

CHOICE-OF-LAW PROBLEMS IN FLORIDA COURTS: A RETROSPECTIVE ON THE *RESTATEMENT (SECOND)*

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I. INTRODUCTION

Almost fifteen years have passed since the Florida Supreme Court adopted the *Restatement (Second) of Conflict of Laws* for resolving choice-of-law problems in tort.¹ During this period, state and federal courts in Florida have addressed an unusually large and diverse group of conflicts issues, reflective in part of the state's transient population and international business community.

While the number of conflicts disputes has proliferated since adoption of the *Restatement (Second)*,² the Florida Supreme Court has offered relatively sparse guidance to the courts that must implement its provisions.³ The consequence is that the state judiciary has largely shifted for itself as it extemporizes solutions within the notoriously open-ended standards of the *Restatement*.

Even a generous reading of Florida decisions leaves one with the impression that there is widespread confusion about the appropriate methodology to use in applying the *Restatement (Second)*. Indeed, a survey of case law suggests that there is no single methodology upon which a majority of the lower courts have yet agreed.⁴

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1. See *Bishop v. Florida Specialty Paint Co.*, 389 So. 2d 999 (Fla. 1980). See generally Michael S. Finch & Lora Smeltzly, *The Restatement Second and Conflict of Laws: Extending the Bishop Approach to Problems in Contract*, 16 STETSON L. REV. 261 (1987); Harold P. Southerland & Jerry J. Waxman, *Florida's Approach to Choice-of-Law Problems in Tort*, 12 FLA. ST. U. L. REV. 447 (1984).

2. Throughout this Article, the RESTATEMENT (SECOND) OF CONFLICT OF LAWS (1969), will be referred to as either the "*Restatement Second*" or simply the "*Restatement*." The earlier RESTATEMENT OF CONFLICT OF LAWS (1938), will be referred to as the "*first Restatement*."

3. For a discussion of how the Florida Supreme Court has applied the *Restatement (Second)*, see *infra* text accompanying notes 83-131.

4. For a discussion of the application of the *Restatement (Second)* in Florida's lower courts, see *infra* text accompanying notes 132-230.

If a primary goal of choice-of-law doctrine is to provide a predictable and relatively straightforward method of resolving disputes, the *Restatement (Second)* is a minor failure.

Florida decisional law mirrors the confusion and indecision that underlie not only the *Restatement (Second)*⁵ but contemporary conflicts doctrine generally.⁶ The subject of choice of law remains in great intellectual ferment, and no choice-of-law theory captures this ferment more fully than the *Restatement (Second)*.

The range of uncertainty and confusion could be measurably lessened, however, by reconsideration of the *Restatement (Second)*'s origin and structure. There is growing indication that the *Restatement (Second)*'s key phrasings and concepts have become alienated from their historical, and sometimes even their textual, context. This is a troubling development in the case law, particularly given the specialized meanings intended by the *Restatement*'s drafters and the rather sophisticated structure provided by the document. The *Restatement (Second)* is a sufficiently challenging document in its own right without judicial compounding of its complexities.

This Article undertakes what appears overdue in Florida — a reconsideration of the structure and history of the *Restatement (Second)*, particularly as it suggests a methodology for resolving conflicts issues in tort. As will be demonstrated, the reporter's notes and supplementary writings to the *Restatement (Second)* provide important clues as to the methodology intended by its authors and, equally important, provide needed checks upon some of the errant trends that lower courts have often followed. Even if, as critics have argued, the *Restatement (Second)* is susceptible to varying interpretations, it is not nearly so unstructured as a review of Florida decisional law might suggest.

This Article also examines the body of case law produced by state and federal courts in Florida under the regime of the *Restatement (Second)* — the good, the bad, and the misguided. This part of the Article will analyze the various sub-methodologies that courts use in applying the *Restatement (Second)* and will discuss the diver-

5. See generally Herma H. Kay, *Theory into Practice: Choice of Law in the Courts*, 34 MERCER L. REV. 521, 552–62 (1983); Joseph W. Singer, *A Pragmatic Guide to Conflicts*, 70 B.U. L. REV. 731, 732–37 (1990).

