other “Tie Breakers”

Practically speaking, the most important of the *Neumeier* rules is that they help courts resolve true conflicts and no interest cases. *Neumeier* 1—which deals with false conflicts—is not controversial. *Neumeier* 2 and 3, by contrast, govern true conflict and no interest cases. These cases can be considered to involve a “tie”: 1–1 in the false of the true conflict, and 0–0 in the no interest case. *Neumeier* 2 and 3 break this tie by preferring the law where the tort occurred.

The *Neumeier* rules are the law only in New York. However, other courts employ their own tie breakers. The Second Restatement and Leflar approaches are best thought of as separate (albeit related) approaches, and discussion of them is accordingly deferred to the next two sections. You will see in those sections that each of these has its own ways to break ties.

Professor Brainerd Currie, the “father” of interest analysis, argued that courts should not compare or weigh the competing state interests. Instead, his solution called for the forum to apply its own law (assuming either that it was one of the interested states, or that no state had an interest). Elements of that reasoning continue today in the *lex fori* approach discussed in pt. C.4.

One problem with a *lex fori* approach is that it can encourage forum shopping. While several commentators have suggested forum shopping is really not that much of a problem, or a necessary incident of a federal system, courts hold it in much lower regard. They have accordingly devised other approaches to deal with ties. The primary three methods are restrained forum, comparative impairment, and out-and-out balancing.

Restrained forum. This approach is the most faithful to Professor Currie’s original views, and also the most deferential to other states. If the forum is one of two or more interested states, the court will reevaluate the forum’s law, but not those of other states, to determine the extent to which not applying forum law would impair forum policy. If it determines the impairment of forum policy is not that great, it will select another state’s law.

The restrained forum approach works best when the particular forum law conflicts with a more general state policy. To illustrate, suppose the forum has a “one free bite” rule for dog bites, under which a dog owner is not responsible the first time the dog bites. Defendant is from the forum, and her dog has bitten plaintiff. While this is the first time the dog has bitten, the dog has exhibited other aggressive behavior before. Plaintiff is from a state that would impose liability even on the first attack. A court in such a case could apply restrained forum and select the plaintiff’s state’s law. The policy of the forum’s one bite rule—to ensure the owner knew a

bite was probable—would not be greatly impaired in this case because of the other evidence of aggressive behavior. Note that restrained forum helps prevent forum shopping by making it *less* likely the forum will apply its own rule.

Comparative impairment. Although often treated as a separate approach, comparative impairment is in many ways just a logical extension of restrained forum. The main difference is that the court reevaluates the interests of *all* competing states, not only the forum. Because it allows the court to minimize the interests of other states, it is far less deferential than restrained forum. Moreover, as courts naturally tend to favor their own rule, comparative impairment may exacerbate the forum shopping problem.

One well-known example of comparative impairment is *Bernhard v. Harrah's Club*, 16 Cal.3d 313, 546 P.2d 719 (1976). In *Bernhard*, California residents drank alcohol at a club located just across the state line in Nevada. The club continued to serve drinks even though the parties were obviously intoxicated. When the parties drove home, they collided with plaintiff, another Californian, in California. Plaintiff sued the Nevada club in a California state court. California law would allow full recovery. Nevada, by contrast, had a dramshop law that would prevent plaintiff from recovering. The case accordingly presented a “true conflict” (make sure you understand why). The California court applied comparative impairment and selected California law. It noted that while the particular dramshop law protected defendant, Nevada also had a *criminal* statute imposing sanctions on bars that served alcohol to clearly intoxicated people. This statute, the court reasoned, meant that Nevada did not condone such activity, and that Nevada policy would therefore not be impaired that greatly if liability was also imposed on defendant. Do you agree? What about the fact plaintiff could have sued the other driver? Does that not limit the impairment of *California's* interest should California law not be applied?

Balancing. A few courts attempt to balance the interests of the competing states. While on the surface this approach resembles comparative impairment, it allows the court to gauge the relative importance of a wide variety of state policies, not merely the policy underlying the rule being considered. For an example of balancing, see *D'Agostino v. Johnson & Johnson, Inc.*, 628 A.2d 305 (N.J. 1993).

c. Conduct-regulating and Loss-allocating Rules

In *Feldman*, suppose New York had enacted a statute setting specific standards for water slides. The slide at the Mexican resort did not meet this standard, and Mexico had no statutory standard of its own. Would the New York court apply the New York standard? What if both plaintiff and defendant were from New York?

In fact, under all the modern approaches, courts recognize a “conduct-regulating exception.” Under this rule, the law of the place of conduct automatically governs any issue involving whether that conduct was proper or acceptable. See *Simon v. U.S.*, 805 N.E.2d 798 (Ind. 2004); John T. Cross, *The Conduct-Regulating Exception in Modern United States Choice of Law*, 26 CREIGHTON L. REV. 425 (2003). Courts do not even consider whether other states, including the state where the parties reside, have any interest in applying their standards of conduct. The rule seems to be so firmly established that there are not that many cases even discussing the question. In *Feldman*, for example, the parties conceded that Mexican law governed the basic question of liability, and limited their arguments to the issue of amount of damages.

Because of the conduct-regulating rule, most litigated questions under modern choice of law approaches deal with “loss-allocating” rules like the damages in *Feldman*. The *Neumeier* rules are similarly limited to questions of loss allocation. Once you realize that the allocation of harm mainly affects the parties, the focus on party residence in interest-based approaches begins to make more sense.

But where is the line between regulating conduct and allocating loss? Many issues, such as safety standards and traffic laws, are clearly conduct regulating. The difficult issues involve standards of care, especially gradations of degrees of negligence. While most courts hold that strict liability rules are purely loss-allocating, courts differ in how they treat negligence rules. The better view is probably that differences between ordinary negligence, gross negligence, and recklessness are loss allocating, but several courts disagree. A few hold a more nuanced view, finding that while *limits* on liability (such as a guest statute) are loss allocating, a rule allowing full recovery is at least partly conduct regulating because it encourages parties to exercise more care. See *Hurtado v. Superior Court*, 11 Cal.3d 574, 522 P.2d 666 (1974). The New York *Schultz* case, discussed in Note 7 above, flips this logic on its head. The court in that case found the charitable immunity defense at issue in that case (a limitation on liability) had a conduct-regulating aspect because it encouraged charities to engage in activities in that state.

2. THE SECOND RESTATEMENT “MOST SIGNIFICANT RELATIONSHIP” ANALYSIS

In 1953—fewer than 20 years after the First Restatement—the American Law Institute published a draft of what would become the Restatement (Second) of Conflict of Laws [hereinafter the “Second Restatement”].* The draft was refined over a number of years, and the final

* It is interesting to note that this draft preceded *Babcock*—the New York case credited with starting the choice of law revolution—by almost a decade. However, the New York courts began the evolution toward *Babcock* about the same time as the draft, in the case of *Auten v. Auten*, 308 NY 155 (1954).

version was released in 1971. The Second Restatement was intended to revise choice of law analysis to respond to the criticisms of the traditional rules.

Today the Second Restatement is the leading choice of law approach in the United States. Approximately half of the states have adopted it. PETER HAY, PATRICK J. BORCHERS, AND SYMEON C. SYMEONIDES, *CONFLICT OF LAWS* 95 (5th ed. 2010). However, determining a precise number of adopters is difficult for several reasons. First, and at the risk of stating the obvious, a Restatement is not a statute. It is not something a legislature officially adopts, but is merely cited as persuasive authority by a court. Second, some states pick and choose when they will apply the Second Restatement. A handful apply it in tort but not contract, while a similar number apply it in contract but not tort. Other states pick and choose; for example, applying the § 187 provision dealing with choice of law clauses in contract even if they do not use the other provisions.

a. General approach

The basic approach of the Second Restatement builds on the foundation of interest analysis, but (a) tries to limit the variables a court should consider, and (b) allows the court to consider state policies not specifically connected to the law at hand, such as efficiency, party expectations, and uniformity. Deciphering the Second Restatement can be daunting to the newcomer. The first step is to categorize the issue as one of tort, contract, procedure, or other area of the law. For most of these categories, the Second Restatement provides both a “general” rule and several “specific” rules dealing with particular issues. In tort, for example, the general rule is set out in § 145:

RESTATEMENT OF THE LAW (SECOND) OF CONFLICT OF LAWS

§ 145. The General Principle

- (1) The rights and liabilities of the parties with respect to an issue in tort are 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 under the principles stated in § 6.
- (2) 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 domicil, 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.

The tort rules also contain numerous specific provisions, including § 146:

§ 146. Personal Injuries

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.

The analysis differs under these provisions. Under § 145, the court first determines which state laws are in “contention”, using the list set out in § 145(2). Once that list is prepared, the court determines which of the contending states has the “most significant relationship” to the occurrence and the parties. In determining which state’s relationship is the most significant, the court consults the basic principles of choice of law set out in § 6 (more on that section in a moment).

§ 146, like most of the specific provisions, starts out quite differently. It provides a *default* choice, which in the case of § 146 is the law of the place where the injury occurred. However, unlike the *lex loci delicti* rule of the First Restatement, the initial reference to the law of the injury state can be displaced. A court applying § 146 will displace the law of the injury state if it determines some other state has a “*more* significant relationship.” As under § 145, determining significance requires reference to the principles set out in § 6.

§ 6 contains a list of basic choice of law considerations:

§ 6. Choice-of-Law Principles

- (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,
 - (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
 - (d) the protections 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.

Part (1) requires a court in State X to apply a State X statute dictating what law applies (which seems obvious). If no such statute exists, the court looks to the list of considerations set out in § 6(2). At first reading, this list may seem like a comparison of apples, oranges, and papayas. But courts do not weigh all the factors equally. They place the most weight on factors (b), (c), and (e). Reread these. Do they sound familiar? The other factors come into play only if there is no clear choice under these three.

The following materials show how courts tend to apply the Restatement Second. One caveat however—not all courts agree on how to apply the provisions, especially the hodgepodge of factors in § 6.

O'CONNOR V. O'CONNOR

201 Conn. 632, 519 A.2d 13 (1986)

PETERS, CHIEF JUSTICE.

The sole issue on this appeal is whether, under the circumstances of this case, an injured person may pursue a cause of action under Connecticut law to recover for allegedly tortious conduct that occurred in a jurisdiction where such a cause of action would not be permitted. The plaintiff, Roseann O'Connor, brought an action against the defendant, Brian O'Connor, seeking damages for injuries that she suffered as a result of an automobile accident in Quebec.¹ The trial court, Reilly, J., granted the defendant's motion to strike the complaint, finding that the law of Quebec, the place of injury, governed the controversy and that Quebec law precluded the plaintiff's action. . . . The plaintiff appealed to the Appellate Court, which, in a *per curiam* opinion, upheld the trial court's judgment. . . .

The relevant facts are undisputed. The plaintiff was injured as a result of a one car automobile accident that occurred on September 3, 1981, in the province of Quebec, Canada. At the time of the accident, the defendant was operating the automobile and the plaintiff was his sole passenger. The parties, both of whom were Connecticut domiciliaries, were on a one day pleasure trip that began, and was intended to end, in Vermont. The plaintiff underwent hospital treatment for her injuries in Quebec and has suffered continuing physical disabilities while residing in Connecticut.

The plaintiff brought an action against the defendant on August 17, 1983, alleging that she had suffered serious and permanent injuries as a result of the defendant's negligent operation of the automobile. The

¹ The parties were not related at the time of the accident. They subsequently married each other.

plaintiff's complaint stated a cause of action permitted by General Statutes § 38–323, part of Connecticut's No-fault Motor Vehicle Insurance Act. Section 38–323 permits the victim of serious physical or economic injury caused by an automobile accident to sue the tortfeasor for damages. The defendant, however, moved to strike the complaint, on the ground that the applicable law in the case was the law of Quebec. Quebec law would not permit the plaintiff's tort action because Quebec Revised Statutes, chapter A-25, title II, §§ 3 and 4, provides instead for government funded compensation for victims of bodily injury caused by automobile accidents.

After a hearing, the trial court, Reilly, J., granted the motion to strike in an oral decision. The court expressly based its decision on this court's opinion in *Gibson v. Fullin*, 172 Conn. 407, 374 A.2d 1061 (1977), our most recent decision affirming the doctrine that the nature and extent of tort liability is governed by the place of injury, hereinafter referred to as “lex loci delicti” or “lex loci.” . . .

On appeal to this court, the plaintiff . . . urges this court to reexamine the propriety of our continued adherence to the doctrine of lex loci delicti in cases of personal injury. In the particular circumstances of this case, the plaintiff maintains, we should no longer adhere rigidly to the doctrine of lex loci but should instead seek to discern and to apply the law of the jurisdiction that has the most significant relationship to the controversy, in accordance with the principles of the Restatement Second of Conflict of Laws. . . . We agree with the plaintiff.

I

This court has traditionally adhered to the doctrine that the substantive rights and obligations arising out of a tort controversy are determined by the law of the place of injury, or lex loci delicti. . . .

II

We have consistently held that “a court should not overrule its earlier decisions unless the most cogent reasons and inescapable logic requires it.” *Herald Publishing Co. v. Bill*, 142 Conn. 53, 62, 111 A.2d 4 (1955). We have also recognized, however, that “[p]rinciples of law which serve one generation well may, by reason of changing conditions, disserve a later one,” and that “[e]xperience can and often does demonstrate that a rule, once believed sound, needs modification to serve justice better.” *Herald Publishing*. Accordingly, we now undertake to analyze the policies and principles underlying the doctrine of lex loci delicti, as a preliminary step to determining whether “cogent reasons and inescapable logic” demand that we abandon the doctrine under the circumstances of the present case.

The doctrine of lex loci delicti, as first adopted by American courts in the late nineteenth and early twentieth century, presumes that the rights and obligations of the parties to a tort action “vest” at the place of injury. Justice Cardozo, describing the vested rights theory in *Loucks v. Standard*

Oil Co., 224 N.Y. 99, 110, 120 N.E. 198 (1918), stated: “A foreign statute is not law in this state, but it gives rise to an obligation, which, if transitory, ‘follows the person and may be enforced wherever the person may be found. . . . [I]t is a principle of every civilized law that vested rights shall be protected’ (Beale, [Conflict of Laws], § 51).” . . .

The vested rights theory of choice of law is an anachronism in modern jurisprudence. Its underlying premise, that the legislative jurisdiction of the place where a right “vests” must be recognized in every other jurisdiction, presupposes that a nationally uniform system of choice of law rules is necessary and desirable. Choice of law rules are not immutable principles, however. . . .

. . . [T]he vested rights doctrine is simply another legal theory, and one which has been the subject of extensive criticism for the past half century. Professor David F. Cavers criticized the vested rights doctrine as ignoring the substantive content of legal rules and focusing exclusively on territorial concerns, “the law’s content being irrelevant to the choice” of law. D. Cavers, *Re-Stating the Conflict of Laws: The Chapter on Contracts*, in XXTH CENTURY COMPARATIVE AND CONFLICTS LAW (1961) pp. 349, 350. Another, more fundamental criticism of the vested rights theory of conflicts of law is that it fails to explain “why the law of the place of wrong should be applied to cases which have arisen there. [It gives] us a guiding principle but without any *raison d’être*.” N. Hancock, *TORTS IN THE CONFLICT OF LAWS* (1942) p. 36.

The theoretical barrenness of the vested rights doctrine, from which the rule of *lex loci delicti* derives, is but one of the many reasons that a majority of state courts have rejected the rule of *lex loci*, and that legal scholars have virtually unanimously urged its abandonment. . . . The *lex loci* approach fails to acknowledge that jurisdictions other than the place of injury may have a legitimate interest in applying their laws to resolve particular issues arising out of a tort controversy.

Having noted the perceived weaknesses of a categorical *lex loci delicti* rule, we now consider the principal reasons advanced for its retention. These are: . . . (3) the certainty and predictability of result afforded by a categorical choice of law rule and the concomitant ease of applying such a rule; . . .

The third argument in favor of retention of the doctrine of *lex loci* is that it imparts certainty, predictability, and ease of application to choice of law rules. We do not underestimate these characteristics. “Simplicity in law is a virtue. Judicial efficiency often depends upon it.” R. Leflar, *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U.L.REV. 267, 288 (1966). The virtue of simplicity must, however, be balanced against the vice of arbitrary and inflexible application of a rigid rule. . . . In the present case, application of the *lex loci delicti* doctrine makes determination of the governing law turn upon a purely fortuitous circumstance: the

geographical location of the parties’ automobile at the time the accident occurred. Choice of law must not be rendered a matter of happenstance, in which the respective interests of the parties and the concerned jurisdictions receive only coincidental consideration. Numerous jurisdictions have declined to apply the law of the place of injury in similar circumstances. . . .

