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## Disentangling Choice of Law for Torts and Contracts

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# Disentangling Choice of Law for Torts and Contracts

By Frederic L. Kirgis\*

## *Abstract*

*In a federal system with state lines that are easily crossed, physically and electronically, legal disputes often raise choice-of-law issues. Common among those disputes are torts and contracts cases. The courts have taken a variety of approaches to these cases, leading to inconsistent results that depend largely on which forum the plaintiff selects. Judicial fairness and economy dictate, or should dictate, that the choice-of-law issues be resolvable consistently and without unnecessarily tying up the courts or imposing large litigation costs, if it can be done in a principled manner. This article shows how it could be done.*

## *Table of Contents*

I. From Rules to Policies .....	72
II. Torts and Contracts in the Second Restatement .....	73
III. A Simplified System for Torts and Contracts .....	75
A. A Presumptive Choice of Law that Would Violate the U.S. Constitution.....	77
B. A Non-Interested State in a False-Conflict Situation	77
C. The Reasonable Expectations of One of the Parties...	84
D. The Public Policy Exception .....	86
IV. Conclusion.....	88

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*I. From Rules to Policies*

A century ago, almost all judges and scholars faced with choice-of-law issues thought that the goal was to achieve predictable, uniform results that would be reached regardless of the judicial forum in which the issue was to be decided. Why, it was asked, should the plaintiff's choice of forum dictate the result?<sup>1</sup> That would be unfair, not to mention unsettling, for judges who would have to work out choice-of-law puzzles without principled guidance. Thus, what was needed—and what was actually in place under the First Restatement of Conflict of Laws, at least nominally—was a choice-of-law system that would lead any court that might hear a case to the same result that any other court would reach. For example, the First Restatement dictated that in tort cases, the law of the place of wrong would determine whether or not a cause of action existed.<sup>2</sup> This seemed particularly important, as long-arm jurisdictional rules became increasingly flexible, allowing plaintiffs an expanding opportunity to forum shop.<sup>3</sup>

Along came the choice-of-law revolution that the late Brainerd Currie spurred, who pointed out that rigid, jurisdiction-selecting choice-of-law rules can produce irrational results.<sup>4</sup> For example, traditional choice-of-law rules for torts dictated that the law of the place of harm should determine liability. But if a driver and a passenger from New York proceed in an automobile on a short round-trip to Ontario and have a one-car accident there

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1. See 1 JOSEPH BEALE, TREATISE ON CONFLICT OF LAWS 105 (1916) (“A right having been created by the appropriate law, the recognition of its existence should follow everywhere. Thus, an act valid where done cannot be called into question anywhere.”). Joseph Beale was the Reporter for the First Restatement of Conflict of Laws.

2. See RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 377 cmt. a (1934).

3. See, e.g., SYMEON C. SYMEONIDES & WENDY COLLINS PERDUE, CONFLICT OF LAWS: AMERICAN, COMPARATIVE, INTERNATIONAL 842 (3d ed. 2012) (“One reason a plaintiff may choose a particular forum is because of its choice of law rules.”).

4. See BRAINERD CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS 721–26 (1963) (asserting in detail that applying Ontario law to an accident involving only New Yorkers riding together made no sense, even though the accident occurred in Ontario).

that injures the passenger, why should Ontario's law determine the two New Yorkers' rights and obligations toward each other? That makes no sense, said Currie.<sup>5</sup> Good point, said the drafters of the Second Restatement of Conflict of Laws, but we should not throw out principles of predictability and uniformity altogether.<sup>6</sup> In tort and contract cases—among some others, especially those involving land titles—predictability and uniformity remain relevant in the Second Restatement, but they become just one combined factor among a list of factors to be taken into account.<sup>7</sup> The Second Restatement's overall goal is to apply the law of the state which, with regard to the specific issue, has the most significant relationship to the transaction and the parties.<sup>8</sup>

## II. Torts and Contracts in the Second Restatement

For torts cases, the Second Restatement supplies a presumptive choice of law, generally looking to the place of harm when the parties' conduct is at issue (for example, having to do with the rules of the road)<sup>9</sup> and looking to the residence or domicile of one or both parties when loss-allocation is at issue (for example, whether one party is immune from tort liability to the other party).<sup>10</sup> So far so good, if we are concerned with

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5. *Id.* The New York Court of Appeals agreed with him in *Babcock v. Jackson*, 191 N.E.2d 279, 285 (N.Y. 1963) (applying New York law); see also Brainerd Currie, *Comments on Babcock v. Jackson, a Recent Development in Conflict of Laws*, 63 Colum. L. Rev. 1212, 1216 (1963) (discussing the choice of law approach taken by the court in *Babcock*).

6. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 cmt. i (1971) (noting the value of predictability and uniformity).

7. See *id.* § 6(2)(f) (setting forth the factors for a court to consider in its analysis). The others are needs of the interstate or international system, relevant policies of the forum and other interested states, protection of justified expectations, policies underlying the particular field of law, and ease in the determination and application of the law to be applied.

8. In the tort and contract contexts, see *id.* §§ 145, 188.

9. See *id.* § 145 cmt. d ("A state has an obvious interest in regulating the conduct of persons within its territory.").

10. See *id.* ("The local law of the state where the parties are domiciled, rather than the local law of the state of conduct and injury, may be applied to determine whether one party is immune from tort liability to the other.").

predictability and uniformity of result, but there is a joker in the deck. The presumptive choice can be trumped by a laundry list of principles in section 6, but—as mentioned above—only one of them has to do with predictability and uniformity.<sup>11</sup> Section 6 leaves it to the courts to determine which principles are more significant in any given case than the others. Unpredictability and lack of uniformity ensue.

The Second Restatement gives the parties to a contract quite a bit of leeway to make their own choice of law in the contract itself, although it limits their ability to determine which state's law controls the contract's validity.<sup>12</sup> In the absence of an effective parties' choice, the approach is very similar to the approach for torts: a list of relevant contacts, followed by comments supplying a presumptive choice of law. Usually it is the place of contracting for questions of validity (at least, if the place of contracting is not fortuitous),<sup>13</sup> and the place of performance for questions relating to the nature of performance, or the party who is to perform, or the details of performance.<sup>14</sup> Sometimes it is the situs of the subject matter, as in a contract insuring against risks in a particular location.<sup>15</sup> But again, the unruly presence of section 6 looms over the whole process.

Courts in the United States have struggled mightily with choice-of-law issues ever since the choice-of-law revolution began. Some have stuck with the First Restatement, but they are now in the distinct minority. Most now apply, or try to apply, the Second

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11. *See id.* § 6(2) (setting forth factors for a court to consider when conducting a choice of law analysis). For the others, see *supra* note 7.

12. *See id.* § 187 (disallowing the parties' choice regarding validity if there is no substantial relationship with the chosen state and no other reasonable basis for the choice, or if application of the chosen state's law would frustrate a fundamental policy of a state with a materially greater interest in determining validity).

13. *See id.* § 188 cmt. e (noting that the state of contracting usually is also "the state where the parties conducted the negotiations").

14. *See id.* ("The state where performance is to occur under a contract has an obvious interest in the nature of the performance and in the party who is to perform.").

15. *See id.* ("The state where the thing or the risk is located will have a natural interest in transactions affecting it. Also the parties will regard the location of the thing or of the risk as important.").

Restatement. A few use other approaches or some hybrid thereof.<sup>16</sup> Even those courts that espouse the First Restatement's predictability and uniformity sometimes stray when strict loyalty would produce a result perceived to be unjust.<sup>17</sup>

Unpredictability and lack of uniformity may not be the worst things that could possibly happen in the choice-of-law context, but unnecessary unpredictability or eclecticism surely should be avoided if it can be done in a principled way. Happily, a system can be devised that would simplify the process—thus enhancing both predictability and uniformity—without discarding all of the other values implicit in the section 6 laundry list. Moreover, it can be done without abandoning the basic approach of the Second Restatement. While preserving that approach, it would breathe new life into one of the section 6 laundry list items—ease in the determination and application of the law to be applied.<sup>18</sup>

Even better, the approach suggested in this article could and should become a foundation for the American Law Institute's recently proposed Third Restatement of Conflict of Laws, at least in the torts and contracts fields.<sup>19</sup> Because the proposed Third Restatement “will be similar to its predecessors in structure and coverage,”<sup>20</sup> there would be no barrier to adoption of an approach that builds on the Second Restatement.