6. See generally WILLIAM M. RICHMAN & WILLIAM L. REYNOLDS, UNDERSTANDING CONFLICT OF LAWS 241 (2d ed. 1993) (stating that “choice-of-law theory today is in considerable disarray — and has been for some time”).

gent interpretations given to the more central *Restatement* concepts such as the “significant relationship” test, factual “contacts,” and “interest” analysis. In this discussion, the Author will attempt to identify some of the recurring missteps taken by the courts, with the hope that corrective action can be taken before these vices become habits.

Finally, this Article will attempt to sketch the outlines of peculiarly Florida rendition of the *Restatement (Second)*. As will be argued, many lower courts have followed the lead of the Florida Supreme Court in emphasizing the territorialist roots of the *Restatement (Second)*. In many cases, the conflicts solutions reached are similar to those that would have been reached under the territorialist approach of the first *Restatement*, although the latest *Restatement* does provide greater flexibility in addressing problem cases.

In conclusion, it will be argued that the neo-territorialist bent of Florida courts is consonant with, though not commanded by, the approach of the *Restatement (Second)* and can ultimately lead to results that are sufficiently fair and predictable. At least until such time as someone offers a pragmatic alternative to this approach, it has as much to commend it as other conflicts theories currently in vogue.

II. THE ORIGINS AND STRUCTURE OF THE RESTATEMENT (SECOND)

“[W]e wish that we had done a better job. The only thing that prevented us from doing so was that we could not come anywhere near to agreement on anything else.”

Robert Leflar, Member
Committee of Advisors
Restatement (Second).⁷

A. The Dynamics of the *Restatement* Process

The most important interpretive clue to the *Restatement (Second)* may be found in the above-quoted excerpt from Professor

7. Robert A. Leflar, *The Torts Provisions of the Restatement (Second)*, 72 COLUM. L. REV. 267, 278 (1972).

Robert Leflar, who played a significant role in the development of the *Restatement*. From beginning to end, the *Restatement* was an attempted “reconciliation.”⁸ It was drafted and redrafted over a period of eighteen years,⁹ barely two decades after the promulgation of the first *Restatement*, whose “vested rights” territorialism had suffered withering attack in the academic community.¹⁰

As scholars attempted to free themselves from the conceptual restraints of the first *Restatement*, the conflicts literature enjoyed a renaissance of theorizing. A variety of conflicts jurisprudes — including several members of the American Law Institute (ALI)¹¹ who would attempt to reconcile their theories in the *Restatement (Second)* — advocated novel goals and methods for the resolution of choice-of-law problems.¹² A bold group of state court jurists, in turn, attempted to implement the new learning in their courts.¹³

Clearly, parts of the first *Restatement* were becoming obsolete by the time work commenced on the new restatement. But there was sharp disagreement over whether the time was ripe for a second “restatement” of conflicts doctrine.¹⁴ How could one restate what had yet to be fully stated by the courts? And how could the ALI condense into a coherent document the high degree of tentativeness and dissensus that was characteristic of evolving conflicts doctrine? In open pleas to the ALI, some conflicts scholars asked that the at-

8. *Id.* at 277.

9. Work on the *Restatement (Second)* commenced in 1953 and culminated in its publication in 1969. *See generally* Kay, *supra* note 5, at 552–54.

10. *See generally* LEA BRILMAYER, CONFLICT OF LAWS, FOUNDATIONS AND FUTURE DIRECTIONS 22–37 (1991).

11. The ALI is responsible for promulgation of the various restatements. *See generally* E. Allan Farnsworth, *Ingredients in the Redaction of the Restatement (Second) of Contracts*, 81 COLUM. L. REV. 1 (1981).

12. In 1952, Professor Willis Reese, who would later serve as reporter to the *Restatement (Second)*, published an article identifying policies that should guide courts in analyzing conflicts problems. *See* Elliott E. Cheatham & Willis L. Reese, *Choice of the Applicable Law*, 52 COLUM. L. REV. 959 (1952). In 1966, Professor Leflar, who would serve as a member of the committee that drafted the *Restatement (Second)*, identified similar policies. *See* Robert A. Leflar, *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U. L. REV. 267 (1966). Elements of the policies identified by Professors Reese and Leflar ultimately influenced the content of the “significant relationship” test embodied in the *Restatement*. *See infra* text accompanying notes 32–63.