We note, furthermore, that *lex loci*’s arguable advantages of uniformity and predictability have been undermined by its widespread rejection by courts and scholars, and by judicial constructions that avoid its strict application. *Lex loci* “no longer affords even a semblance of the general application that was once thought to be its great virtue.” *Reich v. Purcell*, 67 Cal.2d at 555, 432 P.2d 727, 63 Cal.Rptr. 31. Even when it was the dominant American choice of law rule, courts frequently took advantage of various “escape devices” that allowed them to pay lip service to *lex loci* while avoiding its strict application. . . . “[I]t is a poor defense of the system to say that the unacceptable results which [*lex loci*] will inevitably produce can be averted by disingenuousness if the courts are sufficiently alert.” B. Currie, *supra*, 176.

. . .

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 laws solely by reference to the place where a tort occurred.

In deciding how to assess a replacement for *lex loci*, we recognize that the legal literature offers us various alternative approaches to the problems of choice of law. Three such approaches have gained widespread judicial acceptance: (1) the choice of law rules promulgated in the Restatement Second of Conflict of Laws; (2) the “governmental interest” approach developed by Professor Brainerd Currie; and (3) Professor Robert A. Leflar’s theory of choice of law, in which the applicable law in multijurisdictional controversies is determined by reference to five “choice-influencing considerations.” [The third approach is discussed later in this Chapter.] The Restatement Second approach, the product of more than a decade of research, incorporates some of the attributes of the latter two approaches, as well as others, in an attempt to “provide formulations that were true to the cases, were broad enough to permit further development in the law, and yet were able to give some guidance by pointing to what was thought would probably be the result reached in the majority of cases.” W. Reese, *The Second Restatement of Conflict of Laws Revisited*, 34 MERCER L.REV. 501, 519 (1983). A majority of the courts that have

abandoned *lex loci* have adopted the principles of the Restatement Second as representing the most comprehensive and equitably balanced approach to conflict of laws. It is therefore our conclusion that we too should incorporate the guidelines of the Restatement as the governing principles for those cases in which application of the doctrine of *lex loci* would produce an arbitrary, irrational result.

III

We turn now to an examination of the relevant provisions of the Restatement Second of Conflict of Laws in the context of the dispute presently before us. We note that the defendant, if he cannot persuade us to retain the doctrine of *lex loci* in its entirety, argues, in the alternative, that application of the principles of the Restatement would likewise require deference to the law of Quebec in the circumstances of this case. Careful analysis of the relevant Restatement provisions persuades us of the merits of the opposite conclusion.

[The court quotes §§ 145 and 6, which are set out in the text preceding the case.] . . .

Applying the choice of law analysis of §§ 145 and 6 to the facts of this case involves a weighing of the relative significance of the various factors that § 6 lists. Of greatest importance for present purposes are the choices of policy emphasized in § 6(2)(b), (c) and (e). We are not today concerned with a case that offends systemic policy concerns of another state or country, nor do the facts warrant an inference of justified expectations concerning the applicability of anything other than the law of the forum. Although the principles of certainty and ease of application must be taken into account, the Restatement cautions against attaching independent weight to these auxiliary factors, noting that they are ancillary to the goal of providing rational, fair choice of law rules. As comment i to § 6 states: “In a rapidly developing area, such as choice of law, it is often more important that good rules be developed than that predictability and uniformity of result should be assured through continued adherence to existing rules.”

For assistance in our evaluation of the policy choices set out in §§ 145(1) and 6(2), we turn next to § 145(2) of the Restatement, which establishes black-letter rules of priority to facilitate the application of the principles of § 6 to tort cases. . . .

In the circumstances of the present case, because the plaintiff was injured in Quebec and the tortious conduct occurred there, § 145(2)(a) and (b) weigh in favor of applying Quebec law.¹⁴ Because both parties are Connecticut domiciliaries and their relationship is centered here, § 145(2)(c) and (d) indicate that Connecticut law should be applied. To

¹⁴ See also 1 Restatement (Second), Conflict of Laws, § 146, which [applies to personal injuries. § 146 is quoted in the text preceding this case. *Eds.*] . . .

resolve this potential standoff, we need to recall that it is the significance, and not the number, of § 145(2) contacts that determines the outcome of the choice of law inquiry under the Restatement approach. As the concluding sentence of § 145(2) states, “[t]hese contacts are to be evaluated according to their relative importance with respect to the particular issue.”

In order to apply the § 6 guidelines to the circumstances of the present case, we must, therefore, turn our attention once more to the particular issue whose disparate resolution by two relevant jurisdictions gives rise to the conflict of laws. Specifically, we must analyze the respective policies and interests of Quebec, the place of injury, and Connecticut, the forum state, with respect to the issue of whether the plaintiff should be allowed to recover damages from the defendant in a private cause of action premised on the defendant’s negligent operation of an automobile. In the process of that analysis, we must evaluate the relevance of each jurisdiction’s § 145(2) contacts to this particular controversy.

We first consider the policies and interests of Quebec in this regard. Quebec, as the place of injury, has an obvious interest in applying its standards of conduct to govern the liability, both civil and criminal, of persons who use its highways. . . . If the issue at stake in the present controversy were whether the defendant’s conduct was negligent, we might well conclude that Quebec’s interest in applying its law was of paramount significance.

In the present case, however, the relevant Quebec law expresses no interest in regulating the conduct of the defendant, but rather limits the liability exposure to which his conduct subjects him. Quebec’s Automobile Insurance Act presumably embodies policies similar to that of our own no-fault automobile insurance act: assurance to automobile accident victims of access to expeditious and adequate financial compensation, and assurance to automobile owners of access to insurance at reasonable premiums. Quebec, however, has chosen to implement this policy, in title II, § 4, with a provision which, like our workers’ compensation act eschews investigation into the possible negligence of the defendant’s conduct and limits the amount of damages the victim of the defendant’s conduct may recover.¹⁵ In *Reich v. Purcell*, 67 Cal.2d 551, 556, 432 P.2d 727, 63 Cal.Rptr. 31 (1967), Chief Justice Traynor, speaking with regard to statutory limitations on wrongful death damages, noted: “Limitations of damages . . . have little or nothing to do with conduct. They are concerned not with how people should behave but with how survivors should be compensated. The

¹⁵ We note additionally that the Quebec act does not express a policy of immunizing tortfeasors from the consequences of their actions. Quebec Revised Statutes, chapter A-25, title II, § 7, provides in relevant part: “Notwithstanding section 4, the Régie, where it compensates a victim under this section, is subrogated in the victim’s rights and is entitled to recover the compensation and the capital representing the pensions that the Régie is thereby required to pay from any person not resident in Quebec who, under the law of the place where the accident occurred, is responsible, and from any person liable for compensation for bodily injury caused in the accident by such non-resident. The subrogation is effected of right by the decision of the Régie to compensate the victim.”

state of the place of the wrong has little or no interest in such compensation when none of the parties reside there.”

The policies behind Quebec’s no-fault rule would not be substantially furthered by application of Quebec law in the circumstances of the present case. In this case, neither the victim nor the tortfeasor is a Quebec resident. There is no evidence on the record that the vehicle involved in the accident was insured or registered in Quebec. Rather, the record indicates that the parties were merely “passing through” the province, and that the location of the accident was fortuitous. Clearly the goal of reducing insurance premiums in Quebec is not furthered by application of the Quebec no-fault act to an accident involving only nonresidents of Quebec, in an automobile that was not insured in the province. Quebec’s interest in alleviating the administrative and judicial costs of automobile accident litigation is in no way implicated when, as in this case, a nonresident brings suit against another nonresident in a foreign jurisdiction. We note that a Quebec resident suing the defendant in Connecticut would not be subject to the Quebec act’s lawsuit prohibition; under the Quebec act, such a plaintiff would be entitled to statutory compensation under Quebec law as well as any damages recoverable in a private action under Connecticut law. Application of Quebec law in these circumstances would thus produce the same anomalous result that we deplored in *Simaitis v. Flood*, 182 Conn. 24, 29–30, 437 A.2d 828 (1980), since it would “bestow upon temporary visitors injured in Connecticut all the relief which [Connecticut law] affords, but deny that same relief to Connecticut residents” injured in Quebec. *Id.*

The foregoing analysis leads us to conclude that Quebec’s status as the place of injury is not a significant contact for purposes of our choice of law inquiry in this case. Accordingly, since Quebec has no other contacts with this litigation, we hold that Quebec has no interest in applying its no-fault act to bar the plaintiff’s action.

In order to justify the application of Connecticut law to the issue at stake, however, we must consider whether Connecticut’s contacts with the litigation give it a legitimate interest in applying its law to the controversy. We are persuaded that Connecticut does have the requisite significant contacts.

Connecticut has a significant interest in this litigation because both the plaintiff and the defendant are, and were at the time of the accident, Connecticut domiciliaries. Consequently, to the extent that they might have anticipated being involved in an automobile accident, they could reasonably have expected to be subject to the provisions of Connecticut’s no-fault act. More importantly, however, Connecticut has a strong interest in assuring that the plaintiff may avail herself of the full scope of remedies for tortious conduct that Connecticut law affords. . . . To deny the plaintiff a cause of action in this case would frustrate this important purpose of the

Connecticut no-fault statute. This is particularly true when, as in this case, the alleged consequences of the plaintiff’s injury, including medical expenses and lost income, have been borne in Connecticut.

Our conclusion that we should look to the law of Connecticut rather than to the law of Quebec in this case should not be construed as a blanket endorsement of reliance on Connecticut law in all circumstances. We are persuaded that, in this case, justice and reason point to Connecticut as the jurisdiction whose laws bear the most significant relationship to the controversy at hand. We are reassured that courts in other jurisdictions, relying on the Restatement Second of Conflict of Laws, have equally concluded that they should disregard the law of a foreign jurisdiction that has at best a fortuitous and incidental relationship to the controversy to be adjudicated. We can readily conceive of circumstances, however, in which the choice between the relevant jurisdictions would be much more problematic. For example, Quebec law would have been entitled to greater weight if the accident had involved a Quebec resident; or a unique configuration of Quebec roads; or if the defendant’s negligent conduct, rather than the plaintiff’s right to sue, had been at issue. The guiding principles of the Restatement command respect precisely because they encourage a searching case-by-case contextual inquiry into the significance of the interests that the law of competing jurisdictions may assert in particular controversies.

We therefore reverse the judgment of the Appellate Court upholding the trial court’s granting of the motion to strike the plaintiff’s complaint, and direct that this case be remanded to the trial court for further proceedings consistent with this opinion.

NOTES AND QUESTIONS

1. How would a court applying interest analysis have decided this case? Do all the complexities incorporated into the Second Restatement add much to the analysis?

2. In footnote 14, the court references § 146, a special provision dealing with personal injuries. Why doesn’t the court apply that provision instead of § 145? Would it have made a difference in the ultimate resolution?

3. When it discusses the § 6 factors, the court suggests that the only “expectation” the parties may have had was that forum (Connecticut) law would apply. Is that realistic? When you drive to a different state, shouldn’t you expect that state’s law to apply? Moreover, isn’t the court’s reasoning somewhat self-fulfilling? If courts routinely applied *lex loci delicti* in these cases, wouldn’t parties eventually come to expect *that* law to apply? On the other hand, is it reasonable to expect drivers to research the liability rules (as opposed to the traffic laws) of all the states they plan to visit?

b. Contracts and Choice of Law Clauses

Parties to a contract often include a choice of law provision in their agreement. In some cases, the chosen law is rational, as when the contract selects the law of the state where the parties reside, or where the contract is to be performed. But in other cases, the parties select a state—or even a foreign nation—with no actual connection to the contract. How much freedom do the parties have to select a law to govern their agreement? As the following case demonstrates, the analysis under the Second Restatement may require one to determine what law would apply in the *absence* of the choice of law clause. The relevant provisions are §§ 187 and 188, along with the previously quoted § 6.

**RESTATEMENT OF THE LAW (SECOND)
OF CONFLICT OF LAWS****§ 187. Law of the State Chosen by the Parties**

(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 have resolved by an explicit provision in their agreement directed to that issue, unless either

(a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice, or

(b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of § 188, would be the state of the applicable law in the absence of an effective choice of law by the parties.

(3) In the absence of a contrary indication of intention, the reference is to the local law of the state of the chosen law.

§ 188. Law Governing in Absence of Effective Choice by the Parties

(1) The rights and duties of the parties with respect to an issue in contract are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the transaction and the parties under the principles stated in § 6.

(2) 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.

(3) If the place of negotiating the contract and the place of performance are in the same state, the local law of this state will usually be applied, except as otherwise provided in §§ 189–199 and 203.

DESANTIS V. WACKENHUT CORP.

793 S.W.2d 670 (Tex. 2006)

HECHT, J.

This case involving a noncompetition agreement between an employer and employee presents three principal issues: first, whether the law of the state chosen by the parties to govern their agreement should be applied; second, whether the noncompetition agreement is enforceable; third, if the agreement is not enforceable, whether damages for its attempted enforcement are recoverable under the Texas Free Enterprise and Antitrust Act of 1983 or for wrongful injunction, fraud, or tortious interference with contract.

The trial court applied the law of the state of Florida, chosen by the parties to govern the noncompetition agreement, to hold the agreement valid but overly broad as to the geographical territory in which competition was restricted. Based upon a jury finding that the employee breached the agreement, the trial court enjoined any further violation of the agreement within a smaller territory, and denied the employee’s claims for damages. The court of appeals affirmed. We hold that Texas law, not Florida law, applies in this case, and that under Texas law, the noncompetition agreement is unenforceable. . . . We accordingly reverse the judgment of the court of appeals and render judgment in accordance with this opinion.

I

A

Edward DeSantis has been providing international and corporate security services, both in the CIA and the private sector, for his entire career. In June 1981, while employed by R.J. Reynolds Industries in North Carolina, DeSantis interviewed for a position with Wackenhut Corporation. . . . DeSantis met with Wackenhut's president, founder, and majority stockholder, George Wackenhut, at the company's offices in Florida, and the two agreed that DeSantis would immediately assume the position of Wackenhut's Houston area manager. . . .

At Wackenhut's request, DeSantis signed a noncompetition agreement at the inception of his employment. The agreement recites that it was "made and entered into" on August 13, 1981, in Florida, although DeSantis signed it in Texas. It also recites consideration "including but not limited to the Employee's employment by the Employer". In the agreement DeSantis covenanted that as long as he was employed by Wackenhut and for two years thereafter, he would not compete in any way with Wackenhut in a forty-county area in south Texas. . . . Finally, DeSantis and Wackenhut agreed "that any questions concerning interpretation or enforcement of this contract shall be governed by Florida law."

DeSantis remained manager of Wackenhut's Houston office for nearly three years, until March 1984, when he resigned under threat of termination. DeSantis contends that he was forced to quit because of disagreements with Wackehut's senior management over the profitability of the Houston office. Wackenhut contends that DeSantis was asked to resign because of his unethical solicitation of business.

Following his resignation, DeSantis invested in a company which marketed security electronics. He also formed a new company, Risk Deterrence, Inc. ("RDI"), to provide security consulting services and security guards to a limited clientele. The month following termination of his employment with Wackenhut, DeSantis sent out letters announcing his new ventures to twenty or thirty businesses, about half of which were Wackenhut clients. . . .

B

Wackenhut sued DeSantis and RDI in October 1984 to enjoin them from violating the noncompetition agreement, and to recover damages for breach of the agreement and for tortious interference with business relations. . . . DeSantis and RDI counterclaimed against Wackenhut, alleging that Wackenhut had fraudulently induced DeSantis to sign the noncompetition agreement, that the agreement violated state antitrust laws, and that enforcement of the agreement by temporary injunction was wrongful and tortiously interfered with DeSantis and RDI's contract and business relationships. . . .

. . . A jury found that DeSantis breached the noncompetition agreement by competing with Wackenhut, but failed to find that Wackenhut would be irreparably harmed if DeSantis were not prohibited from further breaching the agreement. The jury also failed to find that Wackenhut had ever been unfair, unjust, misleading or deceptive to DeSantis so as to cause him any injury.