### *III. A Simplified System for Torts and Contracts*

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16. For a chart showing each state's choice-of-law methodology in tort and contract cases, see Symeon C. Symeonides, *Choice of Law in the American Courts in 2014: Twenty-Eighth Annual Report*, 63 AM. J. COMP. L. (forthcoming 2015).

17. See, e.g., *Paul v. Nat'l Life*, 352 S.E.2d 550, 556 (W. Va. 1986) (finding that the accident state's automobile guest statute violated West Virginia's public policy rather than simply applying West Virginia substantive law to the two West Virginia parties, despite the case being on all fours with *Babcock v. Jackson*).

18. See *supra* text accompanying note 7 (discussing the factors aside from uniformity and predictability).

19. The ALI announced the Third Restatement project in November 2014. See Press Release, Am. L. Inst., (Nov. 17, 2014), available at <http://www.ali.org/email/pr-14-11-17.html>.

20. *Id.*

Since the Second Restatement contains well-recognized issue-characterizations (for example, intentional torts as distinguished from negligent torts,<sup>21</sup> or contract validity as distinguished from most issues relating to contract performance),<sup>22</sup> a court should start the choice-of-law process by using the Second Restatement's characterization that best fits the facts of the case. For most characterizations, the Second Restatement contains a connecting factor leading to the state whose law should presumptively be applied.<sup>23</sup> In most cases, it will be the state that would be selected under the First Restatement's rigid rules.<sup>24</sup>

As will be explained below, a court should stick with the Second Restatement's presumptive choice of law in tort and contract cases unless:

(A) it would violate the Constitution to do so; or

(B) the presumptive state is a non-interested state in a false conflict situation;<sup>25</sup> or

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21. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 156 cmt. d (1971) (“If, under the applicable law, the actor is liable only for intentional injuries, he will not be held liable for injury caused either by his negligence or by his recklessness.”).

22. The Second Restatement is not as rigid as the First Restatement regarding the line to be drawn between contract validity and contract performance. See *id.* ch. 8, intro. note (discussing the shift in choice of law in contract disputes). Nevertheless, the Second Restatement emphasizes the parties' expectations and treats place of contracting and place of performance as separate, relevant factors relating to their expectations as to validity and performance of a contract. See, e.g., *id.* § 188 cmt. b (“Protection of justified expectations plays a less significant role in the choice-of-law process with respect to issues that involve the nature of the obligations imposed by a contract upon the parties rather than the validity of the contract or of some provision thereof.”).

23. “State,” as used in this article, would include a “nation” in a transnational case.

24. See, e.g., RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 156 cmt. b(1971) (explaining how courts following the Second Restatement should factor location into their choice of law analysis).

25. It has been noted that courts already tend to go in this direction, even though they may not say so. See William A. Reppy, Jr., *Eclecticism in Methods for Resolving Tort and Contract Conflict of Laws: The United States and the European Union*, 82 TUL. L. REV. 2053, 2074 (2008) (discussing false conflicts); see also PETER HAY, PATRICK J. BORCHERS & SYMEON C. SYMEONIDES, CONFLICT OF LAWS 846–51 (5th ed. 2010).

(C) application of the presumptive state's law would defeat the reasonable expectations of one of the parties; or

(D) application of the presumptive state's law would defeat or significantly impair a strong public policy of an interested state that is also the forum state.

*A. A Presumptive Choice of Law that Would Violate the U.S. Constitution*

The choice of a particular state's law might violate the U.S. Constitution's Due Process or Full Faith and Credit Clause, particularly if it is a choice of the forum state's own law when the state's contacts with, or interest in, the circumstances of the case are tenuous. The U.S. Supreme Court's jurisprudence on the subject has mystified judges and scholars alike, and it will not be reviewed here.<sup>26</sup> Suffice it to say that, obviously, the Constitution would trump any contrary choice of law.

