Guesswork, Luck and a Little Duct Tape: Predicting Outcomes and Presenting Winning Arguments in the Ever-Changing Realm of Conflicts of Law

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I. Introduction

In 2005, Michigan State University College of Law associate professor Brian C. Kalt imagined a genuinely “perfect crime,” not subject to prosecution under any law. Brian C. Kalt, The Perfect Crime, 93 Geo. L.J. 675 (Jan. 2005). The potential crime scene is within the 50 square miles of land in the State of Idaho comprising Yellowstone National Park. In an imaginative and entertaining article, Professor Kalt described in detail how the collision of historical events prevents a theoretical crime from being reached by any law.

The scenario begins with the enactment of Article III, Section 2 of the U.S. Constitution, requiring the trial of a crime in the state in which the crime was committed, and the later enactment of the Sixth Amendment, requiring a jury to be from the state and the district in which the crime was committed. Next was the creation of Yellowstone National Park in 1872 – a federal enclave in which state law is not enforceable – which comprised land largely located in what was then the Territory of Wyoming, but which also included portions of the Montana and Idaho Territories. When the states of Wyoming, Montana, and Idaho were created more than 25 years later, each contained a portion of Yellowstone, but Congress elected to ignore this when it created the United States District Court for the District of Wyoming. This was the third, key event. Rather than divide Yellowstone between the Wyoming, Montana and Idaho District Courts, Congress put the entire park in the District of Wyoming. In turn, the Districts of Montana and Idaho specifically exclude the areas of Yellowstone placed in the Wyoming District.

There is a hypothetical crime in the Idaho portion of Yellowstone; an arrest is made; and the charge is a felony. The matter has to be prosecuted and tried before a jury in the Wyoming District, but the perpetrator is entitled to a jury drawn from Idaho, the state in which the crime was committed. As noted by Professor Kalt, however, the Idaho portion of Yellowstone has a population of “precisely zero,” Id. at 678, preventing a jury from being empaneled to decide guilt or innocence. The perfect crime – no prosecutor, and no law, can reach it.

The circumstances addressed by this paper present the very opposite challenge – the availability of far too much law, and the often confounding and unanswerable question about which of myriad, potentially applicable legal principles will control the outcome of a dispute. The concept of a “conflict of law” is simple enough, and in theory, so is the more important question of which of competing states’ laws should apply to the resolution of the conflict. But theory and reality are more often strangers than compatriots, and in practice, determining the applicable, controlling law can be a guessing game, fraught with peril. Court decisions about the various choice of law theories “are often decidedly, perhaps wildly, inconsistent” and reveal “a distinct inability to distinguish them. Courts often say they are using one theory when their opinions clearly show that they are using another.” George Smith, Choice of Law in the United States, 38 Hastings L.J. 1041, 1041 (1987). A more bleak description of the application of conflict rules and methods of resolving those conflicts has been given:

[C]ourts routinely combine methods, apply only a portion of a particular method, [and] arrive at a conclusion without describing their analysis at all . . . --the methodologies themselves allow wide areas of discretion. . . . As a result, it has become difficult to predict what a court will do when faced with choice of law issues, and each case seems to demand an ad hoc determination. For attorneys, this lack of predictability may discourage settlement; it certainly inhibits an accurate case valuation. For judges, choice of law
issues take an inordinate amount of time and require a fairly complex analysis. The current situation has been described in a variety of ways, generally unfavorably. It is “a total disaster,” “chaos,” “gibberish,” “a veritable playpen for judicial policymakers,” and “a conflicts mine field in a maze constructed by professors drunk on theories.””


The universe of secondary material addressing conflicts of law is immense, and there is excellent source material providing in-depth analysis of every conceivable issue which can arise within the conflict of law rubric. The aspiration of this paper is less grand. It begins with a brief identification of the ostensible conflicts of law approaches taken by the courts – past and present. While some reflect the application of minority, fading, or abandoned views, remnants of these rules remain in the case law, and so they are identified and a brief description provided. The paper next turns to an examination of state statutes which can modify or trump altogether a state’s purportedly applicable conflict of law rule where the application of certain insurance policies are at issue. Finally, the paper addresses real and somewhat disturbing examples of the uncertainty surrounding the applicable conflict of law rule in given states, and the serious litigation dangers choice of law issues can present. It is by no means exhaustive of all examples of disparity and inconsistency within states about purportedly applicable conflicts of law rules. It is instead a warning of the need for diligent research, no matter how straightforward a state’s conflict of law rule may on the surface appear.

II. The Conflicts of Law Theories In Contract Matters

Courts and commentators have identified and articulated numerous methodologies for determining which state’s law should control in a conflict of law situation. The identification of defined “rules” with precise names suggests a surface landscape of cogent, well defined, and established conflicts of law approaches. This is belied by the nature of the rules themselves, however, and by the actual practice of the courts in interpreting and applying them, by whatever name called. The interconnectedness between certain of the rules; the inconsistency with which the rules are described; and the different ways in which the purported rules are applied among the states, all contribute to confusion, uncertainty, and potential peril.

A. Traditional Rule/Lex Loci Contractus

The traditional, and oldest conflict of law approach in contracts cases is *lex loci contractus*, whereby the law of the place of the origin of the contract controls. According to Professor Williston, the rule arose from the historical notion that parties marrying without an express contract were presumed to contract in relation to the law of the country where the marriage took place, and that this tacit contract follows them wherever they go. 11 Williston on Contracts § 30:21 (4th ed.), citing *Saul v. His Creditors*, 5 Mart. (n.s.) 569, 1827 WL 1936 (La. 1827). This rule was adopted by the American Law Institute in the *Restatement, Conflict of Laws*, in May, 1934 and reflected the principle that the law of the place of contracting determines the validity of a promise. Robert Szold, *Comments on Tentative Draft No. 6 of the Restatement (Second), Conflict of Laws – Contracts*, 76 Harv. L. Rev. 1524 (1963). The rule was for years the dominant approach among U.S. jurisdictions, but the number of states maintaining adherence to it has significantly dwindled.

Today, it appears that Alabama (subject to a contrary statutory provision), Florida, Georgia, Kansas, Maryland, New Mexico (some question exists), Oklahoma, Rhode Island, South Carolina (subject to a contrary statutory provision), Tennessee (subject to a contrary statutory provision), Virginia (subject to a contrary statutory provision), and Wyoming continue to follow the *lex loci contractus* rule. Symeon C.
The purportedly oldest of the “modern” choice of law theories in contracts cases is the Center of Gravity Test or Grouping of Contacts Test, whereby a court considers all of the significant factors which might logically influence the determination of which law to apply, with the goal of choosing the law of the state that has the greatest contacts with the case. George Smith, *Choice of Law in the United States*, 38 Hastings L.J. 1041, 1046-1047 (August 1987). “Its virtue and its vice lie in its almost infinite flexibility,” and the rule “is applied surreptitiously by many courts purporting to apply the Restatement (Second).” Id. The rule had its origin in decisions of the New York appellate courts. In *Auten v. Auten*, 124 N.E.2d 99 (N.Y. 1954), for example, the “court abandoned what it considered to be the ‘generally accepted [traditional] rules that [a]ll matters bearing upon the execution, the interpretation and the validity of contracts are determined by the law of the place where the contract is made, while all matters connected with its performance are regulated by the law of the place where the contract, by its terms, is to be performed.’” (punctuation omitted). *Auten*, 124 N.E.2d at 102. See also *Babcock v. Jackson*, 191 N.E.2d 279, 282 (N.Y. 1963). The *Auten* court opted to instead apply “what has been termed the ‘center of gravity’ or ‘grouping of contacts’ theory of the conflict of laws.” *Babcock v. Jackson*, 191 N.E.2d 279, 282 (N.Y. 1963). Pursuant to this rule, “the courts, instead of regarding as conclusive the parties’ intention or the place of making or performance, lay emphasis rather upon the law of the place which has the most significant contacts with the matter in dispute.” *Auten*, 124 N.E.2d at 102.


### B. Center of Gravity/Grouping of Contacts Test

In 1963, Professor Brainerd Currie suggested a conflict of law rule termed the “Interest Analysis” (or “Governmental Interest Analysis”), whereby the underlying purposes of the implicated, conflicting laws were analyzed and a determination made whether 1) multiple states actually had an interest in the

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application of their law (a “true conflict”); 2) only one state had an actual interest in the application of its law (a “false conflict”); or 3) no state had an interest in application of its law (an “unprovided-for conflict”). Cutler, W., Texas Conflicts Law: The Struggle to Grasp The Most Significant Relationship Test, 65 Baylor L. Rev. 355, 358 (2013). Although adopted early on by some courts, the interest analysis has “in its entirety lost steam amongst the courts”. Id. Noting that modern alternative approaches to the lex loci contractus rule refer to the concepts of “interest” and “policy”, one commentator noted some years ago that “whether they mean the same thing [as Currie’s approach] by that language is another matter. To determine how successful governmental interest analysis has been, one would have to know what the term means and whether other modern approaches are really following it.” Lea Brilmayer, Governmental Interest Analysis: A House Without Foundations, 46 Ohio St. L.J. 459 (1985). She went further: “Policy and interest have no clear meanings any more. The foundations of interest analysis, which Currie strived so hard to develop, are in complete disarray.” Id. at 460.