. . . Accordingly, the trial court permanently enjoined DeSantis from competing with Wackenhut, and RDI from employing DeSantis to compete with Wackenhut, for two years from the date DeSantis left Wackenhut in an area reduced by the trial court from the forty counties stated in the agreement to the thirteen counties found by the trial court to be reasonably necessary to protect Wackenhut’s interest. . . .

The court of appeals affirmed the judgment of the trial court in all respects.

II

We first consider what law is to be applied in determining whether the noncompetition agreement in this case is enforceable. Wackenhut contends that Florida law applies, as expressly agreed by the parties. DeSantis argues that Texas law applies, despite the parties’ agreement.

A

This Court has not previously addressed what effect should be given to contractual choice of law provisions. . . .

When parties to a contract reside or expect to perform their respective obligations in multiple jurisdictions, they may be uncertain as to what jurisdiction’s law will govern construction and enforcement of the contract. To avoid this uncertainty, they may express in their agreement their own choice that the law of a specified jurisdiction apply to their agreement. Judicial respect for their choice advances the policy of protecting their expectations. This conflict of laws concept has come to be referred to as party autonomy. However, the parties’ freedom to choose what jurisdiction’s law will apply to their agreement cannot be unlimited. They cannot require that their contract be governed by the law of a jurisdiction which has no relation whatever to them or their agreement. And they cannot by agreement thwart or offend the public policy of the state the law of which ought otherwise to apply. So limited, party autonomy furthers the basic policy of contract law. With roots deep in two centuries of American jurisprudence, limited party autonomy has grown to be the modern rule in contracts conflict of laws.

We believe the rule is best formulated in section 187 of the RESTATEMENT and will therefore look to its provisions in our analysis of this case.

B

Section 187 states: [§ 187 is quoted in the text before the case] . . .

The issue before us—whether the noncompetition agreement in this case is enforceable—is not “one which the parties could have resolved by an explicit provision in their agreement”. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 comment d (1971). We therefore apply section 187(2).

The parties in this case chose the law of Florida to govern their contract. Florida has a substantial relationship to the parties and the transaction because Wackenhut’s corporate offices are there, and some of the negotiations between DeSantis and George Wackenhut occurred there. Thus, under section 187(2) Florida law should apply in this case unless it falls within the exception stated in section 187(2)(b). Whether that exception applies depends upon three determinations: first, whether there is a state the law of which would apply under section 188 of the RESTATEMENT absent an effective choice of law by the parties, or in other words, whether a state has a more significant relationship with the parties and their transaction than the state they chose; second, whether that state has a materially greater interest than the chosen state in deciding whether this noncompetition agreement should be enforced; and third, whether that state’s fundamental policy would be contravened by the application of the law of the chosen state in this case. More particularly, we must determine: first, whether Texas has a more significant relationship to these parties and their transaction than Florida; second, whether Texas has a materially greater interest than Florida in deciding the enforceability of the noncompetition agreement in this case; and third, whether the application of Florida law in this case would be contrary to fundamental policy of Texas.

1

Section 188 of the RESTATEMENT provides that a contract is to be governed by the law of the state that “has the most significant relationship to the transaction and the parties”, taking into account various contacts in light of the basic conflict of laws principles of section 6 of the RESTATEMENT. In this case, that state is Texas. Wackenhut hired DeSantis to manage its business in the Houston area. Although some of the negotiations between DeSantis and Wackenhut occurred in Florida, the noncompetition agreement was finally executed by DeSantis in Houston. The place of performance for both parties was Texas, where the subject matter of the contract was located. Wackenhut may also be considered to have performed its obligations in part in Florida, from where it supervised its various operations, including its Houston office. Still, the gist of the agreement in this case was the performance of personal services in Texas. As a rule, that factor alone is conclusive in determining what state’s law is

to apply. See RESTATEMENT § 196 (1971).⁴ In this case, the relationship of the transaction and parties to Texas was clearly more significant than their relationship to Florida.

2

Texas has a materially greater interest than does Florida in determining whether the noncompetition agreement in this case is enforceable. At stake here is whether a Texas resident can leave one Texas job to start a competing Texas business. Thus, Texas is directly interested in DeSantis as an employee in this state, in Wackenhut as a national employer doing business in this state, in RDI as a new competitive business being formed in the state, and in consumers of the services furnished in Texas by Wackenhut and RDI and performed by DeSantis. Texas also shares with Florida a general interest in protecting the justifiable expectations of entities doing business in several states. Florida’s direct interest in the enforcement of the noncompetition agreement in this case is limited to protecting a national business headquartered in that state. Although it is always problematic for one state to balance its own interests fairly against those of another state, the circumstances of this case leave little doubt, if any, that Texas has a materially greater interest than Florida in deciding whether the noncompetition agreement in this case should be enforced.

3

Having concluded that Texas law would control the issue of enforceability of the noncompetition agreement in this case but for the parties’ choice of Florida law, and that Texas’ interest in deciding this issue in this case is materially greater than Florida’s, we must finally determine under section 187(2)(b) of the RESTATEMENT whether application of Florida law to decide this issue would be contrary to fundamental policy of Texas. The RESTATEMENT offers little guidance in making this determination. Comment g states only that a “fundamental” policy is a “substantial” one, and that “[t]he forum will apply its own legal principles in determining whether a given policy is a fundamental one within the meaning of the present rule. . . .”

Comment g to section 187 does suggest that application of the law of another state is not contrary to the fundamental policy of the forum merely because it leads to a different result than would obtain under the forum’s law. We agree that the result in one case cannot determine whether the

⁴ Section 196 states:

Contracts for the Rendition of Services

The validity of a contract for the rendition of services 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 the contract requires that the services, or a major portion of the services, be rendered, 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.

issue is a matter of fundamental state policy for purposes of resolving a conflict of laws. Moreover, the fact that the law of another state is materially different from the law of this state does not itself establish that application of the other state's law would offend the fundamental policy of Texas. In analyzing whether fundamental policy is offended under section 187(2)(b), the focus is on whether the law in question is a part of state policy so fundamental that the courts of the state will refuse to enforce an agreement contrary to that law, despite the parties' original intentions, and even though the agreement would be enforceable in another state connected with the transaction.

Neither the RESTATEMENT nor the cases which have followed section 187 have undertaken a general definition of "fundamental policy", and we need not make the attempt in this case; for whatever its parameters, enforcement of noncompetition agreements falls well within them. This Court has held that "[a]n agreement not to compete is in restraint of trade and will not be enforced unless it is reasonable." *Frankiewicz v. National Comp Assoc.*, 633 S.W.2d 505, 507 (Tex.1982). As a general rule, unreasonable restraints of trade, including unreasonable covenants not to compete, contravene public policy. What noncompetition agreements are reasonable restraints upon employees in this state, therefore, is a matter of public policy. Moreover, that policy is fundamental in that it ensures a uniform rule for enforcement of noncompetition agreements in this state. . . .

These same considerations and others have led virtually every court that has addressed the question of whether enforcement of noncompetition agreements is a matter of fundamental or important state policy to answer affirmatively. Not many of these courts have considered the matter specifically in the context of section 187 of the RESTATEMENT, and yet, rather remarkably, many have nevertheless expressed similar conclusions.

We likewise conclude that the law governing enforcement of noncompetition agreements is fundamental policy in Texas, and that to apply the law of another state to determine the enforceability of such an agreement in the circumstances of a case like this would be contrary to that policy. We therefore hold that the enforceability of the agreement in this case must be judged by Texas law, not Florida law.

III

We now consider whether the noncompetition agreement between DeSantis and Wackenhut is enforceable under Texas law. [The court held Texas law would not enforce the agreement.] . . .

V

Inasmuch as we have held the noncompetition agreement in this case to be unreasonable and unenforceable, we reverse the judgment of the court

of appeals which affirmed the permanent injunction enforcing that agreement, and vacate that injunction ordered by the trial court.

[The concurring opinion of MAUZY, J., in which SPEARS, J., joined, is omitted. This opinion deals only with the standard for enforcing noncompetition agreements.]

SWANSON V. THE IMAGE BANK, INC.

206 Ariz. 264, 77 P.2d 439 (2003)

JONES, CHIEF JUSTICE.

Appellants, The Image Bank, Inc. and Swanstock, Inc. (collectively “TIB”), sought review of the court of appeals’ decision affirming the trial court’s grant of partial summary judgment in favor of Appellee, Mary Virginia Swanson (“Swanson”). The judgment awarded treble damages under Arizona Revised Statutes (“A.R.S.”) § 23–355 (1995) for bad faith breach of an employment contract. We granted review to determine whether the contract’s express choice-of-law provision assigning Texas substantive law to govern any controversy arising out of the contract precludes recovery of a statutory claim for treble damages under A.R.S. § 23–355. After full review, we hold that the contractual choice of Texas law governs the remedies available to Swanson for breach of the contract and we reverse the treble damage award. . . .

FACTS

From 1991 to 1997, Swanson owned Swanstock, Inc., an Arizona corporation that represented owners of fine art photography. She resided permanently in Arizona and operated Swanstock, Inc. from this state. The Image Bank, Inc. is a New York corporation with its home office in Texas. In June 1997, The Image Bank purchased Swanstock, Inc. and retained Swanson to operate the company as its president, creative director, and chief executive officer pursuant to a negotiated employment contract. The contract contained provisions regarding compensation to be received upon termination and the application of Texas law as the law under which the contract should be governed and construed. Each party was represented by counsel during the contract negotiations.

TIB terminated Swanson in July 1999 “other than for cause” but refused to make the severance payments required by the contract. Swanson filed suit, followed by a motion for partial summary judgment, alleging breach of the employment contract and claiming TIB violated A.R.S. § 23–352 which provides that “[n]o employer may withhold or divert any portion of an employee’s wages. . . .” In addition to damages at law for the breach, Swanson sought treble damages pursuant to A.R.S. § 23–355. The trial court determined that TIB breached the employment contract with Swanson and awarded Swanson \$150,000 in severance pay. Notwithstanding the parties’ express agreement that Texas law should

control, the trial court trebled the damages under § 23–355, finding that the statute set forth a “fundamental public policy” of Arizona and, as such, should supersede the choice-of-law provision in the contract.

TIB appealed. . . . The court of appeals . . . applied Restatement (Second) of Conflict of Laws § 187 (1971) (hereafter “Restatement”) and upheld the treble damage award on the theory that Arizona law does not permit prospective contractual waiver of claims under § 23–355 in the case of unreasonable, bad-faith withholding of wages. The choice-of-law provision was held to be invalid as a violation of a “fundamental policy” of Arizona under both subsections (1) and (2) of Restatement § 187.

DISCUSSION

Arizona courts apply the Restatement to determine the applicable law in a contract action. If a contract includes a specific choice-of-law provision, we must determine whether that choice is “valid and effective” under Restatement § 187. Choice-of-law issues are questions of law, which we decide de novo.

A. APPLICABILITY OF THE RESTATEMENT

The choice-of-law provision in the employment contract reads:

This Agreement shall be governed by and construed in accordance with the internal laws of the State of Texas, without regard to the principles of conflicts [*sic*] of laws.

TIB claims this provision forecloses the application of conflict of laws principles set forth in the Restatement because the parties, by including the last phrase, expressed their unequivocal intent that Texas law control the relationship. TIB argues the court of appeals improperly overrode that intent by engaging in a § 187 analysis. TIB further contends that absent fraud or overreaching, parties are always free to preclude a § 187 analysis by choosing the state whose law will govern their relationship and the available remedies. These arguments are not sound and we do not adopt them.

When more than one state has a relationship to or an interest in a contract, courts apply a conflicts analysis to determine which state’s law should govern. However, neither a statute nor a rule of law permitting parties to choose the applicable law confers unfettered freedom to contract at will on this point. Consistent with this principle, Restatement § 187, comment g reads:

Fulfillment of the parties’ expectations is not the only value in contract law; regard must also be had for state interests and for state regulation. The chosen law should not be applied without regard for the interests of the state which would be the state of the applicable law with respect to the particular issue involved in the absence of an effective choice by the parties.

Section 187 provides a mechanism by which to balance the interests of both the parties and the states. Therefore, when parties include an express choice-of-law provision in a contract, we will perform a § 187 analysis to ascertain the appropriate balance between the parties’ circumstances and the states’ interests. By so doing, we determine as a matter of law whether the provision is valid and thus whether it should govern the parties’ contractual rights and duties.

B. RESTATEMENT § 187 ANALYSIS

Restatement § 187 outlines the test used to decide whether the parties’ chosen law will govern:

- (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. . . .

In deciding whether the parties’ choice will govern, we first determine whether the disputed issue is one which the parties could have resolved by an explicit provision in their agreement. Restatement § 187(1). As identified by the court of appeals, “[t]he ‘particular issue’ here is whether parties may contractually waive any statutory right or claim to treble damages under § 23–355.” *Swanson*, 202 Ariz. at 234. The parties agree, as do we, that Arizona law applies to this threshold issue.

The court of appeals held that Arizona law does not allow parties to an employment contract to preclude such recovery. The court . . . held that unless waiver is expressly permitted by the statute, it is necessarily prohibited. Our analysis, however, leads to the conclusion that the court of appeals erred in its interpretation of Arizona law and the proper application of Restatement § 187.

First, we do not find support for the court’s implicit holding that an Arizona statute must expressly permit parties to resolve an issue in order to satisfy Restatement § 187(1). We do not interpret § 187(1) so narrowly. Section 187(1) places few limitations on parties’ right to contract. Examples of issues that parties may not determine by explicit agreement include questions involving capacity, formalities, and validity. Restatement § 187 cmt. d. Thus, parties cannot vest themselves with capacity to contract by so stating in an agreement, nor can they dispense with the formal legal elements of a valid contract. Generally speaking, however, parties do have the power to determine the terms of their contractual engagements. We find this to be particularly true in this case where parties of relatively equal bargaining power, both represented by counsel, selected the law of the state to govern their contract.

Second, the plain language of § 23–355 neither expressly nor impliedly prohibits modification or waiver of a statutory remedy. Typically, when the Arizona Legislature intends to preclude employers and employees from

avoiding statutory rights or remedies with an express contractual provision, the statute either prohibits waiver or voids contractual provisions that limit an employee's rights or an employer's liabilities. . . .

Further, we note that under the plain language of the statute, the award of treble damages for the bad-faith withholding of wages is discretionary with the court. When the court, by express direction of the legislature, is given discretion to reject treble damages, it follows that parties to a contract, at least arguably, may likewise exercise discretion to choose a jurisdiction that does not provide for them.

In light of the above, we hold that Arizona statutory law does not preclude parties from agreeing by express contractual provision in a negotiated contract to surrender the right to a statutory remedy under § 23–355.5 Because they may do so by express provision, it follows, under the law, that they may do so by adopting the law of another state.

We further hold that the court of appeals erred by collapsing the analysis of subsections (1) and (2)(b) of Restatement § 187 by engaging in a discussion of state policy. Therefore, because the disputed issue in the instant case is one that the parties were able to resolve pursuant to the express language of § 187(1), we need not address the question whether application of the law of Texas, the state chosen by the contracting parties, would violate a fundamental policy of Arizona. See *Cardon*, 173 Ariz. at 207, 209, 841 P.2d at 202, 204 (declining to apply a § 187(2)(a) analysis where § 187(1) applied).

DISPOSITION

We hold that parties experienced in business, represented by counsel, and having relatively equal bargaining strength, may, by express provision in a negotiated contract, surrender the statutory remedy under A.R.S. § 23–355. We therefore validate and give effect to the parties' choice of Texas law to govern this controversy. Accordingly, that portion of the court of appeals' opinion addressing the treble damage award is vacated and the matter is remanded to the superior court for further proceedings consistent with this opinion. . . .

NOTES AND QUESTIONS

1. As *DeSantis* demonstrates, multiple provisions of the Second Restatement may come into play on contract issues. § 188 is the general choice of law provision, which applies when the contract contains no choice of law clause. Other provisions, including § 196 referred to by the court in a footnote, provide specific rules for certain issues. § 187 applies to choice of law clauses. However, sometimes § 187 requires reference to § 188 or one of the specific provisions. Although it reverses the order of the court's reasoning, logically it may be easier to deal with § 188 first.

2. § 188. Like its counterpart § 145 in tort, § 188 uses the most significant relationship test. The court in *DeSantis* concludes that Texas clearly has the most significant relationship with the contract. Do you understand why the court is so certain of that conclusion?

3. § 188 is a hybrid provision. In addition to the general most significant relationship rule in subsection (1) and (2), subsection (3) sets out a default rule. Review subsection (3). Shouldn't the court in *DeSantis* have applied that to the case, not subsection (1)? The court also cites § 196 in footnote 4. Couldn't it also control? Would application of §§ 188(3) or 196 have affected the court's conclusion that Texas law would have governed had there been no choice of law clause?