*B. A Non-Interested State in a False-Conflict Situation*

Brainerd Currie, the progenitor of interest analysis as a choice-of-law method, insisted that it "makes no sense whatever"<sup>27</sup> to apply the law of a state that has no interest in applying its own law. The classic case is *Babcock v. Jackson*, the case described above in which two New Yorkers were involved in a one-car accident in Ontario, and the only question was whether the negligent driver was liable for the passenger's injuries. Ontario had an automobile guest statute that would have defeated the passenger's claim, but New York had no guest statute. New York was interested in applying its own law (permitting recovery against the driver) to its own citizens, while Ontario would not be interested in applying its non-liability law

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26. For those willing to give it a try, see *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981) and *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985). The *Hofstra Law Review* devoted two entire issues to the *Allstate* case. See 10 *Hofstra L. Rev.* No. 1 (1981); *id.* No. 4 (1982). The results were inconclusive.

27. CURRIE, *supra* note 4, at 90.

to the strangers in its territory. In other words, the case presented a false conflict in favor of New York, as distinguished from a true conflict in which both states have an interest in applying their own law.

Unfortunately for judges and litigants, relatively few cases are so easy. If *Babcock v. Jackson* had involved an Ontario driver and a New York passenger, with Ontario law protecting the negligent driver from liability to the passenger, but New York law imposing liability on the driver, it would have been a true conflict. Ontario would have been interested in protecting its own citizen from liability to a non-Ontario passenger, and New York would have been interested in giving its citizen a remedy against the non-New York driver. The choice of law would not be clear on interest-analysis grounds. The courts have struggled mightily on how to resolve true conflicts.<sup>28</sup> There would be good reason in such cases simply to stick with the law of the place of harm.

A state's interest or non-interest can sometimes be assessed fairly simply, as in the above variation of *Babcock v. Jackson*. It is not always so simple. In the more difficult cases, a state's interest, or lack thereof, can only be determined with any degree of confidence by first identifying the policy underlying its relevant rule of substantive law, and then determining whether that policy would be served by applying its law to the specific facts of the case at hand. It may be tempting, or even necessary, to speculate about the policy when a court in one state is looking at another state's law and there is no clear statement of policy by that state's highest court and no relevant legislative history. Fertile imaginations can be useful in some scenarios, but rarely in this one.

The New York Court of Appeals learned this lesson in a pair of later cases involving two New Yorkers in the same car. In the first of these two cases, *Dym v. Gordon*,<sup>29</sup> the New Yorkers were in Colorado. Because of the New York driver's negligence, their

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28. For samplings of such cases, see HERMA HILL KAY, LARRY KRAMER & KERMIT ROOSEVELT, *CONFLICT OF LAWS: CASES, COMMENTS, QUESTIONS* 175–223 (9th ed. 2013); SYMEON C. SYMEONIDES & WENDY COLLINS PERDUE, *CONFLICT OF LAWS: AMERICAN, COMPARATIVE, INTERNATIONAL—CASES AND MATERIALS* 215–63 (3d ed. 2012).

29. 209 N.E.2d 792 (N.Y. 1965).

car collided with another car on a Colorado road. The New York Court of Appeals speculated that “Colorado has an interest in seeing that the negligent defendant’s assets are not dissipated in order that the persons in the car of the blameless driver will not have their right to recovery diminished by the present suit.”<sup>30</sup> The existence of such a third party, said the majority opinion in *Dym v. Gordon*, was enough to distinguish *Babcock v. Jackson*, where there was no third party. Four years later, the New York Court of Appeals said that the construction placed on the Colorado guest statute in *Dym v. Gordon* “was mistaken.”<sup>31</sup> It was too speculative.

In *Dym v. Gordon*, as in *Babcock v. Jackson*, there was a false conflict in favor of New York. On the other hand, if Colorado actually had a policy to protect non-negligent third parties as the New York court postulated in *Dym v. Gordon*, and if the third parties were Coloradans, there would be no reason to depart from the Second Restatement’s presumptive choice of Colorado law. The case would have presented a true conflict and the court’s outcome in *Dym v. Gordon* would have been correct.

A recent case in the Western District of New York illustrates how a court that labored to reach the correct decision could have done it without so much effort. The case arose from a crash of a commuter aircraft in 2009 on its final approach to the Buffalo Niagara International Airport. All forty-five passengers and the crew were killed. One of the plaintiffs in the ensuing consolidated action against the airline was domiciled in China, as had been his wife, who was killed in the crash. The federal district court, applying New York choice-of-law rules under the *Klaxon* case,<sup>32</sup> went through a six-page analysis to determine whether to apply New York’s generous measure of damages, as urged by the plaintiff, or China’s more restrictive measure, as urged by the airline. After analyzing several New York cases, none of which was directly on point, the court decided to apply New York law.<sup>33</sup>

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30. *Id.* at 794.