Jurisdictions today which apply a “governmental interest analysis” generally do so in combination with an analysis of the most significant relationship test of the Restatement (Second) (discussed infra). In Vaughan v. Nationwide Mut. Ins. Co., 702 A.2d 198 (D.C. App. 1997), for example, the court described the District of Columbia’s application of the “governmental interest analysis” as follows:

we first look at each jurisdiction's policy to see what interests the policy is meant to protect, and then consider which jurisdiction's policy would be most advanced by applying the law of that jurisdiction. Part of the test of determining the jurisdiction whose policy would be most advanced is determining which jurisdiction has the most significant relationship to the dispute.


D. Most Significant Contacts Test

There is perhaps no test more susceptible to confusion and uncertainty than the “most significant contacts test.” Indeed, there is some doubt about whether it even represents a “test” independent of the most significant relationship analysis of the Restatement (Second). See, e.g. Harvey Couch, Is Significant Contacts A Choice-of-Law Methodology?, 56 Ark. L. Rev. 745 (2004). The term “significant contacts” has its origin in cases that predate the Restatement (Second). Id. at 745-751. The term is often associated, however, with the Illinois Supreme Court case of Lapham-Hickey Steel Corp. v. Protection Mut. Ins. Co., 655 N.E.2d 842 (Ill. 1995), which in turn relied upon various factors identified by that court in Hofeld v. Nationwide Life Insurance Co., 322 N.E.2d 454 (Ill. 1975), including the location of the subject matter; the place of delivery of the contract; the domicile of the insurer or insured; the place of the last act to give rise to a valid contract; the place of performance; or other place bearing a relationship to the general
contract. The import of *Lapham-Hickey* was the court’s determination of the proper conflict of law rule where risks are located in multiple states.

The “most significant contacts” test articulated in *Lapham-Hickey* and the most “significant relationship test” of the Restatement (Second) are not precisely the same, but some courts confusingly refer to the Restatement approach as “the most significant contacts test”. Harvey Couch, *Is Significant Contacts A Choice-of-Law Methodology?*, 56 Ark. L. Rev. 745, 754 (2004) (“[A] funny thing happened on the way to the adoption by many courts of the Restatement (Second). The courts . . . made significant contacts part of the lexicon, even though the Restatement speaks of significant relationships and factors, and never of significant contacts. But the latter term was in circulation, and it made its way into some opinions applying the Restatement”); See LaSieur, 571 S.W.2d 654, 656 (Mo. App. 1978); Melton v. Borg-Warner Corp., 467 F. Supp. 983, 986 (W.D. Tex. 1978); Conlin v. Hutcheson, 560 F. Supp. 1164, 1168 (D. Colo. 1983). There are innumerable similar cases from the Illinois courts: *Cont’l Cas. Co. v. Duckson*, 826 F. Supp. 2d 1086 (N.D. Ill. 2011); *Safeco Ins. Co. v. Jelen*, 886 N.E.2d 555 (Ill. App. 2008); *Boise Cascade Home & Land Corp. v. Utilities, Inc.*, 468 N.E.2d 442 (Ill. App. 1984); *Palmer v. Beverly Enterprises*, 823 F.2d 1105 (7th Cir. 1987).

The similarity between the most significant contacts test and the most significant relationship test has been acknowledged, and *Lapham-Hickey* has been characterized by some commentators as an adoption of the Restatement (Second) approach. See Eugene R. Anderson, Jordan S. Stanzler, Lorelie Masters, *Insurance Coverage Litigation*, p. 6-250, n. 203 (2013 Suppl.). But this notion has been disputed by the Illinois appellate court. See *Westchester Fire Ins. Co. v. G. Heileman Brewing Co., Inc.*, 747 N.E.2d 955, 961 (Ill. App. 2001) (“The most significant contacts test is similar to the ‘most significant relationship’ choice of law test in section 188 of the Restatement (Second) of Conflicts of Laws, which is applied to tort claims… Contrary to Westchester’s contention, Lapham-Hickey did not adopt the most significant relationship test”). Indeed, Illinois Courts frequently cite the most significant contacts test with no reference whatsoever to the Restatement (Second) most significant relationship test. *United Farm Family Mut. Ins. Co. v. Frye*, 887 N.E.2d 783 (Ill. App. 2008). And yet other Illinois courts describe the rules as one in the same. *Safeco Ins. Co. v. Jelen, supra.*


### E. Restatement (Second) Most Significant Relationship Test

The Restatement (Second) was a “repudiation” of the approach of the original restatement, and the draft of the ultimate revision has been referred to as “an exposition dedicated to showing the fallacy of lex loci contractus.” Robert Szold, *Comments on Tentative Draft No. 6 of the Restatement (Second), Conflict of Laws – Contracts*, 76 Harv. L. Rev. 1524 (May, 1963). “Sections 187 and 188 of the Restatement (Second) set forth relevant general principles applicable to all contracts, and §§ 189 through 197 address

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2 But see Section IV.A.4. regarding apparent adoption by the Arkansas Supreme Court of the Most Significant Relationship test of the Restatement (Second).
the application of those principles to specific types of contracts.” Reichhold Chemicals, Inc. v. Hartford Acc. and Indem. Co., 703 A.2d 1132, 1136 (Conn. 1997). Under the Restatement (Second), Section 188:

(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.\(^3\)

(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.

As noted, §§189-197 address choice of law principles respecting specific types of contracts. For the purpose of brevity, this paper primarily focuses upon the application of the Restatement (Second) to conflicts arising in the application and interpretation of property and liability insurance policies. Section 193 provides that

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

Consequently, §193 is often seen as requiring that the principal location of the insured risk be given greater weight than any other choice-of-law factor. This factor appears to have been contemplated to be given less weight where the insured’s risks are located in more than one location. See Restatement (Second) of Conflict of Laws § 193, cmts. b & f (1971). National Union Fire Ins. Co. of Pittsburgh, PA v. Petco Petroleum Corp., No. 4:12–cv–00165, 2013 WL 5937430 *4 (S.D. Miss. Nov. 4, 2013). As described in more detail below (most notably in environmental contamination cases), however, the courts apply a wide variety of interpretations of the meaning of §193. See IV.A.2., infra. In practice, different courts emphasize and give greater deference to certain principles and give little weight to others, resulting in divergent and sometimes anomalous outcomes.

\(^3\) Section 6 includes the following overarching “Choice-of-Law Principles” to be included within the court’s consideration in conflicts analyses generally: “(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 protection of justified expectations, (e) the basic policies underlying the particular field of law, (f) certainty, predictability and uniformity of result, and (g) ease in the determination and application of the law to be applied.”
Today, it is suggested that Alaska, Arizona (subject to a contrary statutory provision), Colorado (subject to a contrary statutory provision), Connecticut (some question exists), Delaware, Idaho, Illinois, Iowa, Kentucky, Maine, Michigan, Mississippi (also “center of gravity”, supra), Missouri, Montana, Nebraska, New Hampshire, Ohio, South Dakota, Texas (subject to a contrary statutory provision), Utah, Vermont, Washington, and West Virginia apply the Restatement (Second) most significant relationship test. Symeon C. Symeonides, *Choice of Law in the American Courts in 2013: 27th Annual Survey*, 62 Am. J. Compl. L. ______ (2014).

### F. Better Law Approach

First propounded by Professor Robert A. Leflar in 1966, “the ‘better-law’ approach, as it is commonly known,” considers five “choice-influencing” factors, including: “(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.” Schoffman v. Central States Diversified, Inc., 69 F.3d 215, 219 (8th Cir. 1995). See also Robert A. Leflar, *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U. L. Rev. 267, 282 (1966); Robert A. Leflar, *Conflicts Law: More on Choice-Influencing Considerations*, 54 Cal. L. Rev. 1584, 1586-88 (1966).

As the Minnesota Supreme Court warned, however, “[t]hese factors were not intended to spawn the evolution of set mechanical rules but instead to prompt courts to carefully and critically consider each new fact situation and explain in a straight-forward manner their choice of law. [Cit] The lower courts need to wrestle with each situation anew. While prior opinions may be helpful to a court’s deliberations, the court’s obligation is to be true to the method rather than to seek superficial factual analogies between cases and import wholesale the choice of law analysis contained therein.” Jepson v. General Cas. Co. of Wisconsin, 513 N.W.2d 467, 470 (Minn. 1994).