4. Although the court in *DeSantis* cites § 6, it does not really apply it in its analysis. This omission probably was due to the court's conclusion that factors §§ 6(2)(b), (c), and (e)—which as pointed out earlier are often considered the most important—provided a clear answer, making consideration of the other factors superfluous.

On the other hand, in close cases some of the other § 6 factors may prove more useful in contract disputes than they do in tort. In particular, the § 6(2)(d) reference to “justified expectations,” as well as the “certainty, predictability, and uniformity” mentioned in § 6(2)(f), are more likely to be pertinent in a contract case.

5. § 187. Now turn to § 187, which governs choice of law clauses. That provision has two quite different tests in subsections (1) and (2). Students often have considerable difficulty determining which of these two provisions governs. (If it is any consolation, so do many judges . . . the case reporters are replete with decisions applying the subsection (2) test in situations that should have been governed by the far more lenient subsection (1).) To help you understand the difference, we include two § 187 cases. *DeSantis* deals with subsection (2), while *Swanson* deals with subsection (1).

Swanson also contains a useful passage explaining the basic logic of § 187. Parties with unlimited time and resources would not need choice of law clauses. They could simply spell out in excruciating detail the specifics of every aspect of their agreement. But in many cases, the law of State X will already contain many of those same terms (such as whether a party is entitled to receive notice if the other party thinks it has defaulted). In these situations selecting the law of State X is a shorthand way of incorporating those terms, saving the time and trouble of negotiating and drafting the precise terms.

6. Of course, parties do not have absolute freedom to define their relationship. State law sets external constraints on contracts. For example, if state law prohibits minors from forming enforceable contracts, two twelve-year olds cannot avoid this limitation merely by including a term such as “This contract is enforceable notwithstanding that the parties are not of legal age.” Similarly, if state law holds that gambling debts are not enforceable, no amount of detail will overcome that rule.

7. The discussion in Notes 5 and 6 reflects the distinction between §§ 187 (1) and (2). The former applies when the parties could freely negotiate and set out the term with specificity. § 187(2) deals with cases where the parties could not deal specifically with the issue.

8. Review *Swanson*. Do you see why the court concludes the choice of law clause is governed by § 187(1)?

9. What restrictions does § 187(1) place on the parties' ability to select a law? Suppose two Nebraskans, P and D, enter into a contract to be performed in Nebraska. However, although neither party has ever been there, they select Albanian law to govern the contract. When D fails to perform, P sues. D invokes a provision of Albanian law that would limit P's recovery to a sincere and heartfelt apology, not damages or specific performance. Does Albanian law apply? Does D need to show the parties both knew of this odd provision of Albanian law at the time they entered into the contract?

10. § 187(2) sets out a more difficult standard. As a rule of thumb, it applies primarily to questions of contract validity (infancy, insanity, and the like) as well as to some questions of legality of performance. Note that even though the parties cannot specifically negotiate around a question of validity, they may be able to finesse the issue by selecting the law of a jurisdiction that would render the contract or performance valid.

The § 187(2) analysis starts by assuming the choice of law clause is *valid*, even though the issue in dispute affects validity or legality. However, the court will not enforce the choice if either of the following conditions exists:

- (a) the chosen state does not have a substantial relationship with the transaction, and there is no other reasonable basis to pick that state, or
- (b) even if there is a substantial relationship or other reasonable basis, the rule selected would violate a fundamental policy of the state whose law would have been selected had there been no choice of law clause.

11. *DeSantis* deals with the second of these conditions. Note 2 above discusses why Texas law would otherwise have governed under § 188. But that finding alone is not enough. To invalidate the choice of law clause, the challenging party must also demonstrate that application of the chosen law would violate a fundamental Texas policy. Do you agree with the court that applying Florida law would violate Texas policy? After all, Texas will enforce *some* non-competition agreements. Like Florida, it will enforce them to the extent they are reasonable. Texas and Florida only differ concerning how broad—in terms of geographic and temporal scope—an agreement can be and still be deemed reasonable. Do such differences in degree involve a clash of fundamental policies?

12. Consider again the intrepid Nebraskans in Note 9. Suppose the contract required D to convert to the Eastern Orthodox religion. While such contracts are invalid under Nebraska law (which you can safely assume would

apply under § 188 in the absence of a choice of law clause), suppose they are enforceable under Albanian law. Ignoring § 187(2)(b) for now, would this choice be effective under § 187(2)(a)? Is there a “substantial connection” with Albania?

But what does § 187(2)(a) mean by “other reasonable basis” to select a law? Absent substantial connections between the chosen state and the parties or the transaction, would a choice of that state’s rule ever be reasonable? There are two possible situations where this reasonableness standard might be satisfied. First, many commercial contracts select New York law to govern, in large part because that law is well-known and highly regarded. A desire for predictability and uniformity could warrant selection of New York law even absent any connection between the particular contract and New York. Second, it may be that the law of the chosen state is identical to the law of some other state that *does* have a substantial connection with the parties or the transaction. If the parties could have chosen the latter (subject to the § 187(2)(b) policy provision, of course), there is no reason they should not be able to select the same rule, even though they peg it to a state that lacks any connection. Modern choice of law, after all, is more about selecting rules rather than sovereigns.

3. PROFESSOR LEFLAR’S CHOICE-INFLUENCING CONSIDERATIONS

Several academics have also tried their hand at developing choice of law approaches. After Professor Currie’s interest analysis, probably the most influential approach is the “Choice-Influencing Considerations” of Professor Robert Leflar. Unlike the Second Restatement, his approach has no rules, only a set of principles courts should consider. Nevertheless, his considerations do bear some resemblance to the factors set out in § 6 of the Second Restatement.

Professor Leflar’s approach is not as widely used as the Second Restatement. A recent estimate indicates five states use it in tort and two in contract. PETER HAY, PATRICK J. BORCHERS, AND SYMEON C. SYMEONIDES, *CONFLICT OF LAWS* 95 (5th ed. 2010). And recent decisions by one of these states—Minnesota—suggest that state may be reconsidering. Nevertheless, Professor Leflar’s writings are frequently cited with approval by courts employing other approaches, including some of the cases in this chapter.

DRINKWATER V. AMERICAN FAMILY MUTUAL INS. CO.

290 Wis.2d 642, 714 N.W.2d 568 (2006)

¶ 1 BRADLEY, J.

This case is before the court on certification by the court of appeals pursuant to Wis. Stat. § 809.61. Medical Associates Health Plan, Inc. (“the Plan”), an Iowa corporation, appeals a circuit court judgment that applied

Wisconsin law and determined that Shane Drinkwater must be made whole before the Plan was entitled to subrogation against his recovery for personal injuries. Drinkwater, a Wisconsin resident, was injured in a motor vehicle accident in Wisconsin, and the Plan paid medical expenses on his behalf through his employer's health insurance plan.

¶ 2 The issue is whether Iowa law or Wisconsin law applies to the Plan's subrogation claim against Drinkwater. Applying choice-of-law principles, we determine that Wisconsin law applies. Accordingly, Drinkwater must be made whole under Wisconsin law before the Plan may recover for any of Drinkwater's medical expenses. We conclude that the Plan is not entitled to subrogation against Drinkwater's recovery because he was not made whole under Wisconsin law. Therefore, we affirm the circuit court judgment.

I

¶ 3 The background facts relevant to this appeal are undisputed. Drinkwater is a Wisconsin resident who works at a company located in Iowa. He sustained injuries that included a severe leg fracture when another motor vehicle struck his motorcycle in September 2002 in Wisconsin. The driver of the other vehicle was also a Wisconsin resident who was covered under an insurance policy issued by a Wisconsin insurance company. Both vehicles were registered in Wisconsin.

¶ 4 The Plan paid health care expenses on Drinkwater's behalf pursuant to a group health insurance contract it issued to Drinkwater's employer. The Plan is an Iowa non-profit corporation and its principal offices and place of business are located in Iowa, although it has clinics in Iowa, Illinois, and Wisconsin. The contract was issued to Drinkwater's employer in Iowa.

¶ 5 Drinkwater commenced an action for personal injuries, naming the other driver and the driver's insurer as defendants, and naming the Plan as a potentially subrogated party. The Plan counterclaimed and cross-claimed, alleging a subrogated interest in the damages Drinkwater sought.

¶ 6 More specifically, the Plan alleged that pursuant to Iowa law, it was entitled to "first dollar" reimbursement and payment in full for all of its subrogated expenses without deduction or offset. It alleged that its subrogation interest was not subject to the Wisconsin "made-whole" doctrine of *Rimes v. State Farm Mutual Automobile Insurance Co.*, 106 Wis.2d 263, 316 N.W.2d 348 (1982), but rather that it was entitled to full reimbursement from any of Drinkwater's recovery based upon the terms of the Plan contract and Iowa law.

¶ 7 The Plan contract contained a clause providing that the contract "shall be governed by and interpreted in accordance with the laws of the State of Iowa." It also contained a subrogation clause, which provided as follows:

If a Member suffers an injury or condition, for which benefits are provided by [the Plan], through acts or omissions of a third party for which said third party (or any person or organization liable for such third party’s conduct) is or may be legally liable, or if the Member recovers benefits from any person or organization by reason of such injury or condition, [the Plan] shall be subrogated, to the extent of the reasonable cash value of benefits, supplies, and services provided by [the Plan], to all the Member’s rights of recovery against any person or organization. . . .

¶ 8 The other driver’s negligence was conceded, as was the lack of any contributory negligence on Drinkwater’s part. The insurer for the other driver paid its policy limit of \$250,000.

. . .

¶ 10 The circuit court determined that Wisconsin law applied. . . .

II

¶ 12 The parties agree that under Wisconsin subrogation law, including *Rimes*, the Plan would not be entitled to subrogation against Drinkwater. The circuit court calculated his damages to be \$424,000, which included \$132,000 in medical expense, but he received only \$250,000 from the tortfeasor. As the circuit court determined, Drinkwater was therefore not made whole. He would be further short-changed for every dollar that the Plan was able to recover. The Plan admits that if Wisconsin’s made-whole doctrine applies, then Drinkwater prevails.

¶ 13 Conversely, Iowa has rejected Wisconsin’s made-whole doctrine. The parties agree that under Iowa law the Plan would be entitled to invade Drinkwater’s recovery of \$250,000 to obtain reimbursement of medical expenses it paid on his behalf. Consequently, the question of whether Wisconsin law or Iowa law applies will determine the outcome of this case.

¶ 14 In order to resolve this question, we must employ a choice-of-law analysis in order to determine whether Iowa law or Wisconsin law applies. This choice-of-law determination is a question of law subject to independent appellate review.

A

¶ 15 We begin with a review of the development and status of the made-whole doctrine in Wisconsin. [Discussion of cases omitted.] . . .

¶ 23 Thus, our case law culminating with *Ruckel* establishes that in Wisconsin the made-whole doctrine can trump express language in an insurance contract

B

¶ 24 The Plan asserts that this is a contract case and that its Iowa choice-of-law clause is controlling. Furthermore, the Plan argues that even

if the clause is not controlling, Iowa is the state with the most significant relationship to the question at hand. Thus, the Plan contends, Iowa law should control under a choice-of-law analysis. We disagree.

¶ 25 This court recognized in *Bush v. National School Studios, Inc.*, 139 Wis.2d 635, 407 N.W.2d 883 (1987), that there is a qualification on the freedom to contract for choice of law. . . . Although parties may seek to promote “certainty and predictability in contractual relations,” they will not be “permitted to do so at the expense of important public policies of a state whose law would be applicable if the parties’ choice of law provision were disregarded.” *Id.*

¶ 26 “A precise delineation of those policies which are sufficiently important to warrant overriding a contractual choice of law stipulation is not possible.” *Bush*, 139 Wis.2d at 643, 407 N.W.2d 883. However, “statutes or common law which make a particular . . . contract provision unenforceable . . . or that are designed to protect a weaker party against the unfair exercise of superior bargaining power by another party, are likely to embody an important state public policy.” *Id.*

. . .

¶ 29 A *Bush*-type qualification on the freedom to contract for choice of law is apt here. First, this court’s jurisprudence culminating in *Ruckel* establishes that in Wisconsin the made-whole doctrine trumps an express contract provision to the contrary. Second, the contractual bargaining in this case occurred between the Plan and Drinkwater’s employer, not between the Plan and Drinkwater. He had no choice or opportunity to bargain as to the terms of the Plan contract. . . .

¶ 30 Moreover, the issue before us is not simply one of contract, as the Plan asserts. To treat it as such, without recognizing the tort aspects that this issue implicates, is to ignore the true nature of the question before the court. To rest the analysis of this case only on contract contravenes this court’s analysis in *Ruckel*, which applied equity, not contract, to a tort recovery.

¶ 31 For all of these reasons, we determine that the express choice-of-law provision for Iowa law in the Plan contract does not necessarily control the Plan’s subrogation right against Drinkwater’s recovery for personal injuries. Rather, we must apply a choice-of-law analysis to determine if, absent the clause, Wisconsin law would apply.

C

¶ 32 Wisconsin’s choice-of-law jurisprudence, at least up until recently, has had something of a checkered past. . . .

¶ 35 [Recently, however,] this court decided *State Farm Mutual Automobile Insurance Co. v. Gillette*, 2002 WI 31, 251 Wis.2d 561, 641 N.W.2d 662, and *Beloit Liquidating Trust v. Grade*, 2004 WI 39, 270 Wis.2d

356, 677 N.W.2d 298. Both cases, *Gillette* in particular, supply the choice-of-law framework for our analysis here.

...

¶ 40 The “first rule” in the choice-of-law analysis under *Gillette* is “that the law of the forum should presumptively apply unless it becomes clear that nonforum contacts are of the greater significance.” *Gillette*, 251 Wis.2d 561, ¶ 51, 641 N.W.2d 662. Under *Gillette*, if it is not clear that the nonforum contacts are of greater significance, then the court applies five choice-influencing factors:

- (1) Predictability of results;
- (2) Maintenance of interstate and international order;
- (3) Simplification of the judicial task;
- (4) Advancement of the forum’s governmental interests; and
- (5) Application of the better rule of law.

Gillette, 251 Wis.2d 561, ¶ 53, 641 N.W.2d 662.⁴

¶ 41 The court in *Beloit Liquidating* referred to two tests to apply in a choice-of-law analysis. The first test is “whether the contacts of one state to the facts of the case are so obviously limited and minimal that application of that state’s law constitutes officious intermeddling.” *Beloit Liquidating*, 270 Wis.2d 356, ¶ 24, 677 N.W.2d 298 The second test involves an examination of the five choice-influencing factors.

¶ 42 The “first rule” of *Gillette* and the first test of *Beloit Liquidating* are related. It could not “become[] clear that nonforum contacts are of the greater significance” (*Gillette*) if the nonforum state’s contacts are “so obviously limited and minimal that application of that state’s law constitutes officious intermeddling” (*Beloit Liquidating*).

¶ 43 ... The application of either *Gillette*’s “first rule” or *Beloit Liquidating*’s first test to the facts here necessitates that we apply the five choice-influencing factors. It is not “clear” whether Iowa’s contacts are of the “greater significance”, yet Iowa’s contacts are not “so obviously limited and minimal” that application of Iowa law would constitute officious intermeddling.

¶ 44 Specifically, the relevant contacts of Iowa and Wisconsin include the following:

- The accident and Drinkwater’s injuries occurred in Wisconsin.

⁴ The factors were suggested by Robert A. Leflar in his article, *Choice-Influencing Considerations in Conflicts Law*, 31 N.Y.U. L. REV. 267 (1966). . . .

- Drinkwater is a Wisconsin resident who works at an Iowa company.
- The Plan is an Iowa corporation with its principal offices and place of business located in Iowa, although it has clinics in Iowa, Illinois, and Wisconsin.
- The Plan contract was issued in Iowa to Drinkwater's employer.
- The tortfeasor is a resident of Wisconsin and was covered under an insurance policy issued by a Wisconsin insurance company.
- Both Drinkwater and the other driver were operating vehicles registered in Wisconsin at the time of the accident.

¶ 45 Both Wisconsin's and Iowa's contacts are significant. It is not clear that Iowa's contacts are of greater significance. At the same time, however, Iowa's contacts are more than minimal and limited. We therefore turn to apply the five choice-influencing factors.