13. Kay, *supra* note 5, at 525–36.

14. *See, e.g.*, Brainerd Currie, *Comments on Babcock v. Jackson, A Recent Development in Conflict of Laws*, 63 COLUM. L. REV. 1233 (1963); Albert A. Ehrenzweig, *Comparative Conflicts Law*, 16 AM. J. COMP. L. 615 (1968).

tempt to restate the law be abandoned for the indefinite future.¹⁵

The only means of restating such a heterogeneous phenomenon as conflicts law in the 1960s was, as Professor Leflar would describe it, through “an impossible degree of reconciliation.”¹⁶ Such is the nature of the *Restatement (Second) of Conflict of Laws*, and any attempt to understand that document must begin with the recognition that it does not “restate” what was happening in *any* particular court. Rather, the *Restatement (Second)* is more accurately described as a negotiated settlement of conflicting judicial and academic approaches to a subject that was in the throes of change. As the reporter to the *Restatement (Second)* candidly observed, it is an eclectic document that relies on a variety of theories.¹⁷

This admixture of case law and academic theory was inherently unstable — particularly in comparison to the formalistic, black-letter rules of the first *Restatement*. Indeed, from its inception, the *Restatement (Second)* was self-conscious of its “transitional” nature and specifically anticipated evolution in its provisions.¹⁸

The provisional nature of the *Restatement* should not obscure, however, the fact that it *does* have several determinate features: It sets forth a structured, if malleable, methodology, and it builds upon discrete choice-of-law concepts that have relatively specific meanings in the discipline. To appreciate this structure and content, it is essential to understand the evolution in the drafts of the *Restatement (Second)*.

B. The Layering of the *Restatement*

At the outset, the *Restatement (Second)* rejected the “vested rights” territorialism of the first *Restatement*, under which the state of a tortious injury (the “lex loci delicti,” or “LLD”) was deemed to have *exclusive* jurisdiction to legislate the consequences of tortious

15. See Albert A. Ehrenzweig, *The Second Conflicts Restatement: A Last Appeal for Its Withdrawal*, 113 U. PA. L. REV. 1230, 1232 (1965).

16. See Leflar, *supra* note 7, at 277.

17. See Willis L. Reese, *The Second Restatement of Conflict of Laws Revisited*, 34 MERCER L. REV. 501, 508 (1983). A sure indication of the dissensus found among the committee members working on the *Restatement (Second)* is the fact that the final vote to adopt the “significant relationship” test was 13 for and 12 against. Albert A. Ehrenzweig, *The “Most Significant Relationship” in the Conflicts Law of Torts*, 28 LAW & CONTEMP. PROBS. 700, 702 n.14 (1963).

18. *Id.* at 518–19.

conduct.¹⁹ Banished from the *Restatement (Second)* were tort rules that inexorably called for application of the law of a state where some particular activity had occurred. Early drafts of the *Restatement (Second)* did not repudiate, however, the importance of territorialist connections in resolving choice-of-law problems. Instead, the *Restatement (Second)* expanded the scope of territorialist considerations by including, in addition to the place of injury, the place of tortious conduct, the residence of the parties and other locational facts that connect a tort to a particular state.²⁰ According to early drafts of the *Restatement (Second)*, consideration of these various factual contacts would enable a court to determine which state had the “most significant relationship” to the tort and hence, which state's law should apply.²¹ Thus was born the “significant relationship” test which, more than any other phrase, has come to characterize the *Restatement (Second)* approach to conflicts.