31. *Tooker v. Lopez*, 249 N.E.2d 394, 397 (N.Y. 1969).

32. *See Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941) (concluding that the *Erie* doctrine applies to choice of law in a diversity case).

33. *See In re Air Crash Near Clarence Ctr.*, New York, 983 F. Supp. 2d 249, 252–58 (W.D.N.Y. 2013) (discussing the court’s choice of law analysis). The court

It would have been much easier if New York (and hence the federal court) had used the choice-of-law method suggested in this article. The federal court would have stuck with the Second Restatement's presumptive state (New York, the place of harm), because China clearly would have had no interest in applying its restrictive recovery rule in favor of the U.S. airline and against the Chinese domiciliary. It would not have been a false conflict in favor of China. Under the approach suggested in this article, it is unnecessary to determine whether New York would be interested in applying its own law because the presumption favoring the place of harm could be rebutted only if the other state (or nation, in this case) has an interest in applying its own law.

Another recent personal injury diversity case in New York illustrates how the approach suggested in this article would work if there is a true conflict. A New York worker was injured in New York while operating a machine manufactured in Ohio. New York's loss-allocating law favored the worker; Ohio law favored the manufacturer. The federal court analyzed several New York cases and concluded that New York law should be applied.<sup>34</sup> If New York used the approach put forward in this article, the court would simply explain that it was not a false conflict in favor of Ohio, so the loss-allocating law of New York, the place of injury, would apply. If there had been a true conflict between conduct-regulating rules, the Second Restatement's presumptive choice would normally be the place of conduct, and that state's law would be applied.<sup>35</sup>

Even in tort cases involving no physical injury, the approach suggested here should be used. For example, in a recent diversity

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paid particular attention to the leading New York tort choice-of-law case, *Neumeier v. Kuehner*, 286 N.E.2d 454, 457–58 (1972), which sets forth a three-rule framework for resolving choice-of-law issues in cases involving conflicting loss-allocating laws.

34. *Fargas v. Cincinnati Mach., LLC*, 986 F. Supp. 2d 420, 427 (S.D.N.Y. 2013).

35. See RESTATEMENT (SECOND), CONFLICT OF LAWS § 145 cmts. c–e (1971) (explaining how the presumption usually works); *Williams v. Novartis Pharm. Corp.*, 15 F. Supp. 3d 761, 766 (S.D. Ohio 2014) (applying the law of the place of conduct when the rule is intended to deter or punish conduct); *Kirchman v. Novartis Pharm. Corp.*, No. 8:06-cv-1787-T-24-TBM, 2014 WL 2722483, at \*4 (M.D. Fla. June 16, 2014) (approving the reasoning in *Williams*).

case, the federal district court in Connecticut addressed issues relating to misappropriation of trade secrets in much the same manner as suggested here.<sup>36</sup> Pepsico, headquartered in New York, allegedly misappropriated trade secrets of the plaintiff company headquartered in Connecticut. The plaintiff relied on a Connecticut statute that would provide a claim for relief, but there was no comparable law in New York. Although the court did not quite use the language of interest analysis, it effectively recognized that there was a true conflict on this issue. It looked to the Second Restatement's presumptive choice of law stressing the place where the conduct occurred (here, New York) in misappropriation cases. The court stuck with it and correctly declined to apply the Connecticut statute.<sup>37</sup>

In another recent tort diversity case where there was no physical injury, members of a non-profit organization sued the organization for unjust enrichment.<sup>38</sup> They claimed that they were led to believe that their payments of special assessments that the organization imposed were required for their membership, when in fact the payments were not required. The organization was headquartered in Washington, D.C., where the law provided no such remedy. The plaintiffs resided in California, where a statutory remedy was available. The Court of Appeals for the D.C. Circuit, relying on a case that the District of Columbia Court of Appeals decided,<sup>39</sup> recognized that it was a true conflict and applied forum law as a tiebreaker after a four-page analysis involving a "qualitative weighing" of relevant factors.<sup>40</sup> The Second Restatement's presumptive choice would have been California law because California was the state in which the plaintiffs received and relied on the defendant's misleading

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36. See *Bulldog N.Y. LLC v. Pepsico, Inc.*, 8 F. Supp. 3d 152, 154 (D. Conn. 2014) (describing the court's choice of law analysis).