¶ 46 *Predictability of results.* This factor deals with the parties' expectations; put another way, what legal consequences comport with the predictions or expectations of the parties? Whether the application of Iowa law or Wisconsin law is more likely to lead to predictable and expected results under the facts of this case depends on which party's perspective on predictability and expectations is considered.

¶ 47 On the one hand, the application of Iowa law is consistent with the Plan's ability to predict and expect that Iowa law will apply to all its insureds or members. On the other hand, Wisconsin citizens are entitled to some assurance that when they suffer injuries within their own state, they can generally predict and expect that Wisconsin law will dictate their rights to recovery.

¶ 48 It may be true that the Plan reaps some benefit from the ability to know with complete predictability that Iowa law will apply. Yet, the application of Wisconsin law in this case does not completely undermine predictability for the Plan. A company such as the Plan is in a relatively good position to calculate the risks associated with decreased predictability whether Iowa law will apply. In contrast, we would not expect reasonable Wisconsin insureds to foresee that they should routinely over-insure themselves for injuries resulting from Wisconsin accidents on the off chance they might become subject to another state's law that effectively limits their recovery.

¶ 49 Thus, although the application of Iowa law might modestly increase predictability for the Plan, the application of Wisconsin law would facilitate predictability for Wisconsin citizens such as Drinkwater. The Plan, and those similarly situated, are in a better position to calculate the

risk of a modest amount of unpredictability and adjust accordingly. The first factor therefore points at least somewhat to the application of Wisconsin law.

¶ 50 *Maintenance of interstate order.* This factor requires that a jurisdiction which is minimally concerned defer to a jurisdiction that is substantially concerned. Under the facts of this case both jurisdictions are more than minimally concerned.

¶ 51 We cannot say that the application of Wisconsin law would appreciably impede state-to-state commercial intercourse as compared to the application of Iowa law. Although it might be said that the application of Wisconsin law would discourage Iowa companies from hiring Wisconsin residents, it might just as easily be said that the application of Iowa law would discourage Wisconsin citizens from working for Iowa corporations. Thus, somewhat paradoxically, both Iowa and Wisconsin have at least some interest in the application of either jurisdiction’s laws.

¶ 52 In addition, we note that this case does not appear to involve the risk of forum shopping. The accident occurred in Wisconsin, and both Drinkwater and the tortfeasor who caused his injuries are Wisconsin residents. Similarly, any fear that a prospective plaintiff would move to this state merely to take advantage of its made-whole doctrine is unfounded. All in all, the second factor does not appreciably favor Iowa law or Wisconsin law.

¶ 53 *Simplification of the judicial task.* This court has stated a general rule that the judicial task is rarely simplified when lawyers and judges must apply themselves to foreign law.⁶

¶ 54 The judicial task would not be simplified by the application of Iowa law. In order to see why, we will delve a bit deeper into Iowa law. . . .

¶ 57 . . . Iowa case law suggests that a *Rimes*-type hearing may often be required under Iowa law. Thus, the application of Iowa law would be no simpler than the application of Wisconsin law. Moreover, the *Ludwig* court’s discussion causes us concern that the application of Iowa law might inject additional opportunities for litigants to game the system, thereby increasing the potential complexity of the judicial task. This factor points to the application of Wisconsin law.

¶ 58 *Advancement of the forum’s governmental interests.* “The question in private litigation, such as in an automobile-accident case, is whether the proposed nonforum rule comports with the standards of fairness and justice that are embodied in the policies of the forum law.” *Gillette*, 251 Wis.2d 561, ¶ 62, 641 N.W.2d 662. “If it appears that the application of forum law

⁶ . . . Professor Leflar explained as follows: “It has been argued that a court should apply its own local law unless there is good reason for not doing so. No one can deny the propriety of this argument so long as the ‘unless’ clause is adequately emphasized.” Leflar, 31 N.Y.U. L. REV. at 288.

will advance the governmental interest of the forum state, this fact becomes a major, though not in itself a determining, factor in the ultimate choice of law.” *Gillette*, 251 Wis.2d 561, ¶ 62, 641 N.W.2d 662.

¶ 59 Wisconsin has a strong interest in compensating its residents who are victims of torts.

¶ 60 Our state’s made-whole doctrine, with its deep and firm roots, is a central means by which Wisconsin’s interest in compensating its resident tort victims is effectuated. . . .

¶ 61 In order for this factor to weigh in favor of the application of Wisconsin law, we need not determine that Iowa’s law is a “bad law” or that it “serves no legitimate purpose.” *Gillette*, 251 Wis.2d 561, ¶ 65, 641 N.W.2d 662. We can, and do, however, determine that limiting Drinkwater’s net recovery to less than the damages he would recover under Wisconsin law undermines Wisconsin’s significant interest in fully compensating its citizens who are tort victims. This factor points strongly to the application of Wisconsin law.

¶ 62 *Application of the better rule of law.* As previously suggested, we need not and do not necessarily conclude that Iowa law is bad law or serves no legitimate purpose. Yet, this court’s repeated affirmations of Wisconsin’s made-whole doctrine must to some extent be taken as an indication of Wisconsin’s view that our made-whole doctrine constitutes the better rule. This court has rejected the Iowa approach.

¶ 63 We cannot help but observe that the application of Iowa law would seem to work inequitable results, at least from the viewpoint of a tort system such as that in Wisconsin. At oral argument, counsel for the Plan conceded that if Drinkwater’s medical expenses had been \$251,000, a sum that is \$1,000 more than the limits of the tortfeasor’s liability insurance, under Iowa law the Plan would have been subrogated to all of Drinkwater’s recovery. In other words, according to the Plan’s counsel, the most severe cases of injury are those in which the injured party would be most likely to end up with a net recovery of zero. This is the type of result that, as we declared in *Ruckel*, “turn[s] the entire doctrine of subrogation on its head.” *Ruckel*, 253 Wis.2d 280, ¶ 41, 646 N.W.2d 11. The final factor thus points to the application of Wisconsin law.

¶ 64 Considering the five choice-influencing factors together, we conclude that Wisconsin law should apply. All of the factors either point to the application of Wisconsin law or are neutral. The parties agree, as do we, that under Wisconsin’s made-whole doctrine, the Plan is not entitled to any subrogation against Drinkwater’s recovery. Accordingly, we need go no further to conclude that the circuit court judgment must be affirmed.

III

¶ 65 In sum, we conclude that Wisconsin law applies to require that Drinkwater must be made whole before the Plan is entitled to subrogation against Drinkwater’s recovery for his personal injuries. The Plan is not entitled to subrogation because Drinkwater was not made whole under Wisconsin law. Accordingly, we affirm the circuit court judgment.

The judgment of the Grant County Circuit Court is affirmed.

¶ 66 PROSSER, J. (dissenting).

...

¶ 73 In resolving the choice of law issue presented here, the court skillfully marshals the facts and policy in a manner that supports its decision. But some of the facts carry no weight. For instance, the fact that “[t]he tortfeasor is a resident of Wisconsin and was covered under an insurance policy issued by a Wisconsin insurance company,” is really not relevant. The law would not be different if the tortfeasor lived in Illinois and was covered under a policy issued by an Illinois insurance company. What is important is that the tortfeasor’s insurer provided liability coverage.

¶ 74 The fact that “[b]oth Drinkwater and the other driver were operating vehicles registered in Wisconsin at the time of the accident,” also is not significant. It merely supplements the fact that the two drivers were Wisconsin residents.

...

¶ 76 The rule of this case is that Wisconsin law will trump Illinois or Iowa subrogation law on a Wisconsin injury to a Wisconsin resident when the case is tried in a Wisconsin court.

¶ 77 What is not clear is what the result would be if there were a Wisconsin injury to an Illinois or Iowa resident and the case were tried in a Wisconsin court against the insured’s home state insurer (like Medical Associates Health Plan) claiming subrogation rights. Because Wisconsin is visited by hundreds of thousands of out-of-state tourists, this sort of scenario must be anticipated.

¶ 78 We also do not know what the result would be if a Wisconsin resident like Mr. Drinkwater were to be injured in an Illinois or Iowa accident but able to sue in Wisconsin and bring in the out-of-state insurer claiming subrogation.

¶ 79 This uncertainty undermines the predictability of results. . . .

¶ 80 The result in this case is certainly fair to Mr. Drinkwater. The nagging concern is whether our decision will have collateral consequences to other people or the law.

NOTES AND QUESTIONS

1. The Leflar approach is considered one of the modern “interest” based approaches. As evidence of this kinship, courts often point to the fourth “consideration,” which they conclude calls for interest analysis. Review that fourth consideration. Is it really interest analysis?

2. The first consideration—predictability of results—is often treated as of marginal relevance in a torts case. The rationale is that most torts (at least non-intentional torts) are chance events, and accordingly not something parties enter with any expectations.

3. In applying the third consideration—simplification of the judicial task—the *Drinkwater* court notes that, other things equal, it is always easier for the forum to apply its own law. Is the court taking the easy way out? Won’t that be true in every case?

4. The final consideration—application of the better rule of law—is the most notorious feature of the Leflar approach. Indeed, because of this consideration many refer to the approach as the “better rule” or “better law” approach. This consideration has not surprisingly also proven to be the most controversial, as it calls on courts to gauge the wisdom of other states’ legal rules. In the vast majority of Leflar cases, courts reach the same conclusion as the *Drinkwater* court; namely, that forum law is “better.” Is that the natural response when the rule is judge-made, like the *Rimes* rule involved in *Drinkwater*? If the court thinks the other state’s rule is better, wouldn’t it change its own common-law rule in response?

5. Taken together, do the third and fourth considerations unduly facilitate forum shopping? Under both, courts can justify applying forum law.

4. LEX FORI

All the interest-based approaches owe some credit to Professor Currie’s early writings. Although it is often overlooked, Currie’s original proposal differed in some ways from the early interest analysis cases and the Second Restatement. Currie’s starting point was that the forum should generally apply its own law. A court would defer to foreign law only if the forum had no interest and a foreign state had an interest.

That original suggestion lives on in at least two states, Kentucky and Michigan. These states use the approach only in tort, and decide contract issues using the Second Restatement. Is the *lex fori* approach really just Currie’s view, or are there differences?

SUTHERLAND V. KENNINGTON TRUCK SERVICE, LTD

562 N.W.2d 466 (MI 1997)

MALLETT, CHIEF JUSTICE.

In this choice of law case, an Ontario driver and an Ohio driver collided while on a Michigan highway. Plaintiffs filed suit in Michigan two years and twenty-two days after the accident. Both Ohio and Ontario have two-year statutes of limitations, while Michigan has a three-year statute of limitations. The trial court applied Ontario’s statute of limitations, holding that Michigan had no interest in the litigation. We reverse and hold that because neither Ohio nor Ontario have an interest in having its law applied, Michigan law will apply.

I

Facts and Proceedings

The facts in this case are fit for a law school choice of law examination. On August 14, 1989, two trucks collided on Interstate 75 in Monroe County, Michigan. The driver of one truck, Larry G. Sutherland, is a resident of Ohio and was operating a truck licensed in Ohio. The driver of the other truck, Gregory Zavitz, is a citizen of Ontario, Canada. He was employed by Kennington Truck Service, an Ontario corporation. Zavitz’s truck was owned by Elgin Leasing, which had leased the truck to Canadian Timken. Both Elgin Leasing and Canadian Timken are Ontario corporations.

On September 5, 1991, two years and twenty-two days after the accident, Mr. Sutherland and his wife sued defendants in Monroe Circuit Court, alleging negligence. Defendants moved for summary disposition pursuant to MCR 2.116(C)(7), arguing that the court should apply either Ohio’s or Ontario’s statute of limitations. Both of these jurisdictions bar negligence actions filed more than two years after the cause of action arose. In response, plaintiffs argued that the case should be governed by Michigan’s three-year statute of limitations.²

The trial court granted the motion for summary disposition. Applying “interest analysis,” the court found that Michigan had no interest in the outcome of this litigation because none of the parties are Michigan citizens. The court further found that Ontario had an interest in protecting its citizens from stale claims. On this basis, the court held that Ontario’s two-year statute of limitations would apply.

² Because the action accrued within the State of Michigan, Michigan’s borrowing statute, M.S.A. § 27A.5861, does not apply. M.S.A. § 27A.5861 states:

An action based upon a cause of action accruing without this state shall not be commenced after the expiration of the statute of limitations of either this state or the place without this state where the cause of action accrued, except that where the cause of action accrued in favor of a resident of this state the statute of limitations of this state shall apply. . . .

In an unpublished opinion *per curiam*, the Court of Appeals affirmed. . . .

We granted leave to appeal on plaintiffs' motion for reconsideration.

II

The Choice of Law "Revolution"

[The court discusses the development of the various modern approaches.] . . .

Proponents of these various approaches have engaged in a vigorous debate over the advantages and disadvantages of each approach. As Justice Riley has noted, conflicts of law has become a fecund milieu for academic scholarship. While this debate is illuminating, much of it ignores the fact that, in practice, all the modern approaches to conflicts of law are relatively uniform in the results they produce. Professor Borchers has surveyed cases that purport to apply the various modern approaches and concluded that none of the modern approaches differ significantly from the others in three important respects: the percentage of times that courts apply forum law, the percentage of times that plaintiffs recover, or the percentage of times that local parties prevail.¹⁴

In fact, Professor Borchers' research shows that each of the modern approaches tend to favor significantly the application of forum law. Applying the modern approaches, courts select forum law between approximately fifty-five and seventy-seven percent of the time. This has led one commentator to note:

On reading a substantial number of these cases over the years, one has a feeling that the courts may not be doing what they purport to do, that is, employing the modern choice-of-law theories in a neutral way to determine what law applies. Rather, one suspects that courts employing the new theories have a very strong preference for forum law that frequently causes them to manipulate the theories so that they end up applying forum law.¹⁶

. . .

This preference for forum law is hardly surprising. The tendency toward forum law promotes judicial economy: judges and attorneys are experts in their state's law, but have to expend considerable time and resources to learn another state's law.

Thus, on surveying current conflicts of law jurisprudence, one can reasonably conclude that only two distinct conflicts of law theories actually exist. One, followed by a distinct minority of states, mandates adherence

¹⁴ Borchers, *The Choice-of-Law Revolution: An Empirical Study*, 49 WASH & LEE LR 357 (1992).

¹⁶ McDougal, *The Real Legacy of Babcock v. Jackson: Lex Fori Instead of Lex Loci Delicti and Now It's Time for a Real Choice-of-law Revolution*, 56 ALB. L.R. 795, 797 (1993).

to the *lex loci delicti* rule. The other, which bears different labels in different states, calls for courts to apply the law of the forum unless important policy considerations dictate otherwise.

III

The Development of Michigan’s Choice of Law Jurisprudence

The evolution of Michigan’s choice of law jurisprudence has paralleled national trends. . . .

A majority of this Court finally abandoned the *lex loci delicti* rule in the companion cases of *Sexton v. Ryder Truck Rental* and *Storie v. Southfield Leasing*, 90 Mich.App. 612, 282 N.W.2d 417 (1979). . . .

While *Sexton* marked the end of the *lex loci delicti* rule in Michigan, it did not produce a consensus on the appropriate choice of law methodology to be applied. . . .

This Court clarified much of the confusion surrounding *Sexton* in *Olmstead v. Anderson, supra*. *Olmstead* involved an automobile accident in Wisconsin between a Michigan driver and two Minnesota residents. The plaintiff, the administratrix of the estates of the deceased Minnesota residents, originally filed suit in Minnesota, but this suit was dismissed for improper venue and lack of jurisdiction. The plaintiff then filed suit in Michigan.

The choice of law issue was vitally important in *Olmstead*, because Wisconsin law at the time limited recovery in wrongful death cases to \$25,000. Neither Michigan nor Minnesota limited recoverable damages at that time. In addressing the choice of law question, this Court began with the presumption that Michigan law would apply. The Court then asked whether “reason requires that foreign law supersede the law of this state.” *Id.* at 24, 400 N.W.2d 292.

In analyzing whether a rational justification for displacing Michigan law existed, the Court in *Olmstead* reviewed Wisconsin’s interests in having its law applied. The Court noted that neither party was a resident of Wisconsin, and that Wisconsin therefore did not have any interest in seeing its limitation of damages provision applied to this case. The Court also noted that because the insurance companies of both parties knew of the possibility of unlimited liability, no unfairness would result from the application of Michigan law. Because Wisconsin did not have an interest in having its law applied, the *lex fori* presumption was not overcome, and the Court did not undertake an analysis of Michigan’s interests.