It is helpful to consider the historical context in which the phrase “significant relationship” was developed. Early drafts of the *Restatement (Second)* were circulated at a time when the New York courts were experimenting with a multiple-fact approach to resolving conflicts problems. The “center of gravity” test employed by the New York courts — some version of which was later incorporated into the *Restatement (Second)* as the “significant relationship” test — called upon courts to identify all relevant factual contacts with the concerned states and to apply the law of the state having the greatest relationship to the controversy.²² But the precise meaning of this approach seems to have varied from opinion to opinion. In some cases, the New York courts appeared to emphasize the sheer *number* of factual contacts connecting a state with a legal dispute — what has been uncharitably referred to as “contact counting” — while in other cases, the courts indicated that factual contacts were important only insofar as they established which state was most “interested” in the legal issue, thus suggesting some form of policy analysis.²³

The important methodological lesson is that, by focusing on

19. RESTATEMENT (SECOND) OF CONFLICT OF LAWS ch. 7 intro. cmt. 2, at 413 (1969) (“The vested rights approach of the original Restatement has been rejected . . .”).

20. Kay, *supra* note 5, at 554–55 n.216.

21. *See id.* at 555.

22. *Id.* at 525–38.

23. *See id.* at 527.

multiple fact contacts in ascertaining the state with the most “significant relationship” to a legal dispute, the earliest draft of the *Restatement (Second)* gave arguable textual support to the disreputable practice of “contact counting.” In later drafts of the *Restatement*, there was obvious attempt to correct such misimpressions by emphasizing that contacts were to be assessed based on their *qualitative* relationship to legal policies, rather than by their sheer quantity. Thus, the fact-enumerating section of the tort chapter of the *Restatement (Second)* — presently contained in section 145 — specifically provides that the enumerated contacts are “to be taken into account in applying the principles of section 6.”²⁴ Nonetheless, contact counting remains a way of life for a surprisingly large number of courts, including courts in Florida.²⁵

The introduction of section 6 into the *Restatement (Second)* constitutes the next critical step in its evolution. Section 6 has been described by the *Restatement's* reporter as the document's “central theme.”²⁶ In section 6, one finds the various policies and choice-of-law values that are said to underlie *all* other sections of the *Restatement*.²⁷

Section 6 was added to intermediate drafts of the *Restatement* in part to reflect developments in the case law of certain adventurous jurisdictions, but perhaps in larger part to reflect the contributions of leading conflicts scholars.²⁸ Section 6, entitled “Choice of Law Principles,” is a comprehensive section applying to all conflicts problems (including problems in subject areas such as contracts and property), and provides:

- (1) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.
- (2) When there is no such directive, the factors relevant to the choice of the applicable rule of law include
 - (a) the needs of the interstate and international systems,
 - (b) the relevant policies of the forum,
 - (c) the relevant policies of other interested states and the rela-

24. See RESTATEMENT (SECOND) CONFLICT OF LAWS § 145(2) (1969).

25. For a more complete discussion of contact counting, see *infra* text accompanying notes 154–71.

26. See Reese, *supra* note 17, at 516.

27. *Id.*

28. See generally Patrick J. Borchers, *The Choice-of-Law Revolution: An Empirical Study*, 49 WASH. & LEE L. REV. 357, 362–64 (1992).

tive 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.²⁹

It bears re-emphasis that all other sections of the *Restatement* ultimately trace back to section 6.³⁰ Thus, the factual contacts pertaining to torts as set forth in section 145 are only relevant insofar as they relate to one of the section 6 principles. Most importantly, the “significant relationship” test that constitutes the general principle for resolving tort issues under section 145 is specifically defined by reference to the more detailed principles of section 6. Thus, section 145 affirms that tort issues are to be generally governed by the law of the state “which . . . has the most significant relationship to the occurrence and the parties *under the principles stated in [section] 6.*”³¹

C. The Theory of the “Significant Relationship”

Two important methodological issues arise when determining the state of the most significant relationship under the section 6 principles: first, what specific meanings are intended by these succinct “principles,” and second, how are these principles to be compared or weighed to determine which state bears the most significant relationship to a tort issue? These questions will be considered in order.

The proper interpretation of section 6 principles is not a matter of pure conjecture, even though some courts adjudicate as if it were. Both the official comments accompanying section 6 and the secondary writings of the *Restatement's* reporter, Professor Willis Reese, provide important guides to the interpretation of section 6 principles.