37. *Id.* at 162–63 (relying on RESTATEMENT (SECOND), CONFLICT OF LAWS § 145 cmt f). The remainder of the court's opinion fell short of the approach suggested in this article.

38. *In re APA Assessment Fee Litig.*, 766 F.3d 39, 41 (D.C. Cir. 2014).

39. *Washkoviak v. Student Loan Mktg. Ass'n*, 900 A.2d 168, 179 (D.C. 2006).

40. *In re APA Assessment Fee Litig.*, 766 F.3d at 51–55 (explaining the "qualitative weighing" characterization on page 51).

representations.<sup>41</sup> If the earlier D.C. case had used the approach suggested in this article, the federal court would have followed that approach under the *Klaxon* case<sup>42</sup> and should have stuck with California law to resolve the true conflict. The judicial task would have been much simpler, and the result would have been both rational and fair.

In an invasion-of-privacy case,<sup>43</sup> the federal district court in Colorado reached the correct conclusion, but could have done it more easily if it had used the approach suggested here. A same-sex New Jersey married couple and their wedding photographer brought the invasion-of-privacy action against Colorado political advocacy organizations. The organizations had circulated, in Colorado, a photograph of the couple kissing at their wedding. The organizations' aim was to discredit some political candidates in Colorado who advocated legalizing same-sex relationships. One of the defendants, a Colorado organization, argued that the defendant-favoring New Jersey tort law should be applied to the dispute.<sup>44</sup> The Colorado Supreme Court in another case had adopted the Restatement Second's most-significant-relationship test for multi-state torts.<sup>45</sup> The federal court in the case at hand ploughed through all the factors in Restatement Second section 145 and concluded that they weighed in favor of Colorado law, rather than New Jersey law.<sup>46</sup> In a footnote,<sup>47</sup> the court said there was no need to apply Restatement Second section 152, which would have made its job easier. Under section 152 and its comment c, the place of invasion of privacy would be applied, and when the invasion involves the publication of information about the plaintiff or the appropriation of his or her likeness, the

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41. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 148 cmts. f, g (1971).

42. *Supra* note 32.

43. See *Hill v. Pub. Advocate of the U.S.*, 35 F. Supp. 3d 1347, 1353 (D. Colo. 2014) (choosing between New Jersey and Colorado law).

44. See *id.* (discussing various arguments on choice of law).

45. See *AE, Inc. v. Goodyear Tire & Rubber Co.*, 168 P.3d 507, 508 (Colo. 2007) (choosing to follow the most-significant-relationship test for certain torts cases).

46. See *Hill*, 35 F. Supp. 3d at 1355 (applying Colorado law).

47. See *id.*, n.2 (discussing the Second Restatement, but stating that it did not need to use it to reach its result).

invasion is where the matter was communicated to someone other than the plaintiff.<sup>48</sup> That would be Colorado in this case. There would be no reason to depart from the presumptive choice because New Jersey would not be interested in protecting the Colorado defendant, and there would be no other reason to depart from the presumptive choice of Colorado law.

The approach suggested here could be used in multistate defamation cases as well. The Second Restatement's presumptive choice would normally be the state where the person claiming to be harmed (the plaintiff) is domiciled, if the allegedly defamatory matter was published in that state.<sup>49</sup> If that state's law favors the defendant, there would not be a false conflict in favor of any other state: if the law of the defendant's domicile also favors the defendant, there would be no conflict of laws; if the law of the defendant's domicile favors the plaintiff, that state would have no interest in applying its own law. In either case, the Restatement's presumptive choice would normally carry the day, and the plaintiff would not prevail.<sup>50</sup> If the law of the plaintiff's domicile favors the plaintiff (for example, if it considers the matter defamatory to the plaintiff), and if the state of the defendant's domicile does not consider the matter defamatory, there would be a true conflict. The court should again stick with the Restatement's presumptive choice, but this time it would lead to the plaintiff's recovery if the defamation can be proved and if there is no constitutional impediment.