The “predictability of result” factor seeks to preserve the parties’ justified expectations when they entered into the contract – e.g., their expectation that the contract would produce the same results regardless of where litigation occurs. Courts considering the “maintenance of interstate and international order” take into account that states should promote interstate commerce, have harmonious relationships and respect each other’s sovereignty. The “simplification of the judicial task” factor considers the court’s capabilities and/or difficulties in interpreting and applying either law. “Advancement of the forum’s governmental interest” takes into account “which choice of law most advances a significant interest of the forum.” Finally, application of the “better rule of law” considers which jurisdiction contains the “better” law, and which makes “good socio-economic sense for the time when the court speaks.” See Wohlert v. Hartford Fire Ins. Co., No. 12–54, 2013 WL 1249214, *8 (D. Minn. March 27, 2013); Nodak Mut. Ins. Co. v. Wamsley, 687 N.W.2d 226 (N.D. 2004); Daley v. American States Preferred Ins. Co., 587 N.W.2d 159 (N.D. 1998).

The “better law” approach has been applied in Minnesota. See Schoffman v. Central States Diversified, Inc., 69 F.3d 215 (8th Cir. 1995); Wohlert v. Hartford Fire Ins. Co., No. 12–54, 2013 WL 1249214 (D. Minn. March 27, 2013); Jepson v. General Cas. Co. of Wisconsin, 513 N.W.2d 467 (Minn. 1994). It has also been applied as part of the choice of law analysis in Wisconsin and North Dakota. For example, as discussed above Wisconsin has generally employed a “grouping of contacts” test for contracts cases which considers “that contract rights must be determined by the law of the [jurisdiction] with which the contract has its most significant relationship,” relying upon the factors from the Restatement (Second). See State Farm Mut. Auto. Ins. Co. v. Gillette, 641 N.W.2d 662, 670-671 (Wis. 2002). The Supreme Court of Wisconsin has held, however, that where it is not clear which state’s “contacts” have “greater significance”, the “better law” test’s “choice influencing factors” are to then be considered. Drinkwater v. American Family Mut. Ins. Co., 714 N.W.2d 568 (Wis. 2006). One appellate court interpreting these cases recently declared that the State’s choice of law rule is a “choice influencing factor analysis,”
wherein the “grouping of contacts” comprises merely step one in determining the choice of law. *NCR Corp. v. Transport Ins. Co.*, 823 N.W.2d 532, 535 (Wis. App. 2012). The court found the “approach – considering both the state contacts and the choice-influencing factors in all cases (where one state’s contacts are not clearly more significant) – [to be] consistent with the Restatement as well.” *Id.* at 537. In this regard, the court stressed that §188 of the Restatement (Second) is to be “subordinated to the overriding choice-of-law principles identified in § 6,” which the NCR court found to be “substantially similar to the . . . choice-influencing factors. Thus, except in the simple cases, the choice of law depends on the choice-influencing factors.” *Id.* Given Wisconsin’s reference to use of a choice influencing factors analysis (albeit with the grouping of contacts component), the state is characterized as adopting the Better Law approach.

North Dakota also considers both “contacts” and “better law” principles into its choice of law determinations. *Nodak Mut. Ins. Co. v. Wamsley*, 687 N.W.2d 226 (N.D. 2004). As the North Dakota Supreme Court held in *Nodak*, “[i]n deciding what law to apply in a case presenting multistate contacts, our significant contacts test for deciding choice-of-law questions requires a two-pronged analysis. [Cit] ‘Initially, we determine all of the relevant contacts which might logically influence the decision of which law to apply.’ [Cit] Secondly, we apply Leflar’s choice-influencing considerations ‘to determine which jurisdiction has the more significant interest with the issues in the case.’” *Id.* at 231. See *Schleuter v. Northern Plains Ins. Co., Inc.*, 772 N.W.2d 879 (N.D. 2009). Nonetheless, and despite the similarity between the approach of Wisconsin and North Dakota, North Dakota is considered a Combined Modern state.

Today, it is understood that courts in Minnesota (subject to a contrary state statute) and Wisconsin apply the Better Law approach, See *Symeon C. Symeonides, Choice of Law in the American Courts in 2013: 27th Annual Survey*, 62 Am. J. Compl. L. ______ (2014), although as noted, North Dakota also considers the doctrine as part of the State’s choice of law analysis.

**G. Combined Modern Approach**


While the Combined Modern approach allows courts to consider a variety of factors, it has been criticized by some scholars as providing “little, if any, predictability or direction for litigants or judges in tort cases. Although predictability and consistency are both the goals of the theorists and the concerns of the critics, no single, satisfactory, nationwide formula has been developed.” Scott R. Paulsen, *Note, Choice of The Punitive Damage Law In Airline Accidents: The Chicago Rule Comes Crashing Down*, Journal of Corporation Law, 15 J. Corp. L. 803, 823 (1990). Furthermore, attempting to make “[b]road descriptions of these ‘combined modern’ approaches are perilous because, by their very nature, each state's approach constitutes that particular state’s blend of choice-of-law methodologies.” Rodney Patton, *Sisyphus, The Boulder, And The Choice Of Law Hill: The Analytical Framework For Resolving The Unusual And Complex Choice Of Law Issues That Can Arise When The United States Is A Party In An Aviation Case*, 71 J. Air L. & Com. 471, 484 (2006).

III. Statutes Legislatively Varying the State’s Conflict of Law Rule for Insurance Contracts


As addressed below, these statutes do not necessarily prevent or obviate the need for reference to one or more of the previously identified choice of law rules, and do not mean that in these states a choice of law analysis can be dispensed with in favor of the law of the place of the statute. In fact, the statutes are not absolute, are subject to exceptions, and have been judicially limited in some circumstances. It is important to know of their existence, however, because they are the starting point for consideration of the law which may control a policy of insurance deemed to be or arguably issued in any of these jurisdictions.

A. Alabama

Ala. Code § 27-14-22 provides that: “All contracts of insurance, the application for which is taken within this state, shall be deemed to have been made within this state and subject to the laws thereof.” By its terms, the focus of the statute is the location of the application, rather than the location of the subject matter of the insurance or the location of the delivery of the policy. As a general matter, however, it might be assumed that if an application for insurance coverage is made in Alabama, the property or insured interest is located there and the policy will then necessarily be delivered there.

Alabama has repeatedly followed the rule of *lex loci contractus*, and in a recent case involving a dispute over the application of Tennessee or Alabama law to an uninsured motorist claim, the court applied Tennessee law to a policy issued there, without reference to where the application for the coverage was taken. *Cherokee Ins. Co., Inc. v. Sanches*, 975 So.2d 287 (Ala. 2007). In an older case, the Alabama Supreme Court noted that the application for the involved policy was taken in Alabama, but proceeded to note also that the policies were issued in Alabama, ultimately applying Alabama law to the question of insured motorist coverage under the policy. *American Economy Ins. Co. v. Thompson*, 643 So.2d 1350 (Ala. 1994). It is not entirely clear then how the statute would be deemed to apply if application of the statute resulted in an outcome different from application of the rule of *lex loci contractus*. Notably, an Ohio Court, applying the most significant relationship test of the *Restatement (Second)*, recently applied Alabama law to an insurance policy in part due to the Alabama statute, where the application for insurance occurred in Alabama. *Liberty Mut. Ins. Co. v. Petit*, No. 2:09-cv-111, 2010 WL 2302372 (S.D. Ohio Jun. 7, 2010).

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B. Arizona


No policy delivered or issued for delivery in this state and covering a subject of insurance resident, located or to be performed in this state, shall contain any condition, stipulation or agreement:

1. Requiring the policy to be construed according to the laws of any other state or country, except as necessary to meet the requirements of the motor vehicle financial responsibility laws or compulsory disability benefit laws of such other state or country.

2. Preventing the bringing of an action against the insurer for more than six months after the cause of action accrues.

3. Limiting the time within which an action may be brought to a period of less than two years from the time the cause of action accrues in connection with all insurances other than property and marine and transportation insurances. In property and marine and transportation policies such time shall be one year from the date of occurrence of the event resulting in the loss except that an insurer may extend such limitation beyond one year in its policy provisions.

Any such condition, stipulation or agreement shall be void, but such voidance shall not affect the validity of the other provisions of the policy.

With rare exception, the case law addressing this statute has only considered the provisions of the statute regarding the limitations period for bringing an action under an insurance policy. There is no case addressing the manner in which the statute interfaces with Arizona’s application of the Restatement (Second) approach to the resolution of conflict of law issues. In Mission Ins. Co. v. Nethers, 581 P.2d 250 (Az. App. 1978), however, the court found the statute inapplicable to a policy issued in California.

C. Minnesota

Minn. Stat. Ann. § 60A.08 Subd. 4 provides that “All contracts of insurance on property, lives, or interests in this state shall be deemed to be made in this state.”