Subsection 6(1) states what hardly needs stating. When legislation mandates a particular resolution of choice-of-law disputes, state

29. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1969).

30. *Id.* § 145.

31. *Id.* (emphasis added).

courts should follow their legislature's directive.³² As noted in the *Restatement's* comments, however, legislatures rarely address conflicts issues by statute, and this is particularly true regarding tort issues.³³ In most tort disputes, accordingly, section 6(1) adds nothing to the analysis.

Subsection 6(2)(a) sets forth a principle that, in the great majority of cases, also has little pertinence to the resolution of conflicts issues. While “interstate” and “international” needs are of obvious concern in the greater development of choice-of-law doctrine, they will seldom have pertinence to the resolution of conflicts issues in a particular tort dispute. The reporter for the *Restatement (Second)* has acknowledged as much.³⁴

As one moves to subsections 6(2)(b) and (c), one moves into the heart of the section 6 principles. Principles (b) and (c) of subsection 6(2) embody the most influential conflicts theory to emerge since the “vested rights” territorialism of the first *Restatement*: what has been termed “governmental interest analysis.”³⁵ Although the leading exponent of interest analysis, Professor Brainerd Currie, was opposed to the new restatement effort,³⁶ his writings have had conspicuous impact on the drafting of the *Restatement (Second)*.

Governmental interest analysis — which constitutes a choice-of-law methodology in its own right — is premised on the concept that every state law implements a state policy or policies. These state policies, which can be ascertained by employing the common processes of statutory construction, normally target persons or events having some connection with the state. The connecting factor for some laws is the occurrence of certain *conduct* within the state,³⁷ but

32. *Id.* § 6(1).

33. *See id.* § 6 cmt. i.

34. *See Reese, supra* note 17, at 509 (stating that “it is difficult to see in the ordinary case how these needs would be affected by a decision one way or the other”); *see also* *Judge v. American Motors Corp.*, 908 F.2d 1565, 1573–74 (11th Cir. 1990) (finding no threat to international concerns posed by application of American law to tort occurring in Mexico).

35. *See Reese, supra* note 17, at 509 (stating that “the Restatement gives support to the views of Professor Brainerd Currie and of those other advocates of what is popularly referred to as the ‘governmental interest analysis’ approach to choice of law”).

36. *See Currie, supra* note 14, at 1234–39.

37. For example, a law imposing strict liability upon those keeping dangerous animals might be interpreted as serving the primary purpose of regulating conduct within the jurisdiction, i.e., deterring the keeping of such animals or intimidating their owners into taking exceptional safety precautions.

even more important for many tort laws, the connecting factor is the *domicile* of the persons involved in the tortious occurrence.³⁸

Classical interest analysis posits that state tort laws are usually enacted to *benefit* domiciliaries (or residents).³⁹ Broadly speaking, most tort laws that authorize recovery for injured plaintiffs are intended primarily for the benefit of resident-plaintiffs. By comparison, state tort laws that limit or deny liability (e.g., charitable immunity statutes) are said to be intended for the benefit of resident-defendants. The concept that states enact laws primarily to benefit their own residents is pivotal to interest analysis, particularly if it is to have great utility in resolving conflicts issues.⁴⁰ This is not to suggest that nonresidents live outside the “law” when they journey into another state. Rather, they are deemed to be protected to the extent that the law of their home state protects them.

Only when the policy of a state is implicated by the facts of a controversy — i.e., when one of its domiciliaries would benefit by application of that state's law or (less often) when there has been some conduct that the state seeks to directly regulate by its liability-imposing rule — will that state be deemed “interested” in applying its law to govern a legal issue. If there is no fact that implicates the state's legal policy — i.e., there is no state resident to protect by application of state law and no regulated conduct that has occurred within the state — then that state is “uninterested” in applying its

38. Negligence law is usually interpreted as serving the primary purpose of *compensating* local victims, rather than deterring negligent conduct (which, it is presumed, occurs largely by accident and thus will not be appreciably deterred by the mere existence of liability law). *See, e.g.,* *Schultz v. Boy Scouts of Am., Inc.*, 480 N.E.2d 679 (N.Y. Ct. App. 1985) (holding that rules authorizing recovery for negligent conduct are primarily “loss allocating” and not “conduct-regulating”).