This article's approach would also be effective in the context of interstate contracts. Determining what is or is not a false conflict might in some cases require a somewhat different approach than in the typical tort case, but the goal would remain the same: to determine whether there is a false conflict in favor of a state other than the presumptive state. Thus, if the issue is the contract's validity and the presumptive state—usually the place

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48. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 152 (1971); *id.* cmt. c (discussing choice of law for invasion of privacy claims).

49. See *id.* § 150(2) (showing how the specific rule changes the presumption).

50. This result was reached in *Catalanello v. Kramer*, 18 F. Supp. 3d 504, 513 (S.D.N.Y. 2014), although the court did not use the reasoning I have suggested in this article.

of the last event necessary to complete the making of the contract—is not the residence or domicile of either party, it might still be an interested state if, for example, it is a commercial center that benefits from drawing in non-resident parties to make their deals. If so, there would not be a false conflict in favor of a state other than the presumptive state, even if the law of the other state would favor its own resident.

A Connecticut Supreme Court decision<sup>51</sup> nicely illustrates the approach in a contracts context. Reichhold Chemicals, Inc. sued several of its liability insurance carriers to determine the coverage for cleaning up environmental contamination at Reichhold's facility in Tacoma, Washington. The issues concerned interpretation of pollution-exclusion clauses in the insurance contracts and allocation of damages among the carriers. The contracts did not contain choice-of-law clauses. All insurance carriers either were headquartered in New York or dealt with the plaintiff through their New York offices. New York law favored the insurers; Washington law favored the insured.

The Connecticut Supreme Court, following the Restatement Second's approach for risk-insurance contracts,<sup>52</sup> began with a presumption favoring the law of the place where the insured risk is located. The court then found that New York and Washington were both interested states and said, "[W]e cannot conclude that New York's interests so substantially outweigh Washington's interests as to overcome the presumption of § 193 of the Restatement (Second)."<sup>53</sup> In other words, it was a true conflict, and the court stuck with the presumptive choice of law.

### *C. The Reasonable Expectations of One of the Parties*

Obviously, a court should try not to defeat the expectations of a party that has reasonably relied on a promise that another party made, unless there is an overriding public policy reason to

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51. See *Reichhold Chems., Inc. v. Hartford Accident & Indem. Co.*, 750 A.2d 1051, 1054 (Conn. 2000) (conducting choice of law analysis in a contracts case).

52. See RESTATEMENT (SECOND), CONFLICT OF LAWS § 193.

53. See *Reichhold*, 750 A.2d at 1057 (explaining the reasoning for their choice).

do so. In the choice-of-law context, a clear case for contract enforcement would be one in which parties with comparable bargaining power have agreed on a choice-of-law clause in their contract, and one party has relied on it. Even if there has been no actual reliance, a choice-of-law clause in a non-adhesion contract should normally be enforced, at least if the chosen state has some reasonable relationship with the parties or the transaction. And even in a form contract, a choice-of-law clause should normally be enforced if the party seeking escape from it was given reasonable notice of it before the contract was signed and was not otherwise treated unfairly in the contracting process.

Of course, reasonable expectations regarding choice of law in a contract situation could exist even if there is no choice-of-law clause in the contract. For example, if the parties have negotiated a contract that is to be performed largely or entirely in the state where the negotiations occurred, normally the expectation would be that the law of that state would apply to the agreement. A court should be reluctant to apply the law of some other state that would invalidate the contract or adversely affect the performance of one of the parties. Other examples could be given. The point is simply that reasonable expectations regarding applicable law may arise in a variety of situations and should normally be respected.

The Connecticut Supreme Court in *Reichhold*, discussed above, considered not only the states' interests, but also the parties' expectations. The court said

As an additional important consideration, the application of a state's law should not run counter to the justified expectations of the parties . . . . Applying Washington law, however, does not violate the justified expectations of the parties when the targeted site is in Washington and the other risks that they insured are located in multiple jurisdictions all outside New York.<sup>54</sup>

The court got it right.

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54. *Id.* at 1058.