The application of this statute has been limited, and the place of contracting has instead been given greater weight, resulting in the non-application of the statute to policies issued elsewhere. U.S. Fid. & Guaranty Co. v. Louis A. Roser Co., Inc., 585 F.2d 932 (8th Cir. 1978); Travelers Ins. Co. v. American Fidelity & Cas. Co., 164 F.Supp. 393 (D. Minn. 1958). In both Louis A. Roser & Travelers v. American Fidelity, the courts applied the law of other states because the policies were negotiated, entered into and performed elsewhere, although Minnesota interests were likely involved. This result was at least in part based upon the decision of the United States Supreme Court in Hartford Accident & Indemn. Co. v. Delta & Pine Land Co., 292 U.S. 143, 54 S.Ct. 634, 78 L.Ed. 1178 (1934), in which the Court voided on constitutional grounds application of a similar Mississippi statute. See Louis A. Roser Co., supra, at 941, n.2, Travelers v. American Fidelity, supra, at 398-399. The statute was not cited or addressed in a recent case applying Minnesota law to a class action coverage case in which Minnesota law was found to apply to claims by those both within and outside the state. Mooney v. Allianz Ins. Co., 244 F.R.D. 531 (D. Minn. 2007). This statute was cited, however, and Minnesota law applied in Onstad v. State Mut. Life Assur. Co., 32 N.W.2d 185 (Minn. App. 1948).
D. North Carolina

N.C. Gen. Stat. Ann. § 58-3-1 provides that: “All contracts of insurance on property, lives, or interests in this State shall be deemed to be made therein, and all contracts of insurance the applications for which are taken within the State shall be deemed to have been made within this State and are subject to the laws thereof.”


E. Oregon

Or. Rev. Stat. Ann. § 465.480(2) provides in relevant part that:

(2) Except as provided in subsection (8) of this section, in any action between an insured and an insurer to determine the existence of coverage for the costs of investigating and remediating environmental contamination, whether in response to governmental demand or pursuant to a written voluntary agreement, consent decree or consent order, including the existence of coverage for the costs of defending a suit against the insured for such costs, the following rules of construction shall apply in the interpretation of general liability insurance policies involving environmental claims:

(a) Oregon law shall be applied in all cases where the contaminated property to which the action relates is located within the State of Oregon. Nothing in this section shall be interpreted to modify common law rules governing choice of law determinations for sites located outside the State of Oregon.

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(8) The rules of construction set forth in this section and sections 2 and 7 of this 2013 Act do not apply if the application of the rule results in an interpretation contrary to the intent of the parties to the general liability insurance policy.


It appears from the scant case law available that the conflict of law provisions of this statute will be applied as written, Continental Ins. Co. v. Fost Maritime Co., No. 302CV03936 (N.D. Cal. 2002), but there is little case law on the provisions.
F. South Carolina

S.C. Code Ann. § 38-61-10 provides that: “All contracts of insurance on property, lives, or interests in this State are considered to be made in the State and all contracts of insurance the applications for which are taken within the State are considered to have been made within this State and are subject to the laws of this State.”

This statute has been determined to modify the rule of *lex loci contractus* otherwise applicable to other contracts, under circumstances where a contract of insurance is involved. *Sangamo Weston, Inc. v. National Sur. Corp.*, 414 S.E.2d 127 (S.C. 1992). South Carolina courts have also consistently maintained that application of the statute does not violate constitutional protections because of the state’s significant interest in determining who bears responsibility for injury to South Carolina property and citizens. *Id.* The statute is applicable regardless of whether the insurance contract was entered into in another state, *Johnston v. Comm’l Travelers Mut. Acc. Assoc. of America*, 131 S.E.2d 91 (S.C. 1963), and the policyholder need not be a citizen of South Carolina for the statute to apply. *Sangamo Weston, supra.* The inquiry is whether the subject of the insurance contract is located in South Carolina. *Heslin-Kim v. CIGNA Group Ins.*, 377 F. Supp.2d 527 (D.S.C. 2005). Other cases applying the law of other states have been distinguished on the basis that they involve merely transient contacts with South Carolina. *Id.* at 532.

G. Tennessee

Tenn. Code Ann. § 56-7-102 (West) provides that:

Every policy of insurance, issued to or for the benefit of any citizen or resident of this state on or after July 1, 1907, by any insurance company or association doing business in this state, except fraternal beneficiary associations and mutual insurance companies or associations operating on the assessment plan, or policies of industrial insurance, shall contain the entire contract of insurance between the parties to the contract, and every contract so issued shall be held as made in this state and construed solely according to the laws of this state.

In an early case, the Tennessee Court of Appeals found the statute inapplicable to a policy of insurance applied for and covering an insured located in Michigan, although he ultimately moved to North Carolina. *Page v. Detroit Life Ins. Co.*, 11 Tenn. App. 417 (Tenn. App. 1929). The statute was held applicable to a policy issued and delivered to Tennessee residents in another case, however, with the court rejecting the insurer’s contention that the policy was a Connecticut contract because it was issued by a company located in that state. *Gray v. Aetna Life Ins. Co.*, 156 S.W.2d 391 (Tenn. 1941). In *Burns v. Aetna Cas. & Sur. Co.*, the Tennessee Supreme Court found the statute inapplicable to the uninsured motorist claim of an employee of a company (and the employee’s spouse) issued a vehicle fleet insurance policy by an insurer in Connecticut to the corporate insured in Rhode Island via a Massachusetts broker. This despite the fact that the employee and his spouse were Tennessee residents and that the vehicle involved in the accident was principally garaged in Tennessee. Notably, the Tennessee federal court refused to apply the statute at the request of an insurer, stating that since the statute’s enactment it had never been applied in a manner which was contrary to the state’s adoption of the *lex loci contractus* rule. *NGK Metals Corp. v. National Union Fire Ins. Co.*, No. 1:04-cv-56, 2005 WL 1115925 (E.D. Tenn. Apr 29, 2005). The court noted in any event that the statute was enacted to protect Tennessee insureds, not to harm them, and that the carrier sought to invoke the statute so as to avoid the application of another state’s law which was more favorable to the insured.
H. Texas

Tex. Ins. Code Ann. Art. 21.42 (West) provides that:

Any contract of insurance payable to any citizen or inhabitant of this State by any insurance company or corporation doing business within this State shall be held to be a contract made and entered into under and by virtue of the laws of this State relating to insurance, and governed thereby, notwithstanding such policy or contract of insurance may provide that the contract was executed and the premiums and policy (in case it becomes a demand) should be payable without this State, or at the home office of the company or corporation issuing the same.

In an early case, the Supreme Court of Texas found this statute inapplicable to the claim of a Texas resident claiming insured status under a policy covering property located in Kansas and destroyed by a fire in Kansas. The court determined that the rule of lex loci contractus controlled, and that the statute should not be given extraterritorial effect. Austin Bldg. Co. v. National Union Fire Ins Co., 432 S.W.2d 697 (Tex. 1968). Citing Austin Bldg. Co., the Fifth Circuit concluded that the statute was “designed only to assure that Texas law will apply to contracts made between Texas citizens and insurance companies doing business in Texas, when and only when those contracts are made in the course of the company’s Texas business.” Howell v. American Live Stock Ins. Co., 483 F.2d 1354 (5th Cir. 1973). Consequently, New Mexico law was deemed to apply to an insurance policy issued to a Texas resident operating a farm in New Mexico which covered the death of a thoroughbred horse which was stabled in New Mexico. Hefner v. Republic Indemn. Co. of America, 773 F. Supp. 11 (S.D. Tex. 1991). The statute was found inapplicable although the insurance claim was by a Texas resident injured on property in Texas. The policy had been issued by a California insurer to the limited partner of a Texas limited partnership who was a California resident. The court held that the contract did not arise in the course of in-state business; that California had the more significant relationship (applying the Restatement (Second)); and that it had a greater interest in having its law applied. The Texas Court of Appeals reached a similar result in a recent case in which a Texas physician seeking coverage under a policy issued to an entity in California sought to invoke the statute. Scottsdale Ins. Co. v. National Emergency Services, Inc., 175 S.W.3d 284 (Tex. App. 2004). The court noted that for the statute to apply, the contract of insurance must satisfy three requirements:

1. The insurance proceeds must be payable to a citizen or inhabitant of Texas;
2. The policy issued pursuant to the contract must be issued by a company doing business in Texas; and
3. The policy must be issued in the course of the insurance company’s Texas business.

Id. at 292, citing Hefner, supra. The court found that “[i]t is not enough for the application of [the statute] that . . . certain of [the named insured’s] physicians are Texas residents so that insurance proceeds would be payable in some instances to a citizen or inhabitant of Texas. Id. In a recent case finding Texas law controlling in part based upon the statute, the Fifth Circuit also analyzed the choice of law issue in the context of the Restatement (Second), suggesting that the statute is not the only relevant conflict of law consideration. Mid-Continent Cas. Co. v. Eland Energy, Inc., 709 F.3d 515 (5th Cir. 2013).
I. Virginia

VA Code Ann. § 38.2-313 provides that: “All insurance contracts on or with respect to the ownership, maintenance or use of property in this Commonwealth shall be deemed to have been made in and shall be construed in accordance with the laws of this Commonwealth.”