IV

Analysis

Olmstead provides the analytical framework for deciding this case. That is, we will apply Michigan law unless a “rational reason” to do

otherwise exists. In determining whether a rational reason to displace Michigan law exists, we undertake a two-step analysis. First, we must determine if any foreign state has an interest in having its law applied. If no state has such an interest, the presumption that Michigan law will apply cannot be overcome. If a foreign state does have an interest in having its law applied, we must then determine if Michigan's interests mandate that Michigan law be applied, despite the foreign interests.

Ohio and Ontario are the only two foreign jurisdictions that potentially have an interest in having their law applied in this case. Ohio, where the plaintiffs reside, has a two-year statute of limitations for these types of actions.

However, a court could not apply Ohio law to this case without violating the defendants' due process rights. As Justice Brennan stated in *Allstate Ins. v. Hague*, 449 U.S. 302, 313, 101 S.Ct. 633, 640, 66 L.Ed.2d 521 (1981), in order for a court to choose a state's law, "[the] State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair." In this case, the only contact that Ohio has with this litigation is that plaintiffs are Ohio residents. The United States Supreme Court has stated that the plaintiff's residence, with nothing more, is insufficient to support the choice of a state's law. *Home Ins. Co. v. Dick*, 281 U.S. 397, 408, 50 S.Ct. 338, 341–342, 74 L.Ed. 926 (1930); see also *John Hancock Mut. Life Ins. Co. v. Yates*, 299 U.S. 178, 57 S.Ct. 129, 81 L.Ed. 106 (1936). [The constitutional limits on choice of law are discussed in Part D.1 of this Chapter.]

Because Ohio does not have an interest in seeing the court apply its law, Ontario is the only remaining candidate. Ontario, like Ohio, has a two-year statute of limitations. Defendants claim that because Ontario law would benefit the Ontario defendants by barring the claim, Ontario has an interest in having its statute of limitations applied. Certainly, one purpose of a statute of limitations is to protect defendants from stale claims. We do not agree, however, that Ontario has an interest in protecting the defendants from stale claims in this situation. In fact, according to Canadian and Ontario law, Ontario has an interest in having Michigan's statute of limitations applied in this case.

In the companion cases of *Tolofson v. Jensen* and *Lucas v. Gagnon*, 120 D.L.R.4th 289 (1994), the Supreme Court of Canada adopted the *lex loci delicti* rule and held that Canadian courts must apply the substantive law of the jurisdiction where the tort occurred.²⁴ The court also stated that

²⁴ The Supreme Court of Canada has superintending control over the interpretation of all federal and provincial laws. Thus, choice of law jurisprudence is uniform throughout the provinces. This stands in sharp contrast to the American experience, where the United States Supreme Court has shown a deep reluctance to federalize choice of law.

statutes of limitation are substantive, not procedural, for choice of law purposes. Thus, under *Tolofson*, Canadian courts must apply the statute of limitations of the jurisdiction in which the tort occurred.

...

Thus, had plaintiffs filed this suit in Ontario, Ontario’s courts would have applied Michigan’s three-year statute of limitations. Because even Ontario courts would not allow the defendants to escape this claim through application of Ontario law, we do not see how Ontario can have an interest in having Michigan courts apply Ontario law.

In looking at Ontario’s statute of limitations, we in no way intend to breathe life into the doctrine of *renvoi*. Under *renvoi*, once a court determines that it will apply the law of another jurisdiction, it applies the entire law of that jurisdiction, including its choice of law rules. Thus, the choice of law rules of the chosen state could point the court to a third state or back to the forum state. *Renvoi* creates the potential for circular analysis and has been criticized by American courts.

In this case, we do not engage in *renvoi* because we decline to apply any of Ontario’s law. We look at Ontario’s choice of law rules merely to determine Ontario’s interests.

Therefore, no foreign state has an interest in having its law applied to this case. The *lex fori* presumption is not overcome, and we need not evaluate Michigan’s interests. Michigan’s three-year statute of limitations will apply to this case.

V

For these reasons, we reverse the judgment of the Court of Appeals and remand the case to the trial court for further proceedings.

NOTES AND QUESTIONS

1. The *lex fori* approach described in *Sutherland* captures the essence of Currie’s early proposal. Michigan courts will apparently apply Michigan tort law unless Michigan has no interest in having its rule apply, and some other state does have an interest.

The Kentucky version may differ. The Kentucky courts have indicated they will apply Kentucky law unless there are “valid reasons” to displace it. *Foster v. Leggett*, 484 S.W.2d 827, 829 (KY 1972). It is not clear that the phrase “valid reasons” is synonymous with “interest”. Even if Kentucky’s connection does not give it an interest, Kentucky courts might possibly still apply Kentucky law. See John T. Cross, *A Defense of Kentucky’s Approach to Choice of Law*, 25 N. KY. L. REV. 553, 558–560 (1998).

Interestingly, Canadian choice of law jurisprudence is moving in exactly the opposite direction from American choice of law jurisprudence. While American courts are moving from a *lex loci delicti* standard to *lex fori*, Canadian courts have moved from *lex fori* to *lex loci delicti*.

2. The *Sutherland* court suggests that due to the lack of any connections between Ohio and the dispute, it might be unconstitutional to apply Ohio law. Therefore, it concludes, Ohio has no interest. Does that follow? Wouldn't applying the Ohio law still further that state's interests?

The next section of this chapter deals with the constitutional limits on choice of law. Note that in some cases it may be unconstitutional for the forum to apply its *own* law. Merely because the forum has personal jurisdiction over all the parties does not automatically mean forum law can be applied.

3. In discussing Ontario law, the court discusses not only the substantive law, but also Ontario's choice of law rules. But the court swears it is not engaging in *renvoi*, a frowned-upon practice discussed in note 9 of pt. B.1 of this chapter. Rather than just applying Ontario's choice of law rules, the court in *Sutherland* says it is looking to those choice of law rules merely to ascertain whether Ontario has an interest. If Ontario courts would not have applied that province's law to the same fact, the court reasons, Ontario has no interest in having the Michigan court apply Ontario law.

While *renvoi* was highly criticized under the First Restatement, it may actually have a place in interest-based methods. But was the application in *Sutherland* proper? What choice of law method does Ontario use? Would Ontario's decision not to apply its own law reflect the lack of any interest in the interest analysis sense?

D. LIMITATIONS IMPOSED BY THE U.S. CONSTITUTION

As indicated several times already in these materials, the U.S. Constitution can affect horizontal choice of law decisions. First, it places limits on what law may be applied to a case. Second, when a court decides the law of another jurisdiction should govern, the Constitution may obligate the state to make its courts available to hear that foreign claim. This section discusses each of these situations in turn.

1. LIMITS ON CHOOSING A LAW

ABRAHAM V. WPX ENERGY PROD., LLC

20 F. Supp.(3d) 1244 (D. N.M. 2014)

BROWNING, DISTRICT JUDGE.

THIS MATTER comes before the Court on Williams Four Corners, LLC's and Williams Energy Resources LLC's Motion to Dismiss Plaintiffs' Third Claim for Relief, filed October 30, 2012 (Doc. 18)("MTD"). The Court held a hearing on May 1, 2013. The primary issues are: (i) whether, following New Mexico's "actual conflict" doctrine, there is a conflict between New Mexico and Colorado law, as applied in this case; and (ii) whether, under New Mexico and Colorado law, when a plaintiff has

asserted a breach-of-contract claim against one defendant, that plaintiff may also assert an unjust enrichment claim for the same subject matter against a third party with whom the plaintiff does not have a contract. Although the parties did not raise the choice-of-law issues, but discussed only New Mexico law, the Court concludes that there is no actual conflict between New Mexico and Colorado law, because the Plaintiffs' unjust enrichment claims fail under both New Mexico and Colorado law. Thus, the Court will apply New Mexico law, grant the MTD, and dismiss the Plaintiffs' unjust enrichment claim.

FACTUAL BACKGROUND

This matter arises from alleged royalty underpayments for wells in the San Juan Basin in New Mexico and Colorado. As this matter comes before the Court on a motion to dismiss, the Court will assume that all facts in the Plaintiffs' complaints are true.

Defendant WPX Energy Production, LLC ("WPX Energy") is in the business of exploring for and producing natural gas, and is the lessee under the leases. The Plaintiffs own royalty and overriding royalty interests burdening WPX Energy's working interest in oil-and-gas leases in Colorado and New Mexico. The hydrocarbons at issue are produced from wells that WPX Energy owned and operated in San Juan Basin.

The San Juan Basin, one of the largest natural gas producing fields located in northwest New Mexico and southwest Colorado, was originally developed in the early 1950's by El Paso Natural Gas Company. . . . The natural gas produced in the San Juan Basin is conventional gas which contains methane (natural gas) and entrained natural gas liquids ("NGLs"), such as ethane and butane. In order to make the gas safe to enter the interstate pipeline, the NGLs must be removed from the gas stream.

Elliott Indus. LP v. BP Am. Prod. Co., 407 F.3d 1091, 1099 (10th Cir.2005) ("*Elliott Indus.*"). Pursuant to separate contracts between WPX Energy, the "upstream" exploration and production company, and Defendant Williams Four Corners, LLC ("WFC"), the "midstream" enterprise, WFC gathers the gas, transports it from the wells to a processing plant, and, in some instances, processes the extraction of NGLs. Defendant Williams Energy Resources, LLC ("WER") then markets and sells the NGLs on behalf of WPX Energy and WFC.

PROCEDURAL BACKGROUND

On October 29, 2012, the Plaintiffs filed the TAC [Third Amended Class Action Complaint], alleging that the combined conduct of WPX Energy, WFC, and WER has resulted in "systemic underpayment" of royalties and overriding royalties "due to the failure to pay on the burdened leaseholds' production on NGLs and on oil and condensate, understating the liquids content of production, the improper charging of post-production

expenses against production revenues, and deductions in the royalty computation of charges that are not actually incurred and are unreasonable.” The Plaintiffs contend that, although their contracts are with WPX Energy, WFC and WER are jointly responsible for the underpayment of royalties, because WFC extracts NGLs, and because WER disposes of the NGLs “free of royalty at a substantial financial detriment” to the Plaintiffs and the proposed class. The Plaintiffs’ claims against WPX Energy include breach of contract, breach of the covenant of good faith and fair dealing, breach of the implied covenant to market, and violation of the New Mexico Oil and Gas Proceeds Payment Act, N.M. Stat. Ann. §§ 70–10–1 to –6. The claims against WFC and WER are for unjust enrichment. Against WPX Energy, WFC, and WER, the Plaintiffs request declaratory judgment, accounting for the underpayments, and an injunction for the future royalty calculations and payments.

The Plaintiffs allege that WFC and WER were unjustly enriched from WFC’s processing contracts with WPX Energy, by retaining the value of the NGLs. WFC and WER (collectively, “WFC/WER”) move the Court, pursuant to rule 12(b)(6) of the Federal Rules of Civil Procedure, to dismiss the unjust enrichment claims against them in the TAC. WFC/WER argue that the Plaintiffs cannot maintain an unjust enrichment claim against WFC or WER, because the Plaintiffs have an adequate remedy at law through the breach-of-contract claim against WPX Energy.

WFC/WER argue that the contracts between the Plaintiffs and WPX Energy govern the Plaintiffs’ NGL underpayment claims. By filing a breach-of-contract claim against WPX Energy based on the royalty agreements, WFC/WER say that the Plaintiffs recognize that the royalty agreements govern the underpayment claims. WFC/WER contend that the existence of royalty agreements precludes the Plaintiffs from asserting quasi-contractual claims against WPX Energy. . . .

WFC/WER argue that New Mexico law, as the Tenth Circuit construed it in *Elliott Indus.*, does not allow unjust enrichment claims if there is an enforceable express contract between the parties, because the Tenth Circuit stated that “ ‘the hornbook rule [is] that quasi-contractual remedies . . . are not to be created when an enforceable express contract regulates the relations of the parties with respect to the disputed issue.’ ” . . . Because the claim against WFC/WER covers the same subject matter as the breach-of-contract claim against WPX Energy, WFC/WER argue that the Plaintiffs cannot maintain the unjust enrichment claim.

. . .

The Plaintiffs argue that New Mexico law supports their unjust enrichment claims against WFC/WER, even though the underpayment claims are also the subject of the breach-of-contract claim against WPX Energy.

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CONSTITUTIONAL LIMITATIONS ON
APPLICATION OF FOREIGN LAW

In *Allstate Insurance Co. v. Hague*, 449 U.S. 302, 101 S.Ct. 633, 66 L.Ed.2d 521 (1981), two conflicting rules of state insurance law confronted the Supreme Court of the United States. Minnesota permitted the “stacking” of separate uninsured motorist policies while Wisconsin did not. Although the decedent lived in Wisconsin, took out insurance policies in Wisconsin, and was killed there, he was employed in Minnesota, and after his death, his widow moved to Minnesota for reasons unrelated to the litigation and was appointed personal representative of his estate. She filed suit in Minnesota courts, which applied the Minnesota stacking rule.

The plurality in *Allstate Insurance Co. v. Hague* noted that a particular set of facts giving rise to litigation could justify, constitutionally, the application of more than one jurisdiction’s laws. The plurality recognized, however, that the Due Process Clause and the Full Faith and Credit Clause provided modest restrictions on the application of forum law. These restrictions required “that for a State’s substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair.” The dissenting Justices were in substantial agreement with the principle. The dissent stressed that the Due Process Clause prohibited the application of law which was casually or slightly related to the litigation, while the Full Faith and Credit Clause required the forum to respect the laws and judgments of other states, subject to the forum’s own interests in furthering its public policy. The plurality in *Allstate Insurance Co. v. Hague* affirmed the application of Minnesota law because of the forum’s significant contacts to the litigation, which supported the State’s interest in applying its law.

In *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 105 S.Ct. 2965, 86 L.Ed.2d 628 (1985), gas company investors brought a class action to recover interests on royalties. The state district court entered judgment for the class, and the gas company appealed. The Supreme Court of Kansas affirmed over the gas company’s contentions that the Due Process Clause and the Full Faith and Credit Clause of Article IV of the Constitution prohibited the application of Kansas law to all of the transactions between the gas company and the class. The gas company argued that Kansas courts could not apply Kansas law to every claim in the dispute. The gas company argued that the trial court should have looked to the laws of each state where the leases were located to determine, on the basis of conflict of laws principles, whether interest on the suspended royalties was recoverable and at what rate. The Supreme Court of Kansas rejected the gas company’s contentions.

The Kansas courts applied Kansas contract and Kansas equity law to every claim in the case, notwithstanding that “over 99% of the gas leases and some 97% of the plaintiffs in the case had no apparent connection to the State of Kansas except for th[e] lawsuit.” 472 U.S. at 814–15, 105 S.Ct. 2965. The gas company protested that Kansas courts should apply the laws of the states where the leases were located, or at least apply Texas and Oklahoma law, because so many of the leases came from those states. The Kansas courts disregarded this contention and found the gas company liable for interest on the suspended royalties as a matter of Kansas law, and set the interest rates under Kansas equity principles. The Supreme Court of Kansas took the view that, in a nationwide class action where procedural due process guarantees of notice and adequate representation were met, the law of the forum should be applied unless compelling reasons exist for applying a different law.

The Supreme Court of the United States, in an opinion that Justice Rehnquist wrote, sustained the gas company’s argument regarding the choice of law, and held that Kansas law was not applicable to claims of all class members. . . . The Supreme Court said it must first determine whether Kansas law conflicts in any material way with any other law which could apply. Justice Rehnquist stated: “There can be no injury in applying Kansas law if it is not in conflict with that of any other jurisdiction connected to this suit.” 472 U.S. at 816, 105 S.Ct. 2965. The Supreme Court concluded that “the Supreme Court of Kansas erred in deciding on the basis that it did that the application of its laws to all claims would be constitutional.” 472 U.S. at 818, 105 S.Ct. 2965.