Professor Larry Kramer has recently elaborated on the various purposes of state law and identifies four broad categories of purpose that are relevant to the present discussion: (1) conduct regulation (territorially focused), (2) compensation (resident-focused), (3) liability limitation (resident-focused), and (4) encouragement or prevention of certain consequences (which may focus on both territorial conduct and residents). *See* Larry Kramer, *Rethinking Choice of Law*, 90 COLUM. L. REV. 277, 298–99 (1990).

39. *See* BRILMAYER, *supra* note 10, at 54–56; RICHMAN & REYNOLDS, *supra* note 6, at 213–15.

40. The emphasis of interest analysis on domiciliary protection has been criticized by some conflicts scholars as provincial and even unconstitutional. *See* BRILMAYER, *supra* note 10, at 210–15; John H. Ely, *Choice of Law and the State's Interest in Protecting Its Own*, 23 WM. & MARY L. REV. 173, 192–99 (1981). *But see* Kramer, *supra* note 38, at 302 (arguing presumption that state law is targeted at domiciliaries is deferential to governing power of state where nonresidents are domiciled.)

law.

When two states have conflicting laws pertaining to an issue, interest analysis seeks to resolve the “conflict” by first classifying it. If both states are “interested” in applying their laws to the facts of a dispute, then there is a *true conflict*. If only one state is interested in applying its law, then there is a *false conflict*. Finally, if no state has an interest in applying its law, then there is an *unprovided-for case*.⁴¹

Without question, the most significant contribution of governmental interest analysis is its identification of the “false conflict.”⁴² When a false conflict is presented, the solution is obvious: Apply the law of the only “interested” state.⁴³ In this manner, one state's legal policies are promoted, without harming the legal policies of other states. It is just such a false-conflict case that has prompted numerous state courts, including the Florida Supreme Court, to adopt methodologies like the *Restatement (Second)* which employ interest analysis.⁴⁴

There is considerable dispute about which state's law to apply when the court is presented either with a true conflict or an unprovided-for case. Professor Currie contended that a court should apply its own law (“*lex fori*”) when presented with a true conflict,⁴⁵ but most courts have not followed this suggestion. Alternative methods for resolving true conflicts include applying the law of the “most” interested state,⁴⁶ applying the “better” law,⁴⁷ or applying the law of the state where the injury occurred (the LLD state under territorialist methodology).⁴⁸

As previously stated, it is clear that the *Restatement (Second)* incorporates a substantial element of interest analysis. More partic-

41. See RICHMAN & REYNOLDS, *supra* note 6, at 213–18.

42. See EUGENE F. SCOLES & PETER HAY, CONFLICT OF LAWS 583 (2d ed. 1992) (“The false conflict notion . . . has received almost unanimous acceptance . . .”).

43. The writings of both Professor Leflar and Professor Reese indicate that they support the “false-conflict” analysis, although the term is not used in the *Restatement (Second)*. See Leflar, *supra* note 7, at 274–75; Reese, *supra* note 17, at 510–11.

44. See *infra* text accompanying notes 87–88.

45. Currie, *supra* note 14, at 1242–43.

46. See generally Albert A. Ehrenzweig, *A Counter-Revolution in Conflicts Law? From Beale to Cavers*, 80 HARV. L. REV. 377, 388–89 (1966) (suggesting interest-analysis courts primarily engage in weighing or balancing of interests).