*D. The Public Policy Exception*

If applying the law of another state would defeat or significantly impair a clear and firmly-held public policy of an interested forum state, the forum state cannot be expected—in the absence of Constitutional compulsion—to apply the other state’s law, even if the other state’s law would normally be chosen. This escape device should be applied sparingly, especially if the other state is another state of the United States rather than a foreign nation.<sup>55</sup> Justice Cardozo (then a judge on the New York Court of Appeals) said it best: the public policy escape device should be applied only when the other state’s law would truly “violate some fundamental principle of justice, some prevalent conception of good morals, or some deep-rooted tradition of the common weal.”<sup>56</sup>

Courts in the United States that still follow the rigid First Restatement place-of-wrong rule for torts have sometimes been tempted to stretch the public policy escape device to avoid the First Restatement result. In *Paul v. National Life*,<sup>57</sup> the West Virginia Supreme Court used it to avoid applying an Indiana guest statute that would have precluded recovery by a West Virginia passenger against a West Virginia driver stemming from a one-car accident in Indiana. Justice Cardozo surely did not have this sort of case in mind when he penned the public policy test quoted above. In this *Babcock v. Jackson* situation, it would be much more convincing simply to recognize that Indiana was a non-interested state in a false-conflict situation. West Virginia law would be chosen on that basis rather than on public policy grounds.

Public policy cases in the contracts context often involve an adhesion contract with a dispute-settlement clause that is valid in the contracting state, but that is deemed procedurally and

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55. If the other state is a state of the United States, the Constitution’s Full Faith and Credit clause could preclude the use of a public policy escape device in some circumstances. *See, e.g., Broderick v. Rosner*, 294 U.S. 629, 634 (1935); *Order of United Commercial Travelers v. Wolfe*, 331 U.S. 586, 590 (1947).

56. *Loucks v. Standard Oil Co. of N.Y.*, 120 N.E.2d 198, 202 (N.Y. 1918).

57. *See Paul v. Nat’l Life*, 352 S.E.2d 550, 556 (choosing not to apply Indiana law under the public policy exception) (W. Va. 1986).

substantively unconscionable in the state of the party resisting its enforcement. These cases are usually true conflicts, so the only persuasive reason to depart from the presumptive choice of law is the strong public policy of the forum.<sup>58</sup> That is appropriate if the unconscionability escape device is not being used simply as a crutch to choose the forum's own law.

The public policy exception should be used only if the forum state's own public policy is at stake. A forum state simply is not well equipped to figure out another state's public policy and apply it to override the otherwise-applicable choice of law. A recent personal injury case in the federal district court in West Virginia is illustrative.<sup>59</sup> A group of West Virginia plaintiffs brought a class action against the Massachusetts manufacturer of transvaginal surgical mesh, alleging that after it had been implanted, it had caused them severe complications. The plaintiffs sought compensatory and punitive damages. The defendant moved for partial summary judgment on the punitive damages claim, arguing that Massachusetts substantive law should be applied. The plaintiffs argued for application of West Virginia's plaintiff-favoring law. West Virginia still follows the traditional place-of-harm rule for tort cases, so the federal court in West Virginia held in favor of the plaintiffs. The result should be the same under the approach suggested in this article, but the reasoning would be slightly different. The court would first look to the place of harm under the Second Restatement and then would determine whether to apply any of the four possible exceptions set forth earlier in this article. The only one that might arguably apply would be the public policy exception, because Massachusetts presumably would want its defendant-favoring policy to be applied in favor of the Massachusetts defendant. True enough, but West Virginia had a competing public policy that would favor the plaintiffs. The court in West Virginia could not reasonably be expected to weigh the

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58. See, e.g., *Flemma v. Halliburton Energy Servs., Inc.*, 303 P.3d 814, 817 (N.M. 2013) (looking at public policy to make a choice of law decision).

59. See *Hendricks v. Boston Scientific Corp.*, 51 F. Supp. 3d 638, 641 (S.D. W. Va. 2014) (choosing between Massachusetts and West Virginia law).

inconsistent public policies against each other. It should (and did) stick with the place-of-harm rule.

#### *IV. Conclusion*

Choice of law in a tort or contract case does not have to be as difficult as the courts or the commentators have made it. Principled simplicity in this context would not only rein in forum shopping; it would also free up judicial resources, reduce the cost of litigation, and provide a legal structure that is understandable not only for judges and lawyers, but also for the ordinary citizens who are subject to it. These are laudable and attainable goals.