There is an absence of case law from the Virginia appellate courts addressing this statute, and the decisions addressing it come entirely from the Virginia federal courts. In a 1989 decision, the Virginia federal court noted that there were no Virginia decisions interpreting the statute, but that “it appears that the Virginia General Assembly intended to alter the general rule regarding interpretation of insurance contracts.” *City Insurance v. Lynchburg Foundry Co.*, No. 88-0178, 1989 WL 1102787, *2* (W.D. Va. Apr. 25, 1989). Noting the general application of the *lex loci contractus* rule, the court said the question of application of the statute was academic, since there was no evidence that the law of the place where the policy was issued (Georgia) conflicted with Virginia law. *Id.* at *1*. In a recent case, the Virginia federal court cited the statute without discussion as the basis for applying Virginia law to a dispute involving the value of items comprising a burglary claim against a property insurer. *Sewarz v. First Liberty Ins. Corp.*, No. 3:10CV120, 2012 WL 12438 (E.D. Va. Jan. 3, 2012). In another recent case, the Virginia federal court cited both the rule of *lex loci contractus* and the statute as the basis for applying Virginia law, without addressing the way in which they would be harmonized if application of the rule and the statute led to different results. *Factory Mut. Ins. Co. v. Liberty Mut. Ins. Co.*, 518 F. Supp.2d 803 (W.D. Va. 2007). *See also City of Lynchburg v. Ins. Co. of Ireland*, No. 87-0181, 1990 WL 1232911 (W.D. Va. Aug 24, 1990). Finally, a Virginia federal court considered the argument that a policy was a Maryland policy because it said it was despite being issued to a Maryland resident, but summarily rejected it and noted the language of the statute.

It therefore remains unclear what the outcome would be if a party advocated the rule of *lex loci contractus* to invoke the law of another state where the insurance policy involved the ownership, maintenance or use of property in Virginia, and thereby implicating VA Code Ann. § 38.2-313.

IV. The Conflicts of Law Rules In Practice, and Traps For the Unwary

A. Jurisdictions That Purport To Apply The Same Choice Of Law Rules, But In Reality Do Not

Although two states may have adopted the same choice of law rule, and may even utilize the same wording to describe the rule applicable in that jurisdiction, they may apply vastly different interpretations of the rule, resulting in opposite outcomes in the governing jurisdiction despite purported application of the same rule. The following illustrates a few examples of the peril in assuming that application of the same choice of law rule results in the same outcome under two state’s laws:

1. **Lex Loci Contractus Test, and meaning of “Where The Policy Is Made”**

Two jurisdictions may follow the rule of *lex loci contractus*, with the goal of determining the State in which the contract was “made.” They may both provide that the contract is made where the “last act” essential to completion of the contract occurred. They may both even conclude that this location is where “delivery” occurs. Reason suggests that under these circumstances, both states will apply the same law, since delivery of a contract, after all, presumably occurs in one place only. The reality is otherwise.

The inconsistency in legal outcomes arises from disagreement about the very basic notion of who is the one making the “offer” (party delivering the contract) and who is “accepting” (party to whom the contract is delivered) in the context of an insurance contract. It appears generally understood that an insurer offers
insurance, and upon delivery to the insured, the insured accepts the policy and begins paying the required premium. Many jurisdictions find the delivery necessary to consummate the contract to occur where the insured (or sometimes the broker) received the insurance policy. See Industrial Chem. & Fiberglass Corp. v. North River Ins. Co., 908 F.2d 825, 829 (11th Cir. 1990)(finding that under Alabama law, the last act necessary for the execution of the policies was where it was received and accepted by the named insured); Nationwide Mut. Fire Ins. Co. v. Cato Development, Inc., No. CV 110–118, 2011 WL 4017874, *4 (S.D. Ga. Sept. 8, 2011)(Under Georgia law, “[f]or insurance contracts, the act of delivery is the last act essential for completion of the insurance contract, and thus the place of delivery is where the insurance contract is made”); Evanston Ins. Co. v. Harbor Walk Development, LLC, 814 F.Supp.2d 635 (E.D. Va. 2011)(“Under Virginia law, a contract is made when the last act to complete it is performed, and in the context of an insurance policy, the last act is the delivery of the policy to the insured”); Perini/Tompkins Joint Venture v. Ace American Ins. Co., No. 12–2415, 2013 WL 6570947, *4 (4th Cir. (Md.) December 16, 2013)(under Maryland law, “a contract is made where the last act is performed which makes the agreement a binding contract. Typically, this is where the policy is delivered and the premiums are paid”); Millennium Inorganic Chemicals Ltd. v. National Union Fire Ins. Co. of Pittsburgh, PA, 893 F.Supp.2d 715, 725 (D. Md. 2012)(“delivery of the policy to the broker constitutes delivery to the insured . . . In that circumstance, the state where the broker receives the policy is the locus contractus”).

But this general notion is not absolute, and a Florida decision presents a prominent example of the different approach. In Granite State Ins. Co. v. American Bldg. Materials, Inc., No. 8:10–cv–1542–T–24–EAJ, 2011 WL 6025655 (M.D. Fla. Dec. 5, 2011), a court applying Florida’s lex loci contractus rule held that the offer was made by the insurer, who asked to purchase the insurance at the prices quoted, and that such offer was accepted by the insurer when it bound the policy from its offices in Massachusetts. Although the insurer then generated the policies and emailed electronic versions to the insured’s agents in Florida, the court held that the insurer’s legal obligation to provide coverage under the policies commenced upon issuance of the binders, which it found to “equate[] to the acceptance of the contract . . . Thus, Massachusetts is where the last act necessary to form the policies occurred.” Id. at *5. See also National Trust Ins. Co. v. Graham Bros. Const. Co., Inc., 916 F.Supp.2d 1244, 1252 (M.D.Fla. 2013)(following the reasoning of Granite State finding that the last act necessary to complete the contract occurred in Florida when [the insurer] accepted the agent's offer to bind coverage by issuing the Policy”).

Moreover, it is noted that if the insurance policy provides that “it shall not be valid until it is countersigned by an officer or agent of the company,” some courts may hold that the place of countersigning is the place of the making of the contract, as the last act necessary to effectuate the policy. See Millennium Inorganic Chemicals Ltd. v. National Union Fire Ins. Co. of Pittsburgh, PA, 893 F.Supp.2d 715 (D. Md. 2012); Baker’s Exp., LLC v. Arrowpoint Capital Corp., No. ELH–10–2508, 2012 WL 4370265 (D. Md. Sept. 20, 2012); but see TIG Ins. Co. v. Monongahela Power Co., 209 Md. App. 146, 58 A.3d 497 (Md. App. 2012)(finding where the insured signed the declarations page pertinent).

2. Restatement (Second) of Conflict of Laws – The “Site” of the Insured Risk In CGL Policies

Even where courts of different states with potentially applicable law all purport to apply the Restatement (Second) of Conflict of Laws, there is vast disagreement on the proper determination of the location of the insured risk. The Restatement (Second) of Conflict of Laws § 188 presents a multi-factor test for assessing the contacts a state has with the parties, and the relevant underlying events. Section 193 is in contrast a more specific choice-of-law provision that addresses “contracts of fire, surety or casualty insurance”, and treats the principal location of the insured risk as the most important factor in the choice-of-law determination.

15
In many instances, the principal location of the insured risk may be readily discernible from the facts, the insurance contract and/or the policy endorsements. But in cases where the insured is afforded coverage for multiple risks in multiple states, the choice of law issue is complex, and these cases have generated some of the most polarized opinions, especially in the area of environmental contamination. Two disparate lines of authority have developed.

Under the “site specific” approach, courts conclude that the Restatement (Second) demands application of the law of each state where each of the insured risks are located with respect to coverage arising from that risk – i.e., “the” principal location refers to each specific site covered by the policy at issue in any given case. But another line of authority holds precisely to the contrary. Under the alternative “uniform contract interpretation” approach, courts conclude that the same Restatement (Second) provision demands application of only one state’s law, no matter how many state locations are afforded coverage under the insurance policy – i.e., there can be only one “the” principal location. See National Union Fire Ins. Co. of Pittsburgh, PA v. Standard Fusee Corp., 940 N.E.2d 810 (Ind. 2010). A “review of cases addressing these issues reveals no shortage of authority supporting both” positions. Employers Mut. Cas. Co. v. Lennox Intern., Inc., 375 F. Supp.2d 500, 505 (S.D. Miss. 2005).