47. See generally BRILMAYER, *supra* note 10, at 64–66.

48. See *infra* text accompanying notes 220–25.

ularly, the *Restatement (Second)* affirms the “false-conflict” solution of interest analysis by indicating that, when only one state is truly interested in applying its law to a tort dispute, that state's law should apply.⁴⁹ But the *Restatement (Second)* is less clear about the means of resolving true conflicts. As will be discussed subsequently, it is arguable that the *Restatement* calls for the “weighing” of state interests and application of the law of the “most” interested state, but it is also arguable that the *Restatement* calls for use of the territorialist, LLD law in some situations where state interests conflict.⁵⁰

The *Restatement (Second)* also perpetuates several of the ambiguities that have troubled interest-analysis methodology throughout its history. For example, which state is “interested” in parties domiciled in more than one state? The *Restatement* provides no definitive resolution of how to determine which states are “interested” in multi-state businesses that arguably “reside” in many states.⁵¹ As has been recently illustrated by litigation in Florida, much may turn upon whether a state is interested only in those businesses that are incorporated locally or have their principal place of business within the state, or whether a state's interest extends to any entity transacting some business within the state.⁵² Similarly, the *Restatement* expressly declines to resolve the issue of whether a state is interested in persons or businesses that establish domicile *after* the occurrence of a tort, as occurs with some frequency in conflicts litigation.⁵³

Whatever their ambiguities, principles 6(2)(b) and (c) incorporate some version of interest analysis as a means of determining which state has the most “significant relationship” to a choice-of-law issue. If, as has happened surprisingly often when courts apply the *Restatement (Second)*, there is no consideration of state interests, the court has omitted a key element of the significant relationship test.⁵⁴

The next of the section 6 principles — the “protection of justified expectations” — is largely intended for use in transactional settings,

49. See *supra* note 43.

50. See *infra* text accompanying notes 76–78.

51. See *infra* text accompanying notes 128–29.

52. See *infra* text accompanying notes 126–30, 205–14.

53. See *infra* text accompanying note 123.

54. See *infra* text accompanying notes 159–75.

including the resolution of contractual and property issues.⁵⁵ This principle has little application to most tort issues, where there is seldom any expectation concerning the consequences of unintended torts,⁵⁶ but may indirectly arise in tort litigation insofar as contractual insurance coverage is pertinent to recovery.⁵⁷

Principle 6(2)(e) calls attention to the “basic policies underlying the particular field of law.”⁵⁸ It is unclear what relevance, if any, this principle has to tort litigation. Comments to this principle provide illustrations, but none of these pertains to tort issues.⁵⁹ Consequently, this principle appears to have had little impact on resolution of tort problems under the *Restatement*.

The final two principles of subsection 6(2) are often discussed together. These principles focus on the need for “certainty, predictability and uniformity of result” and “ease in the determination and application of the law to be applied.”⁶⁰ Legal professionals who have a passing familiarity with conflicts problems will attest to the im-

55. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(d) (1969).

56. See Reese, *supra* note 17, at 511.

57. See *infra* text accompanying notes 315–19; see also Wal-Mart Stores, Inc. v. Budget Rent-a-Car Sys., 567 So. 2d 918, 921 (Fla. 1st Dist. Ct. App. 1990) (suggesting that car rental agency might have some expectation that vicarious liability law of state where lease entered into would apply).

58. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(e) (1969).

59. See *id.* § 6 cmts. c–k, § 145 cmts. b–d. The latter comment suggests that the “basic policy” principle is of little utility in personal injury suits, given the conflicting nature of policies that arise in the setting of multi-state torts (tort policies “are likely to point in different directions in situations where the important elements of an occurrence are divided among two or more states.”) *Id.* § 145 cmt. d. It should be noted, however, that Professor Reese suspected that a pro-compensatory policy might be at operation in tort cases, which might suggest that there is a trend to favor plaintiffs in tort litigation. See Reese, *supra* note 17, at 513. This view finds support in a few Florida court decisions. See, e.g., *Beattey v. College Centre of Finger Lakes, Inc.*, 613 So. 2d 52, 54 (Fla. 4th Dist. Ct. App. 1993); *Stallworth v. Hospitality Rentals, Inc.*, 515 So. 2d 413, 417 n.4 (Fla. 1st Dist. Ct. App. 1987).

60. See generally RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(2)(f)–(g). As Professor Reese has observed in discussing these principles:

Choice of law questions are certainly interesting, but the courts have many other questions to decide. It is common sense for the courts to do what they appropriately can to facilitate their task of decision in the choice of law area. By reason of this value, the courts should seek to develop actual rules of choice of law. Application of such rules, once they have been developed, would be far more saving of time and effort than the decision of each case on an ad hoc basis in the light of the policies underlying the relevant local law rules of the interested states. Formulations of actual rules, of course, also would aid in the effectuation of certainty, predictability, and uniformity of result.