Justice Rehnquist began his analysis by noting that the Supreme Court, just four terms earlier, had addressed a similar situation in *Allstate Insurance Co. v. Hague*. Justice Rehnquist stated that, when considering fairness in this context, an important element is the parties’ expectation. Justice Rehnquist stated that there was no indication that, when the leases involving land and royalty owners outside of Kansas were executed, the parties had any idea that Kansas would control. Justice Rehnquist maintained that neither the Due Process Clause, nor the Full Faith and Credit Clause, requires Kansas “to substitute for its own [laws], applicable to persons and events within it, the conflicting statement of another state,” 472 U.S. at 822, 105 S.Ct. 2965 (quoting *Pacific Employers Ins. Co. v. Industrial Accident Comm’n*, 306 U.S. 493, 502, 59 S.Ct. 629, 83 L.Ed. 940 (1939)), but that Kansas “‘may not abrogate the results of parties beyond its borders having no relation to anything done or to be done within them,’” *Phillips Petroleum Co. v. Shutts*, 472 U.S. at 822, 105 S.Ct. 2965 (quoting *Home Ins. Co. v. Dick*, 281 U.S. 397, 410, 50 S.Ct. 338, 74 L.Ed. 926 (1930)).

Kansas’ contacts to the litigation in *Phillips Petroleum Co. v. Shutts* can be gleaned from the Supreme Court of Kansas’ opinion. The gas

company owned property and conducted substantial business in the state, so the Supreme Court of the United States stated that “Kansas certainly has an interest in regulating [the gas company’s] conduct in Kansas.” 472 U.S. at 819, 105 S.Ct. 2965. Justice Rehnquist stated, however, that “Kansas must have a ‘significant contact or significant aggregation of contacts’ to the claims asserted by each member of the plaintiff class, contacts ‘creating state interests,’ in order to ensure that the choice of Kansas law is not arbitrary or unfair.” 472 U.S. at 821–822, 105 S.Ct. 2965 (quoting *Allstate Ins. Co. v. Hague*, 449 U.S. at 312–313, 101 S.Ct. 633). Justice Rehnquist stated that, given Kansas’ “lack of ‘interest’ in claims unrelated to that State, and the substantive conflict with jurisdictions such as Texas,” the application of Kansas law to every claim in this case was “sufficiently arbitrary and unfair as to exceed constitutional limits.” 472 U.S. at 822, 105 S.Ct. 2965.

Justice Rehnquist stated:

The issue of personal jurisdiction over plaintiffs in a class action is entirely distinct from the question of the constitutional limitations on choice of law; the latter calculus is not altered by the fact that it may be more difficult or more burdensome to comply with the constitutional limitations because of the large number of transactions which the State proposes to adjudicate and which have little connection with the forum.

472 U.S. at 821, 105 S.Ct. 2965.

Justice Rehnquist stated that, whatever practical reasons may have commanded the rule that the Supreme Court of Kansas adopted, the rule was not consistent with the Supreme Court of the United States’ decisions. Justice Rehnquist noted, however, that the Supreme Court was not determining which law must apply to the various transactions involved in the lawsuit, and reaffirmed the observation in *Allstate Insurance Co. v. Hague* that in many situations a state court may be free to apply one of several choices of law. Justice Rehnquist stated, however, that the constitutional limitations laid down in cases such as *Allstate Insurance Co. v. Hague* and *Home Insurance Co. v. Dick* must be respected even in a nationwide class action. The Supreme Court therefore reversed the Supreme Court of Kansas’ judgment insofar as it held that Kansas law was applicable to all of the transactions which it sought to adjudicate. The Supreme Court remanded the case for further proceedings.

NEW MEXICO LAW REGARDING FALSE CONFLICTS OF LAW

In *Ferrell v. Allstate Insurance Co.*, 2008-NMSC-042, 144 N.M. 405, 188 P.3d 1156, the Supreme Court of New Mexico described the “false conflict” or “actual conflict” doctrine: “Under this analysis, when the laws of the relevant states do not actually conflict, the court may avoid a conflict-

of-law analysis and may apply forum law to the entire class.” 2008-NMSC-042, ¶ 16 (citing *Phillips Petroleum Co. v. Shutts*, 472 U.S. at 816, 105 S.Ct. 2965). “If, however, the laws of the relevant states actually conflict, or if the laws of certain of the relevant states conflict, then the forum court must resolve that conflict using the choice-of-law rules contained in the forum state’s conflict-of-laws doctrine.” 2008-NMSC-042, ¶ 16. The focus of the doctrine is “not on whether the laws are superficially identical as written, but whether the effect of laws would be identical as applied to a particular case.” *Fowler Brothers, Inc. v. Bounds*, 2008-NMCA-091, ¶ 9, 144 N.M. 510, 188 P.3d 1261.

...

LAW REGARDING NEW MEXICO CHOICE-OF-LAW RULES

Where a plaintiff invokes a federal district court’s diversity jurisdiction, the district court looks to the forum state’s choice-of-law rules to determine which state’s substantive law to apply. The first step in a New Mexico choice-of-law analysis is to characterize the claim by “area of substantive law—e.g., torts, contracts, domestic relations—to which the law of the forum assigns a particular claim or issue.” *Terrazas v. Garland & Loman, Inc.*, 2006-NMCA-111, 140 N.M. 293, 296, 142 P.3d 374, 377. . . . The court is then to apply the New Mexico choice-of-law rule applicable to that category of claim to determine what state’s substantive law to apply.

...

Claims for unjust enrichment are distinct from claims sounding in contract or tort law. The *Restatement (First) of Conflict of Laws* § 453 provides: “When a person is alleged to have been unjustly enriched, the law of the place of enrichment determines whether he is under a duty to repay the amount by which he has been enriched.” *Restatement (First) of Conflict of Laws* § 453. Although “New Mexico has traditionally followed the *Restatement (First)*,” *Ferrell v. Allstate Ins. Co.*, 2008-NMSC-042, ¶ 50, the Supreme Court of New Mexico has been willing to follow the *Restatement (Second) of Conflict of Laws* in certain cases, such as in multi-state class action cases in which the laws of the states involved actually conflict, because the *Restatement (First) of Conflict of Laws* is “particularly ill-suited for the complexities present in multi-state class actions,” *Ferrell v. Allstate Ins. Co.*, 2008-NMSC-042, ¶ 56 (adopting the *Restatement (Second) of Conflict of Laws* for multi-state contract class actions). In *Fowler Brothers, Inc. v. Bounds*, the Court of Appeals of New Mexico explained that courts can “avoid a choice of law question when the laws of the involved states would produce identical results,” 2008-NMCA-091, ¶ 9, and agreed with the district court’s implicit determination that Arizona and New Mexico law on unjust enrichment did not conflict as applied in the case.

NEW MEXICO LAW REGARDING UNJUST ENRICHMENT

[The court concluded that under New Mexico law, a party cannot recover in unjust enrichment/quasi contract when there is an express contract governing the relationship between the parties.]

COLORADO LAW REGARDING UNJUST ENRICHMENT

...

“In general, a party cannot recover for unjust enrichment by asserting a quasi-contract when an express contract covers the same subject matter because the express contract precludes any implied-in-law contract.” *Interbank Invs., LLC v. Eagle River Water & Sanitation Dist.*, 77 P.3d 814, 816 (Colo.Ct.App.2003). . . .

ANALYSIS

The Court will grant the MTD and dismiss the Plaintiffs’ unjust enrichment claims against WFC/WER. Although the parties did not raise the choice-of-law issue, the Court first considers whether there is a conflict between New Mexico and Colorado law, concluding that, following New Mexico’s choice-of-law analysis, there is no actual conflict, because the result under both states’ substantive laws in this case is the same. Thus, the Court will apply New Mexico law as the forum law and dismiss the Plaintiffs’ unjust enrichment claim.

. . . [Extensive discussion of the two states’ laws omitted.]

Following New Mexico’s choice-of-law analysis, specifically the actual conflict doctrine, the Court concludes that there is no actual conflict between Colorado and New Mexico law, because the result is the same under both states’ substantive law: the Plaintiffs’ unjust enrichment claim fails. Thus, the Court will apply New Mexico law as the forum law and dismiss the Plaintiffs’ unjust enrichment claims against WFC/WER, because the Plaintiffs have not alleged that their contract claim against WPX Energy is not viable.

NOTES AND QUESTIONS

1. As the court notes, both the due process and full faith and credit clauses may prevent a court from applying the law of Jurisdiction X to a case if there are no substantial connections between X and the case. Early Supreme Court cases suggested the type and number of connections required to satisfy the two clauses might not be the same. Since at least *Allstate*, however, it is clear the requisite number of contacts under the two provisions is the same.

2. At first glance, the connections analysis used in the case may seem to resemble the personal jurisdiction “minimum contacts” analysis. However, there are key differences. Most importantly, a connection can be counted even if it does not involve the “purposeful availment” required in personal jurisdiction analysis.

3. Will due process and full faith and credit always both present a potential obstacle? What if some leases had been in Mexico, and there was a notable difference between the laws of Mexico and New Mexico? Would application of New Mexico law to these Mexican leases violate full faith and credit? To whom must a state afford full faith and credit? Would application of New Mexico law violate due process?

Similarly, what if the litigant burdened by the choice of a particular law is a state, or the federal government? While government must afford due process, is a governmental body entitled to due process?

4. Does the court consider whether there are sufficient connections between New Mexico and the claims involving the Colorado leases to satisfy the constitutional standard? Why not? Why does the lack of a conflict mean there is no due process problem? Is there any deprivation of property if the rules of all contender states is the same?

On the other hand, is there still a full faith and credit problem? After all, the court is refusing to apply Colorado law. On the other hand, under modern choice of law thinking, what is a court actually doing when it chooses a law? Is it picking a sovereign, or a rule? If the latter, is there a full faith and credit problem when the court applies a rule that is the same as Colorado's rule?

5. The U.S. Supreme Court's decision in *State of Nevada v. Hall*, 440 U.S. 410 (1979), presented an interesting variant on the issue of when a state must apply another state's law. Plaintiffs in *Hall* were Californians who were injured in California in a two-car accident. The driver of the other car was a Nevada state employee, and was in California on Nevada state business. The Nevadan died. Plaintiffs sued the State of Nevada in a California court, seeking over \$1,000,000 in damages.

Nevada law waived sovereign immunity, but imposed a cap of \$25,000 on any money judgment in a tort case against the state. Nevada argued the U.S. Constitution required California to apply the cap. Although its argument was based in part on full faith and credit, the rationale was different than that in the main case. After all, there were certainly numerous connections between California and the accident. Rather, Nevada's argument was that only Nevada had the authority to define the extent to which the sovereign has waived traditional immunity from litigation and open itself up to a suit for damages. Nevada argued that because only it had that authority, California had to apply the Nevada rule.

A majority of the Court rejected Nevada's argument. It also rejected the state's argument that the Eleventh Amendment—which on its face only bars suits against states in *federal* court—reflected a deeper core principle that states may only be sued to the extent they agree to be sued.

6. Notwithstanding the foregoing, a forum may always apply its own limitations period to a claim, even if the only connection between the forum and the case is that the forum's courts are hearing the case. *Sun Oil v. Wortman*, 486 U.S. 717 (1988). The rule applies regardless of whether the

period is longer or shorter than the period provided by the state whose substantive law applies.

2. OBLIGATION TO PROVIDE A FORUM

HUGHES V. FETTER

341 U.S. 609, 71 S.Ct. 980, 95 L.Ed. 1212 (1951)

MR. JUSTICE BLACK delivered the opinion of the Court.

Basing his complaint on the Illinois wrongful death statute, appellant administrator brought this action in the Wisconsin state court to recover damages for the death of Harold Hughes, who was fatally injured in an automobile accident in Illinois. The allegedly negligent driver and an insurance company were named as defendants. On their motion the trial court entered summary judgment "dismissing the complaint on the merits." It held that a Wisconsin statute, which creates a right of action only for deaths caused in that state, establishes a local public policy against Wisconsin's entertaining suits brought under the wrongful death acts of other states. The Wisconsin Supreme Court affirmed, notwithstanding the contention that the local statute so construed violated the Full Faith and Credit Clause of Art. IV, § 1 of the Constitution. The case is properly here on appeal under 28 U.S.C. § 1257.

We are called upon to decide the narrow question whether Wisconsin, over the objection raised, can close the doors of its courts to the cause of action created by the Illinois wrongful death act.⁴ Prior decisions have established that the Illinois statute is a "public act" within the provision of Art. IV, § 1 that "Full Faith and Credit shall be given in each State to the public Acts . . . of every other State." It is also settled that Wisconsin cannot escape this constitutional obligation to enforce the rights and duties validly created under the laws of other states by the simple device of removing jurisdiction from courts otherwise competent. We have recognized, however, that full faith and credit does not automatically compel a forum state to subordinate its own statutory policy to a conflicting public act of another state; rather, it is for this Court to choose in each case between the competing public policies involved. The clash of interests in cases of this type has usually been described as a conflict between the public policies of two or more states. The more basic conflict involved in the present appeal, however, is as follows: On the one hand is the strong unifying principle embodied in the Full Faith and Credit Clause looking toward maximum enforcement in each state of the obligations or rights created or recognized by the statutes of sister states; on the other hand is the policy of Wisconsin,

⁴ The parties concede, as they must, that if the same cause of action had previously been reduced to judgment, the Full Faith and Credit Clause would compel the courts of Wisconsin to entertain an action to enforce it.

as interpreted by its highest court, against permitting Wisconsin courts to entertain this wrongful death action.¹⁰

We hold that Wisconsin's policy must give way. That state has no real feeling of antagonism against wrongful death suits in general. To the contrary, a forum is regularly provided for cases of this nature, the exclusionary rule extending only so far as to bar actions for death not caused locally. The Wisconsin policy, moreover, cannot be considered as an application of the *forum non conveniens* doctrine, whatever effect that doctrine might be given if its use resulted in denying enforcement to public acts of other states. Even if we assume that Wisconsin could refuse, by reason of particular circumstances, to hear foreign controversies to which nonresidents were parties, the present case is not one lacking a close relationship with the state. For not only were appellant, the decedent and the individual defendant all residents of Wisconsin, but also appellant was appointed administrator and the corporate defendant was created under Wisconsin laws. We also think it relevant, although not crucial here, that Wisconsin may well be the only jurisdiction in which service could be had as an original matter on the insurance company defendant. And while in the present case jurisdiction over the individual defendant apparently could be had in Illinois by substituted service, in other cases Wisconsin's exclusionary statute might amount to a deprivation of all opportunity to enforce valid death claims created by another state.

Under these circumstances, we conclude that Wisconsin's statutory policy which excludes this Illinois cause of action is forbidden by the national policy of the Full Faith and Credit Clause. The judgment is reversed and the cause is remanded to the Supreme Court of Wisconsin for proceedings not inconsistent with this opinion.

MR. JUSTICE FRANKFURTER, whom MR. JUSTICE REED, MR. JUSTICE JACKSON, and MR. JUSTICE MINTON, join, dissenting.

. . . I cannot agree that the Wisconsin statute, so applied, is contrary to Art. IV, § 1 of the United States Constitution'

The Full Faith and Credit Clause was derived from a similar provision in the Articles of Confederation. Art. IV, par. 3. The only clue to its meaning in the available records of the Constitutional Convention is a notation in Madison's Debates that "Mr. Wilson & Doctr. Johnson (who became members of the committee to which the provision was referred) supposed the meaning to be that Judgments in one State should be the ground of actions in other States, & that acts of the Legislatures should be included, for the sake of Acts of insolvency etc—." II FARRAND, THE RECORDS OF THE

¹⁰ The present case is not one where Wisconsin, having entertained appellant's lawsuit, chose to apply its own instead of Illinois' statute to measure the substantive rights involved. This distinguishes the present case from those where we have said that "Prima facie every state is entitled to enforce in its own courts its own statutes, lawfully enacted." *Alaska Packers Ass'n v. Industrial Acc. Commission*, 294 U.S. 532, 547, 55 S.Ct. 518, 524, 79 L.Ed. 1044

FEDERAL CONVENTION, 447. This Court has, with good reason, gone far in requiring that the courts of a State respect judgments entered by courts of other States. *Fauntleroy v. Lum*, 210 U.S. 230, 28 S.Ct. 641, 52 L.Ed. 1039. But the extent to which a State must recognize and enforce the rights of action created by other States is not so clear.

1. In the field of commercial law—where certainty is of high importance—we have often imposed a rather rigid rule that a State must defer to the law of the State of incorporation, or to the law of the place of contract. . . .

2. In cases involving workmen’s compensation, there is also a pre-existing relationship between the employer and employee that makes certainty of result desirable. . . .

In *Alaska Packers Ass’n v. Industrial Acc. Commission*, 294 U.S. 532, 55 S.Ct. 518, 79 L.Ed. 1044, we held that California—where the contract of employment was entered into—was free to apply the terms of its own workmen’s compensation statute to an employee injured in Alaska, although an Alaska statute purported to give an exclusive remedy to persons injured there. In *Pacific Employers Insurance Co. v. Industrial Accident Commission*, 306 U.S. 493, 59 S.Ct. 629, 83 L.Ed. 940, we held that the California courts need not give full faith and credit to the exclusive remedy provisions of the Massachusetts workmen’s compensation statute, although Massachusetts was the place of contract and the usual place of employment.