Courts adopting a site specific approach generally reason that the jurisdiction where the insured site is located has the most significant interest in applying its State’s law (especially in the area of environmental contamination), and that the parties to the contract contemplated such law to be applicable. See, e.g., G. Heileman Brewing Co. v. Royal Group, Inc., No. 88 Civ. 1041, 1991 WL 120366 (S.D.N.Y. June 21, 1991); Reichhold Chemicals, Inc. v. Hartford Accident and Indemnity Co., 252 Conn. 774, 750 A.2d 1051 (Conn. 2000). Consequently, in Pfizer, Inc. v. Employers Ins. of Wausau, 712 A.2d 634, 637-638 (N.J. 1998), it was held that under New Jersey’s choice of law rules, coverage for environmental contamination claims at 90 sites in 19 states were governed by the law of each waste site, as having the dominant significant relationship to the issues. See also NL Industries, Inc. v. Commercial Union Ins. Co., 154 F.3d 155 (3rd Cir. (N.J.) 1998)(following Pfizer in holding that the law of the state of contamination applied (possibly 28 states)).

In Transamerica Ins. Co. v. Thomas M. Durkin & Sons, Inc., No. 90–0968, 1991 WL 206765 (E.D. Pa. Oct. 1, 1991), the insured was a Pennsylvania company in the business of hauling and disposing of waste. The claim involved clean up operations at two landfills – one in Pennsylvania and the other in New Jersey. Stressing New Jersey’s interests in contamination claims within its borders, the court held that New Jersey law applied to the New Jersey landfill, while Pennsylvania law applied to the Pennsylvania landfill. So holding, the pollution exclusion barred the claims arising from the Pennsylvania landfill, but not the claims arising from the New Jersey landfill. Id.

The site specific approach is sharply criticized by courts adopting the uniform contract interpretation. See Aetna Cas. & Sur. Co. v. Dow Chemical Co., 883 F.Supp. 1101, 1109 (E.D. Mich. 1995)(suggesting that the site specific approach “would result in litigation chaos. . . The potential exposure to insurers caused by such an anomalous result would wreak havoc in the insurance industry”); Maryland Cas. Co. v. Continental Cas. Co., 332 F.3d 145, 154 (2nd Cir. 2003)(noting that the insured’s “choice-of-law argument – that the laws of as many as fifty states should simultaneously govern the same clause of the same insurance policy – would be amusing, had it not been advanced with such sincerity”); Cargill, Inc. v. Evanston Insurance Co., 642 N.W.2d 80, 89 (Minn. App. 2002)(“It strains credulity to believe that either party to this contract of insurance could have intended such a result”); Appalachian Ins. Co. v. General Elec. Co., 867 N.Y.S.2d 372, 20 Misc.3d 1122(A) (Table), *6 (N.Y. Sup. 2008)(“It would be not only an enormous burden to consider the laws of numerous states on every issue in this case, but such an approach would make uniform interpretation of the contract impossible”).
Jurisdictions applying the uniform contract interpretation approach stress that the Restatement (Second) should be interpreted to eliminate the possibility that one contract provision could mean coverage in one state but not in another. With multiple-risk insurance policies covering multiple sites at multiple locations, it is reasoned, there may be no principal location for the insured risk and in such circumstances, the multi-factored test of § 188 of the Restatement (Second), rather than some location-specific test purporting to follow § 193, should control. See e.g., St. Paul Fire and Marine Ins. Co. v. Building Const. Enterprises, Inc., 526 F.3d 1166 (8th Cir. 2008); Continental Ins. Co. v. Beecham, Inc., 836 F.Supp. 1027, 1036 (D.N.J. 1993); Employers Mut. Cas. Co. v. Lennox Intern., Inc., 375 F. Supp.2d 500 (S.D. Miss. 2005); National Union Fire Ins. Co. of Pittsburgh, PA v. Standard Fusee Corp., 940 N.E.2d 810 (Ind. 2010); Emerson Elec. Co. v. Aetna Cas. & Sur. Co., 319 Ill.App.3d 218, 743 N.E.2d 629 (Ill. App. 2001).

Determining the likely choice of law rule which will apply to an insured with multiple locations requires close consideration and analysis of the potential jurisdictions’ application of §193 and §188. Like other areas of choice of law, this one continues to evolve. And indeed, some cases are simply head scratchers.

For example, in Leksi, Inc. v. Federal Ins. Co., 736 F. Supp. 1331 (D.N.J. 1990), the insured owned and operated Pennsylvania facilities in which it manufactured false teeth. The insurance policy was contracted in Pennsylvania. It was alleged that byproducts of the manufacturing process were transported to various landfills in New Jersey, causing contamination. New Jersey law was more liberal in finding coverage than Pennsylvania, and the insured sought application of New Jersey law. Purporting to apply §188 and §193 of the Restatement (Second) of Conflicts of Law, the court held that New Jersey law governed, reasoning in part:

This is not a case where it is completely unforeseeable to the insurer that a certain state's law would be applied. New Jersey is immediately adjacent to Pennsylvania; it was foreseeable that Leksi’s wastes would be deposited across the Delaware River in New Jersey. It was therefore foreseeable that the law of New Jersey would control the insurance coverage issue.

Id. at 1336. The court found that its “rule is elegant in its simplicity and properly recognizes that the host state’s interest in its environment is superior to that of the law of the place of the contract. Although this rule may not provide unerring clarity to the parties at the time of negotiating, this difficulty may be cured by the simple insertion of a choice of law provision.” Id.

The courts of still other states have simply been unable to decide where they stand on this issue. Delaware is a good example. In an unpublished decision in Burlington Northern R. Co. v. Allianz Underwriters Ins. Co., No. 90C-07-108, 1994 WL 637011 (Del. Super. Aug. 25, 1994), the issue involved coverage by 41 insurers under nearly 500 liability policies for environmental claims arising out of 80 different sites located in 18 states. New York was assumed to be the place of contracting, place of negotiations, and place of performance. Minnesota was the State housing the most sites. But the court held that the governing law was the law of each site. Specifically, the court concluded that it was not “far fetched to assume that the law” of the states would be sufficiently similar to permit “reasonable groupings” to be established, and did not “believe . . . that applying the law of the site will result in unmanageable complexity.” Id. at *7. The court stressed that the insurers “were aware that they were insuring risks in other states and were presumably aware of the significance of the location of the risk in choice of law.” Id.

One year later, in the same court and county, a different judge expressly rejected the site specific test. In an unpublished decision in Sequa Corp. v. Aetna Cas. & Sur. Co., No. 89C-AP-1, 1995 WL 465192 (Del. Super. Ct. July 13, 1995), the court was faced with a coverage determination for environmental claims brought against the insureds respecting nine sites in eight states. There, however, the court applied the
law of New York, where the “activities incidental to the insurance policies” took place. The court recognized that a different test had been employed a year earlier in Burlington, but concluded that “this Court chooses not to adopt that approach.” Id. at *4. The court distinguished Burlington by reference to the amount of corporate contacts with one state, but ultimately noted that “[t]he Court in Burlington was not troubled by the potential complexity of applying the law of eighteen states. Even though there are fewer sites and states involved in this matter, this Court, respectfully, is not as sanguine about applying the laws of eight states to the issues of this case.” Id.

A decade later a Delaware court was faced with a case involving an insured whose principal place of business was Oklahoma – the state in which it also paid its premiums – which was seeking coverage for allegedly race-motivated torts at the insured’s theme parks in Maryland and California. Premier Parks, Inc. v. TIG Ins. Co., No. 02C-04-126, 2006 WL 2709235 (Del. Super. Sept. 21, 2006)(incorporating ruling in TIG Ins. Co. v. Premier Parks, Inc., No. Civ.A.02C04126JRS, 2004 WL 728858(Del.Super. March 10, 2004)). The court held that while “none of the states with competing interests could stake an overwhelming claim to this controversy under the Restatement (Second), Oklahoma, at the end of the day, takes the prize because it has the ‘most significant relationship’ when the relevant factors are tallied on the scorecard.” 2004 WL 728858 at *4; 2006 WL 2709235 at *9.

3. Application of “Exceptions” That Swallow the Otherwise Applicable Rule

Courts employing “exceptions” to the applicable jurisdictions’ choice of law rules are often more the rule than the exception. Many states employing the doctrine of lex loci contractus have a public policy exception. Indeed, no matter what choice of law rule is employed, the public policy of the forum state in the particular issues and area of law must be considered.

Some of these “exceptions” are not evident at first sight. In Missouri, although many courts have adopted the Restatement (Second) §§188 and 193 in addressing choice of law issues (see Viacom, Inc. v. Transit Cas. Co., 138 S.W. 3d 723 (Mo. 2004)), the state has apparently retained application of the doctrine of lex loci contractus for determining the law governing “group” insurance contracts. See Williamson v. Hartford Life and Acc. Ins. Co., No. 09–4114, 2012 WL 2368473 (W.D. Mo. June 21, 2012)(applying the law of the state where the policy was delivered to the group policy holder, rather than the state of the individual).

New Mexico has carved out an exception to its lex loci contractus choice of law rule in the case of class actions. Ferrell v. Allstate Insurance Company, 188 P.3d 1156 (N.M. 2008). In a class action suit brought by insureds from 15 states, the court held that the “rigidity” of the lex loci contractus rule “is particularly ill-suited for the complexities present in multi-state class actions.” Id. at 1173. There, the court instead employed the Restatement (Second) as the “a more appropriate approach for multi-state contract class actions.” Id.

Florida has long followed the doctrine of lex loci contractus, but describing the doctrine as “archaic” and “antiquated,” the Eleventh Circuit created an “exception” to the doctrine in insurance contract cases where the insured risk involves fixed and immovable real property. In Shapiro v. Associated International Insurance Co., 899 F.2d 1116 (11th Cir. 1990), a property insurance policy covered multiple properties in various states. The Eleventh Circuit concluded that the Florida Supreme Court would no longer follow lex loci contractus and would instead apply the significant relationship test for insurance contracts for real property. Id. at 1119-1121. See Northland Cas. Co. v. HBE Corp., 145 F.Supp.2d 1310 (M.D. Fla. 2001)(applying most significant relationship test under Shapiro to claims involving race discrimination at hotels). In a subsequent case involving a mobile risk (automobile), the Florida Supreme Court made clear that it “had never retreated from our adherence to [the rule of lex loci
contractus] in determining which state's law applies in interpreting contracts.” State Farm Mutual Automobile Insurance Co. v. Roach, 945 So.2d 1160, 1163–64 (Fla. 2006).


4. Evolution of the Law


Some jurisdictions have multiple cases – even very recent – purporting to definitely state the applicable choice of law rule in the state, but applying entirely different rules. Identification of even a recent case applying a particular rule and presuming the rule to in fact be controlling in the jurisdiction is a potential trap, because views are constantly evolving in this area.

Decisions from Arkansas provide an example. Traditionally, Arkansas applied the doctrine of lex loci contractus. In recent years, however, while some Arkansas courts held that choice of law questions were to be resolved utilizing the doctrine of lex loci contractus, others relied upon the Restatement (Second) most significant relationship test, and still others unabashedly pronounced that courts may utilize either or both tests. See Cross v. State Farm Mut. Auto. Ins. Co., No. CA 10–683, 2011 WL 240734 (Ark. App. Jan. 26, 2011)(applying the lex loci contractus rule); Hicks v. American Heritage Life Ins. Co., 332 F.Supp.2d 1193 (W.D. Ark. 2004)(applying lex loci contractus rule); Crisler v. Unum Ins. Co. of Am., 233 S.W.3d 658, 660 (Ark. 2006)(applying the most significant relationship test); Southern Farm Bureau Cas. Ins. Co. v. Craven, 79 Ark. App. 423, 89 S.W.3d 369, 372 (Ark. App. 2002)(“Despite the easy applicability of the lex loci contractus rule, courts sometimes consider, in addition to the place where the contract was made, which state has the most ‘significant contacts’ with the issue at hand”); Slater v. Republic- Vanguard Ins. Co., No. 5:09CV00269, 2010 WL 2710463, *2 (E.D. Ark. July 7, 2010)(“In Arkansas, choice-of-law questions regarding insurance coverage have traditionally been resolved by applying the law of the state where the insurance contract was made (the lex loci contractus rule). [Cits] Arkansas courts may also consider the significant contacts test in determining choice of law questions”).
Legal scholars warned of consequent uncertainty in the issue. See John J. Watkins, William H. Enfield, “A Guide to Choice of Law in Arkansas”, 2005 ARLN 151, 163 (2005) (stating that “[a] word of caution is in order, for the Arkansas case law in this area is not . . . neat and tidy”, and noting that courts themselves complain that Arkansas decisions have “vacillated” between different lines of cases, “generally citing to one [leading] case without referencing the other”).

Arkansas appears to have settled upon the most significant relationship test of the Restatement (Second) Conflict of Laws § 188. See Scottsdale Ins. Co. v. Morrowland Valley Co., LLC, 411 S.W.3d 184 (Ark. 2012)5. This rule was recently applied in a Tennessee nuisance and trespass lawsuit arising out of the operation of ten poultry houses in Tennessee with between 400,000 and 600,000 chickens at any given time. The named insured was an Arkansas company who purchased the insurance through an Arkansas insurance agent, but the initial policy was issued to insure one single location only, in Tennessee, where the claim arose. The lower court concluded that Arkansas had the most significant relationship to the transaction. Although the insured location was in Tennessee (where the claim also arose), the Supreme Court agreed with the lower court’s finding that such facts were not “sufficient to overcome the other factors in concluding that Arkansas has the most significant relationship to the transaction and parties in this case.” Scottsdale, 411 S.W.3d at 190.

Evolution of the law is a continuing issue in California, where the applicable law is far from settled. As outlined by one federal court trying to get to the bottom of the issue:

California employs several different choice of law analyses. Some courts, applying a statutory test under California Civil Code § 16466, look to the place of performance or contract formation. Other courts have suggested, however, that California’s modern approach limits § 1646 analyses to matters of contract interpretation, and that other choice of law questions are more properly analyzed under a “governmental interests” analysis. . . . In instances where the parties have not made a choice of law, as is the case here, some courts apply a third test, based on Section 188 of the Restatement (Second), Conflict of Laws (the “Restatement”). The Section 188 approach seeks to determine which state “has the most significant relationship to the transaction and the parties.

(Citations omitted). Rutherford v. FIA Card Services, N.A., No. CV 11–04433, 2012 WL 5830081, *2-3 (C.D. Cal. Nov. 16, 2012). Some courts apply all three tests. See Costco Wholesale Corp. v. Liberty Mut. Ins. Co., 472 F.Supp.2d 1183, 1207 (S.D. Cal. 2007)(applying the above three tests for an accident at the insured’s Pennsylvania warehouse, determining that Connecticut law governed “because the contract was made in Connecticut and Connecticut is the state whose interests would be most impaired by the failure to apply its law”); But see Royal Indem. Group v. Travelers Indem. Co. of R.I., No. C-04-00886, 2005 WL 2176896, *5 (N.D. Cal. Sept. 6, 2005)(applying the statutory test and rejecting the governmental interest test, saying that it is applied to class actions only and that the cases where the governmental interest test was applied “did so when the statutory choice of law provision was


6 See fn. 3. Civil Code section 1646 provides, “[a] contract is to be interpreted according to the law and usage of the place where it is being performed; or, if it does not indicate a place of performance, according to the law and usage of the place where it is made.” Furthermore, “[t]he language of a writing is to be interpreted according to the meaning it bears in the place of its execution unless the parties have reference to a different place.” Cal.Civ.Proc.Code § 1857.
uninformative” to the issue, such as when punitive damages (rather than policy interpretation) was at issue).

5. **Bad Faith As a Contract Remedy vs. Bad Faith As a Tort**

The choice of law rule for torts in a particular state is often vastly different than the rule for contracts. Where the accident occurred is generally paramount in tort cases, while contractual negotiations are significant in contract cases. Even with respect to the majority of states employing some version of the Restatement (Second) of Conflicts of Laws most significant relationship test, the factors determinative of the most significant relationship differ in tort cases as compared to contract cases. Compare §188 with §145.

Most insurance coverage disputes involve issues of contract – the meaning and interpretation of the applicable policy of insurance. But where an insured sues for breach of the insurance contract and for bad faith, some jurisdictions find the bad faith claim to be based in tort, and apply a different choice of law rule to that claim. Iowa, Maine, Missouri, Montana, Oklahoma, Utah, and Washington appear to stand as examples of jurisdictions utilizing tort choice of law rules for bad faith claims. See World Plan Executive Council-U.S. v. Zurich Ins. Co., 810 F.Supp. 1042 (S.D. Iowa 1992); Schuller v. Great-West Life & Annuity Ins. Co., No. C-04-62, 2005 WL 2259993 (N.D. Iowa Sept. 15, 2005); Adams v. Rubin, 964 F.Supp. 507 (D. Me. 1997); West American Ins. Co. v. RLI Ins. Co., No. 07-0566, 2008 WL 1820839 (W.D. Mo. April 21, 2008); General American Life Ins. Co. v. Ofner, 972 F.2d 1339 (Table) (9th Cir. (Mont.) 1992); Butterfly-Biles v. State Farm Life Ins. Co., No. 09-CV-0086, 2010 WL 346839 (N.D. Okla. Jan. 21, 2010); Rupp v. Transcontinental Ins. Co., 627 F.Supp.2d 1304 (D. Utah 2008). The rationale is generally that bad faith handling of a claim is extra-contractual, subject to the law of the place where the bad faith conduct occurred (e.g., where the duty to defend was improperly denied, where the case was improperly settled, etc.).