. . .

3. In the tort action before us, there is little reason to impose a “state of vassalage” on the forum. The liability here imposed does not rest on a pre-existing relationship between the plaintiff and defendant. There is consequently no need for fixed rules which would enable parties, at the time they enter into a transaction, to predict its consequences.

The Court, in the *Clapper* case [*Bradford Electric Light Co. v. Clapper*, 286 U.S. 145, 52 S.Ct. 571, 76 L.Ed. 1026], . . . indicated that a State may be free to close its courts to suits based on the tort liability created by the statutes of other States: “It is true that the full faith and credit clause does not require the enforcement of every right conferred by a statute of another State. There is room for some play of conflicting policies. Thus, a plaintiff suing in New Hampshire on a statutory cause of action arising in Vermont might be denied relief because the forum fails to provide a court with jurisdiction of the controversy. A state may, on occasion, decline to enforce a foreign cause of action. In so doing, it merely denies a remedy, leaving unimpaired the plaintiff’s substantive right, so that he is free to enforce it elsewhere.” 286 U.S. at page 160.

This Court should certainly not require that the forum deny its own law and follow the tort law of another State where there is a reasonable

basis for the forum to close its courts to the foreign cause of action. The decision of Wisconsin to open its courts to actions for wrongful deaths within the State but close them to actions for deaths outside the State may not satisfy everyone's notion of wise policy. But it is neither novel nor without reason. Compare the similar Illinois statute which was before this Court in *Kenney v. Supreme Lodge*. Wisconsin may be willing to grant a right of action where witnesses will be available in Wisconsin and the courts are acquainted with a detailed local statute and cases construing it. It may not wish to subject residents to suit where out-of-state witnesses will be difficult to bring before the court, and where the court will be faced with the alternative of applying a complex foreign statute—perhaps inconsistent with that of Wisconsin on important issues—or fitting the statute to the Wisconsin pattern. The legislature may well feel that it is better to allow the courts of the State where the accident occurred to construe and apply its own statute, and that the exceptional case where the defendant cannot be served in the State where the accident occurred does not warrant a general statute allowing suit in the Wisconsin courts. . . .

No claim is made that Wisconsin has discriminated against the citizens of other States and thus violated Art. IV, § 2 of the Constitution. Nor is a claim made that the lack of a forum in Wisconsin deprives the plaintiff of due process. Nor is it argued that Wisconsin is flouting a federal statute. The only question before us is now far the Full Faith and Credit Clause undercuts the purpose of the Constitution, made explicit by the Tenth Amendment, to leave the conduct of domestic affairs to the States. Few interests are of more dominant local concern than matters governing the administration of law. This vital interest of the States should not be sacrificed in the interest of a merely literal reading of the Full Faith and Credit Clause.

. . .

Finally, it may be noted that there is no conflict here in the policies underlying the statute of Wisconsin and that of Illinois. The Illinois wrongful death statute has a proviso that “no action shall be brought or prosecuted in this State to recover damages for a death occurring outside of this State where a right of action for such death exists under the laws of the place where such death occurred and service of process in such suit may be had upon the defendant in such place.” Smith-Hurd's Ill. Ann. Stat. c. 70, s 2. . . . Thus, in the converse of the case at bar—if Hughes had been killed in Wisconsin and suit had been brought in Illinois—the Illinois courts would apparently have dismissed the suit. There is no need to be “more Roman than the Romans.”

NOTES AND QUESTIONS

1. The Wisconsin court in *Hughes*, applying the traditional rules, determined Illinois law applied, but refused to apply it. Today, would there be another option? Could the court simply have chosen *Wisconsin* law? Would anything in the Supreme Court's opinion prevent that?

2. Could the Wisconsin court have initially selected Illinois law, but then decided that law violated Wisconsin policy, and thereby decide the case under Wisconsin law?

3. If Wisconsin can do either of the things suggested in Notes 1 and 2, what is wrong with what it actually did in *Hughes*?

4. Does *Hughes* abolish the doctrine of *forum non conveniens*, under which a court can dismiss a case because the forum would not be a convenient place to conduct litigation? Could the Wisconsin court in *Hughes* honestly apply *forum non conveniens* under the facts?

5. What if the Wisconsin legislature passed a jurisdiction statute expressly stripping its courts of jurisdiction over foreign wrongful death claims? Would the statute be constitutional? But even if it is unconstitutional, how could a Wisconsin court hear the case? After all, a court cannot create its own subject-matter jurisdiction.

6. The rule set out in *Sun Oil v. Wortman*, discussed in Note 6 in the prior section, also applies here. A state does not violate its obligation to provide a forum to a sister-state claim when it dismisses the case under the forum's shorter statute of limitations. *Wells v. Simonds Abrasive Co.*, 345 U.S. 514, 73 S.Ct. 856 (1953). Remember, though, that a limitations dismissal does not bar plaintiff from filing the action again in a forum with a longer limitations period.

The prior case dealt with a state's obligation to open its courts to a claim arising under a sister state's law. Does the analysis differ when a state does not want to hear a *federal* claim? In this regard, it is worth noting that neither the Full Faith and Credit Clause nor 28 U.S.C. § 1738 explicitly requires states to give full faith and credit to federal laws.

HAYWOOD V. DROWN

556 U.S. 729, 129 S.Ct. 2108, 173 L.Ed.2d 920 (2009)

JUSTICE STEVENS delivered the opinion of the Court.

In our federal system of government, state as well as federal courts have jurisdiction over suits brought pursuant to 42 U.S.C. § 1983, the statute that creates a remedy for violations of federal rights committed by persons acting under color of state law. While that rule is generally applicable to New York's supreme courts—the State's trial courts of general jurisdiction—New York's Correction Law § 24 divests those courts

of jurisdiction over § 1983 suits that seek money damages from correction officers. New York thus prohibits the trial courts that generally exercise jurisdiction over § 1983 suits brought against other state officials from hearing virtually all such suits brought against state correction officers. The question presented is whether that exceptional treatment of a limited category of § 1983 claims is consistent with the Supremacy Clause of the United States Constitution.

I

Petitioner, an inmate in New York's Attica Correctional Facility, commenced two § 1983 actions against several correction employees alleging that they violated his civil rights in connection with three prisoner disciplinary proceedings and an altercation. . . . The trial court dismissed the actions on the ground that, under N.Y. Correct. Law Ann. § 24 (West 1987) (hereinafter Correction Law § 24), it lacked jurisdiction to entertain any suit arising under state or federal law seeking money damages from correction officers for actions taken in the scope of their employment. The intermediate appellate court summarily affirmed the trial court.

The New York Court of Appeals, by a 4-to-3 vote, also affirmed the dismissal of petitioner's damages action. The Court of Appeals rejected petitioner's argument that Correction Law § 24's jurisdictional limitation interfered with § 1983 and therefore ran afoul of the Supremacy Clause of the United States Constitution. The majority reasoned that, because Correction Law § 24 treats state and federal damages actions against correction officers equally (that is, neither can be brought in New York courts), the statute should be properly characterized as a "neutral state rule regarding the administration of the courts" and therefore a "valid excuse" for the State's refusal to entertain the federal cause of action. 9 N.Y.3d 481, 487, (quoting *Howlett v. Rose*, 496 U.S. 356, 369, 372, 110 S.Ct. 2430, 110 L.Ed.2d 332 (1990)). The majority understood our Supremacy Clause precedents to set forth the general rule that so long as a State does not refuse to hear a federal claim for the "sole reason that the cause of action arises under federal law," its withdrawal of jurisdiction will be deemed constitutional. 9 N.Y.3d, at 488. So read, discrimination *vel non* is the focal point of Supremacy Clause analysis.

In dissent, Judge Jones argued that Correction Law § 24 is not a neutral rule of judicial administration. Noting that the State's trial courts handle all other § 1983 damages actions, he concluded that the State had created courts of competent jurisdiction to entertain § 1983 suits. In his view, "once a state opens its courts to hear section 1983 actions, it may not selectively exclude section 1983 actions by denominating state policies as jurisdictional." *Id.*, at 497.

Recognizing the importance of the question decided by the New York Court of Appeals, we granted *certiorari*. 554 U.S. 902, 128 S.Ct. 2938, 171 L.Ed.2d 863 (2008). . . .

II

Motivated by the belief that damages suits filed by prisoners against state correction officers were by and large frivolous and vexatious, New York passed Correction Law § 24. The statute employs a two-step process to strip its courts of jurisdiction over such damages claims and to replace those claims with the State's preferred alternative [a claim against the state itself, not the officer, in the state court of claims].⁴ . . .

For prisoners seeking redress, pursuing the Court of Claims alternative comes with strict conditions. In addition to facing a different defendant, plaintiffs in that Court are not provided with the same relief, or the same procedural protections, made available in § 1983 actions brought in state courts of general jurisdiction. Specifically, under New York law, plaintiffs in the Court of Claims must comply with a 90-day notice requirement, are not entitled to a jury trial, have no right to attorney's fees, and may not seek punitive damages or injunctive relief.

We must decide whether Correction Law § 24, as applied to § 1983 claims, violates the Supremacy Clause.

III

This Court has long made clear that federal law is as much the law of the several States as are the laws passed by their legislatures. Federal and state law “together form one system of jurisprudence, which constitutes the law of the land for the State; and the courts of the two jurisdictions are not foreign to each other, nor to be treated by each other as such, but as courts of the same country, having jurisdiction partly different and partly concurrent.” *Claflin v. Houseman*, 93 U.S. 130, 136–137, 23 L.Ed. 833 (1876); see *Minneapolis & St. Louis R. Co. v. Bombolis*, 241 U.S. 211, 222, 36 S.Ct. 595, 60 L.Ed. 961 (1916); *The Federalist* No. 82, p. 132 (E. Bourne ed. 1947) (A. Hamilton). Although § 1983, a Reconstruction-era statute, was passed “to interpose the federal courts between the States and the people, as guardians of the people's federal rights,” *Mitchum v. Foster*, 407 U.S. 225, 242, 92 S.Ct. 2151, 32 L.Ed.2d 705 (1972), state courts as well as federal courts are entrusted with providing a forum for the vindication of federal rights violated by state or local officials acting under color of state law.

So strong is the presumption of concurrency that it is defeated only in two narrowly defined circumstances: first, when Congress expressly ousts state courts of jurisdiction, and second, “[w]hen a state court refuses jurisdiction because of a neutral state rule regarding the administration of the courts,” *Howlett*, 496 U.S., at 372, 110 S.Ct. 2430. Focusing on the latter

⁴ Although the State has waived its sovereign immunity from liability by allowing itself to be sued in the Court of Claims, a plaintiff seeking damages against the State in that court cannot use § 1983 as a vehicle for redress because a State is not a “person” under § 1983. See *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 66, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989).

circumstance, we have emphasized that only a neutral jurisdictional rule will be deemed a “valid excuse” for departing from the default assumption that “state courts have inherent authority, and are thus presumptively competent, to adjudicate claims arising under the laws of the United States.” *Tafflin v. Levitt*, 493 U.S. 455, 458, 110 S.Ct. 792, 107 L.Ed.2d 887 (1990).

In determining whether a state law qualifies as a neutral rule of judicial administration, our cases have established that a State cannot employ a jurisdictional rule “to dissociate [itself] from federal law because of disagreement with its content or a refusal to recognize the superior authority of its source.” *Howlett*, 496 U.S., at 371, 110 S.Ct. 2430. In other words, although States retain substantial leeway to establish the contours of their judicial systems, they lack authority to nullify a federal right or cause of action they believe is inconsistent with their local policies. “The suggestion that [an] act of Congress is not in harmony with the policy of the State, and therefore that the courts of the State are free to decline jurisdiction, is quite inadmissible, because it presupposes what in legal contemplation does not exist.” *Second Employers’ Liability Cases*, 223 U.S. 1, 57, 32 S.Ct. 169, 56 L.Ed. 327 (1912).

It is principally on this basis that Correction Law § 24 violates the Supremacy Clause. In passing Correction Law § 24, New York made the judgment that correction officers should not be burdened with suits for damages arising out of conduct performed in the scope of their employment. Because it regards these suits as too numerous or too frivolous (or both), the State’s longstanding policy has been to shield this narrow class of defendants from liability when sued for damages. The State’s policy, whatever its merits, is contrary to Congress’ judgment that all persons who violate federal rights while acting under color of state law shall be held liable for damages. As we have unanimously recognized, “[a] State may not . . . relieve congestion in its courts by declaring a whole category of federal claims to be frivolous. Until it has been proved that the claim has no merit, that judgment is not up to the States to make.” *Howlett*, 496 U.S., at 380. That New York strongly favors a rule shielding correction officers from personal damages liability and substituting the State as the party responsible for compensating individual victims is irrelevant. The State cannot condition its enforcement of federal law on the demand that those individuals whose conduct federal law seeks to regulate must nevertheless escape liability.

IV

While our cases have uniformly applied the principle that a State cannot simply refuse to entertain a federal claim based on a policy disagreement, we have yet to confront a statute like New York’s that registers its dissent by divesting its courts of jurisdiction over a disfavored federal claim in addition to an identical state claim. The New York Court

of Appeals' holding was based on the misunderstanding that this equal treatment of federal and state claims rendered Correction Law § 24 constitutional. To the extent our cases have created this misperception, we now make clear that equality of treatment does not ensure that a state law will be deemed a neutral rule of judicial administration and therefore a valid excuse for refusing to entertain a federal cause of action.

...

Although the absence of discrimination is necessary to our finding a state law neutral, it is not sufficient. A jurisdictional rule cannot be used as a device to undermine federal law, no matter how evenhanded it may appear. As we made clear in *Howlett*, “[t]he fact that a rule is denominated jurisdictional does not provide a court an excuse to avoid the obligation to enforce federal law if the rule does not reflect the concerns of power over the person and competence over the subject matter that jurisdictional rules are designed to protect.” 496 U.S., at 381, 110 S.Ct. 2430. Ensuring equality of treatment is thus the beginning, not the end, of the Supremacy Clause analysis.

... [T]his case does not require us to decide whether Congress may compel a State to offer a forum, otherwise unavailable under state law, to hear suits brought pursuant to § 1983. The State of New York has made this inquiry unnecessary by creating courts of general jurisdiction that routinely sit to hear analogous § 1983 actions. . . . For instance, if petitioner had attempted to sue a police officer for damages under § 1983, the suit would be properly adjudicated by a state supreme court. Similarly, if petitioner had sought declaratory or injunctive relief against a correction officer, that suit would be heard in a state supreme court. It is only a particular species of suits—those seeking damages relief against correction officers—that the State deems inappropriate for its trial courts.

We therefore hold that, having made the decision to create courts of general jurisdiction that regularly sit to entertain analogous suits, New York is not at liberty to shut the courthouse door to federal claims that it considers at odds with its local policy. A State's authority to organize its courts, while considerable, remains subject to the strictures of the Constitution. . . .

[T]he dissent's fear that “no state jurisdictional rule will be upheld as constitutional” is entirely unfounded. Our holding addresses only the unique scheme adopted by the State of New York—a law designed to shield a particular class of defendants (correction officers) from a particular type of liability (damages) brought by a particular class of plaintiffs (prisoners). Based on the belief that damages suits against correction officers are frivolous and vexatious, Correction Law § 24 is effectively an immunity statute cloaked in jurisdictional garb. Finding this scheme unconstitutional merely confirms that the Supremacy Clause cannot be evaded by formalism.

V

The judgment of the New York Court of Appeals is reversed, and the case is remanded to that court for further proceedings not inconsistent with this opinion.

[The lengthy dissent of JUSTICE THOMAS, with whom THE CHIEF JUSTICE, JUSTICE SCALIA, and JUSTICE ALITO joined in part, is omitted].

NOTES AND QUESTIONS

1. As long as the state would treat both state and federal claims the same, why must it hear a federal claim? Would the state's refusal frustrate the goals of the federal legislation? Can't Congress always use the federal courts to hear these federal claims?

2. When hearing a federal claim, does a state have the same options discussed in the notes following *Hughes*? Can it dismiss based on *forum non conveniens*, at least if the state would truly be an inconvenient place for litigation? Can the legislature enact a statute depriving the state courts of subject-matter jurisdiction over state and federal claims alike?