For example, Newmont U.S.A., Ltd. v. American Home Ass. Co., Newmont USA Ltd. v. American Home Assur. Co., 676 F. Supp. 2d 1146 (E.D. Wash. 2009) involved environmental contamination claims from operations at a uranium mine in the state of Washington. The insured sued its excess and liability insurers, alleging breach of the duty to defend and bad faith. As to the bad faith question, the court applied the §145 most significant relationship test, rather than §188 for contracts, finding that under Washington law, “claims for bad faith breach of contract sound in tort.” Id. at 1163.

The court determined that Washington had the most significant contact with the bad faith “injury”; that is, where the defense of the lawsuit was required and the duty to defend was allegedly breached. It also stressed that Washington had a substantial interest in deterring bad faith conduct within its state. The court recognized that New York may have been a “candidate for governing the question of coverage,” and that the coverage issue may be resolved by New York law, where the insured's headquarters at the time of contracting “might play a more significant role than they do” in the bad faith inquiry. Id. at 1163-1164. The court reasoned that “[a]s messy and unpredictable as it may be, certainly is not an anomaly to have various states laws applied to different issues in an insurance dispute involving a policy without a choice of law provision.” Id.

Other states, however, reject the application of tort choice of law principles to bad faith claims, since such claims are intertwined with the duties of the insurer under the insurance contract. See, e.g. Colonial Life & Acc. Ins. Co. v. Hartford Fire Ins. Co., 358 F.3d 1306 (11th Cir. (Ala. 2004)(in applying Alabama’s choice of law rules, the court held that the bad faith claim sounded in contract and therefore, the doctrine of lex loci contractus was applicable); AT&T Wireless Services, Inc. v. Federal Ins. Co., No. 03C-12-232, 2007 WL 1849056, (Del. Super. June 25, 2007)(holding that the the most significant relationship test of § 188 (contracts) and not §145 (torts) applied to the bad faith claim, finding that the “breach of contract
claim and the bad faith claim are too intertwined and interdependent to be separated’’); *Fogarty v. Allstate Ins. Co.*, No. CCB–04–414, 2011 WL 1230350, *7 (D. Md. March 30, 2011) (“judges of this court have repeatedly held that under Maryland’s choice of law rules, the law that governs a bad faith claim is the same law that governs the insurance contract from which the claim of bad faith arises’’); *Lafarge Corp. v. Nat’l Union Fire Ins. Co. of Pittsburgh*, Pa., 935 F.Supp. 675, 692 (D.Md. 1996) (holding that the law governing contract interpretation also governed the bad faith claim, since the claims are ‘‘inextricably intertwined’’ and the court would not subject the insurer to “potentially conflicting standards of conduct’’); *Commerce and Indus. Ins. Co. v. U.S. Bank Nat. Ass’n*, No. 07 Civ. 5731, 2008 WL 4178474, *4-6 (S.D.N.Y. Sept. 3, 2008) (finding that because “the bad faith claim is ‘inextricably intertwined’ with the contract claim. . . the same law should govern both the contractual claim as well as the bad faith claims’’).

6. Federal Courts Applying A Different Version of the Conflict Rule Than Applied By the State Appellate Courts

Georgia has long adhered to the traditional rule of *lex loci contractus*, applying the law of the place where the contract was made. Under this rule, insurance contracts are constructively made at the place where the contract is delivered. *OneBeacon America Ins. Co. v. Catholic Diocese of Savannah*, 477 Fed. Appx. 665, 669 (11th Cir. 2012); *Shorewood Packaging Corp. v. Commercial Union Ins. Co.*, 865 F.Supp. 1577, 1578 (N.D. Ga. 1994) (“For insurance contracts, the act of delivery is the last act essential for completion of the insurance contract, and thus the place of delivery is where the insurance contract is made’’). There is extensive case authority in Georgia applying the rule of *lex loci contractus* without exception, largely from Georgia’s appellate courts.


Rare is the occasion anymore in which a Georgia appellate court applies this rule, but the irony is that the rule has its origin in an apparently long forgotten or disregarded decision of the Georgia Supreme Court. Before 1940, Georgia courts applied a limited version of the *lex loci* rule called the “presumption of identity rule.” *See Seaboard Air Line Ry. v. Andrews*, 140 Ga. 254, 78 S.E. 925 (Ga. 1913). Pursuant to this rule, where the rights of the parties are governed by the law of another state, and no statute from the foreign state was ‘pleaded or proved,’ Georgia presumed that the relevant common law rule governed, and furthermore, that the common law in Georgia and the competing state were the same. *Slaton v. Hall*, 168 Ga. 710, 148 S.E. 741 (Ga. 1929).

In *Trustees of Jesse Parker William Hospital v. Nisbet*, 289 Ga. 807 (1940), the Georgia Supreme Court changed the law, however, stating that the presumption of identity rule applied only to states constituting one of the thirteen original colonies, or derived therefrom. The Court reasoned that these jurisdictions’
laws were all outgrowths of English common law. Because Georgia was an original colony, *Nisbet* directed Georgia courts to construe the common law of the thirteen colonies in accordance with Georgia law. In reference to the law of states not constituting one of the thirteen colonies, the Court stated that such law “must be pleaded, in the absence of which it will be presumed that the law of this State obtains therein.” *Id.* at 811. In so holding, *Nisbet* described two different rules, either of which resulted in the application of Georgia law. First, the presumption of identity rule, applied to the original thirteen colonies, would result in the application of Georgia law unless the party seeking application of foreign law could demonstrate that the foreign law involved a statute governing the issue under consideration. Likewise, the same result would be reached under the pleaded and proved judicial doctrine.

One year after deciding *Nisbet*, the Georgia Supreme Court addressed a contract choice of law issue, but omitted reference or citation to *Nisbet* altogether. In *Menendez v. Perishable Distributors, Inc.*, 254 Ga. 300 (1985) the Court considered whether Georgia or Florida law applied to a release. The Court noted that a release was a form of a contract, such that the rule of *lex loci contractus* would determine which states’ substantive law applied. Concluding that a conflict existed between the two states’ construction of a release, the Court noted that Florida had abolished the common law rule that the release of one tortfeasor discharges other tortfeasors. Instead of consulting *Nisbet*, the presumption of identity rule, or the pleaded and proved doctrine, the Court merely stated that under the rule of *lex loci contractus*, Florida law controlled because it was where the release was executed. Although application of *Nisbet* would have necessitated the same result in light of the Florida statute on point (assuming it was properly pleaded), it bears noting that the Court appears to have decided the issue based on a full application of the *lex loci* rule, rather than the limited version under one of the above mentioned doctrines. In *Avnet Inc. v. Wyle Laboratories, Inc.*, 437 S.E.2d 302 (Ga. 1993), the Court again addressed *lex loci contractus* without applying *Nisbet*. However, the Court did apply the presumption of identity rule. The Court concluded that Georgia law applied because no party “pled or proved” a statute from another state. *Id., citing Slaton v. Hall*, 168 Ga. at 714).

The Georgia Court of Appeals has also long disregarded the purported rule of either *Seaboard Air Line Ry. v. Andrews* or *Nisbet*, instead applying without exception the simple rule of *lex loci contractus*, and deciding the legal question in the context of the law of the place where the contract was made or delivered. For instance, in *Matthews v. Greiner*, 130 Ga. App. 817, 819, 204 S.E.2d 749 (Ga. App. 1974), the Georgia Court of Appeals cited *Nisbet* for the rule that a foreign contract containing no choice of law clause or indication as to place of performance should be construed as a foreign contract and enforced under the foreign state’s laws. The court also stated that the only exception was a foreign state contrary to Georgia public policy. The court concluded that because the brokerage contract was created in Virginia, and was also to be performed there, that Georgia policy was not implicated, let alone contravened. The court actually cited *Nisbet*, but reached the opposite conclusion the case appears to have dictated.

In *Howard v. Doe*, 174 Ga. App. 415, 330 S.E.2d 370 (Ga. App. 1985), the Georgia Court of Appeals sought to determine whether Georgia or Tennessee law applied to an insurance dispute arising from a car accident. Although the accident occurred in Georgia, the policy was delivered to the insured in Tennessee where he resided. The court noted that a conflict existed between the states’ laws because Georgia required physical contact by an unknown motorist unless corroborated by an eyewitness. Like the court in *Matthews*, the *Howard* court stated the rule that a foreign contract would be construed in accordance with the laws of the foreign jurisdiction absent evidence that Georgia public policy would be frustrated. Without further analysis, the court concluded that no violation of public policy was present, and because the insurance policy was delivered in Tennessee, Tennessee law governed. The same is true for *Terry v.*

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In Georgia then, the outcome of application of the state’s conflict of law rule may depend upon whether the action on the contract is proceeding in state court or federal court. In state court, it is likely that a broad application of the *lex loci contractus* rule will prevail, resulting in application of foreign law where the policy was delivered in another state. The limited exception is foreign law that runs counter to the common law of Georgia. In federal court, however, a far more narrow version of the rule will apply, with Georgia law applying unless the foreign law at issue involves application of a statute.

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