Reese, *supra* note 17, at 513.

portance of these principles. The great bulk of conflicts issues sounding in tort will be resolved through negotiations with personal injury attorneys and insurance company representatives. It is vital to the dispute resolution process that, at a minimum, the participants be able to make a reliable forecast of the basic tort law principles that govern liability. If conflicts doctrine is exceedingly complex or indeterminate, a foundation for settlement will be more difficult to discover.

Whatever the conceptual vacuity of the first *Restatement*, if interpreted literally it usually was predictable, uniform, and easy to apply.⁶¹ This is particularly true concerning tort conflicts given the pervasiveness of the LLD rule and the usual ease with which a court could determine where the plaintiff's injury was inflicted.

Although the *Restatement (Second)* gives prominence to the principles of predictability and simplicity, the comments accompanying the text adopt a surprisingly apologetic tone. Thus, the drafters take pains to note that the "certainty" principles should not be "over-emphasized" to the point of interfering with the achievement of "desirable results."⁶² At this point, one is reminded that the new restatement is indeed an "impossible reconciliation"⁶³ among advisors who would simultaneously seek stability and change.

Whatever the tentativeness of the Restatement's authors, many courts have given considerable emphasis to the goals of predictability and simplicity. As will be discussed in the following section, such emphasis has most often lead courts to return to the territorialist roots of the *Restatement (Second)*.

61. A great deal of scholarly criticism of the first *Restatement* has emphasized how, through a variety of "escape devices," the purported simplicity and uniformity of territorialism was undermined. See SCOLLES & HAY, *supra* note 42, at 576-83. It is difficult to assess how frequently the "escape devices" were actually employed, however, and one suspects that their impact has been somewhat exaggerated in the scholarly literature. One recent effort to empirically assess the operation of the first *Restatement* and other conflicts theories suggests that the first *Restatement* may in fact achieve its avowed goals. As Professor Patrick Borchers concluded based on his study of reported conflicts decisions: "The First Restatement is the most evenhanded of the approaches and courts appear to take it fairly seriously. Territorial connecting factors do not favor forum law, prorecovery rules or local parties. In practice, therefore, it appears that the First Restatement works much as one would expect." Borchers, *supra* note 28, at 377.

62. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 cmt. i (1969).

63. See *supra* text accompanying note 16.

D. The Vestiges of Territorialism

The *Restatement's* ambivalent attitude toward the classical conflicts goals of predictability and simplicity illustrates a final characteristic of the *Restatement (Second)* that pervades the work: notwithstanding the centrality of section 6 and its diverse principles, and notwithstanding its open-ended invitation to courts to search for the state of the “most significant relationship,” the document sounds a strong and recurring note of *territorialism*. This is acutely manifest in a final feature of the *Restatement (Second)* that requires discussion — its abundant use of the presumption that the law of the place of injury will govern *unless* some other state has a more significant relationship to the tort problem.

A point about the organization of the *Restatement (Second)* is in order. If one were to open the text of the *Restatement* and turn to the chapter on “Wrongs” (whose lead topic is “Torts”), one would first encounter section 145. That section, as previously discussed, calls for the application of the law of the state with the “most significant relationship” to a tort issue under the principles of section 6 and further enumerates miscellaneous factual contacts that are to be considered in applying the section 6 principles.⁶⁴

The *Restatement's* treatment of torts does not conclude at this point, however; indeed, one finds that section 145 is followed by *forty* additional sections pertaining to the subject. Some of these sections home in on particular types of torts (e.g., defamation or wrongful death actions), while others focus upon particular tort issues (e.g., contributory fault or charitable immunity).⁶⁵ The question arises: Why these additional sections?

In part, these additional sections can be viewed as in-depth elaboration of how the “significant relationship” test should apply to discrete problems. That is, given the complexity and open-endedness of sections 145 and 6, the drafters have sometimes provided detailed guidance as to how those sections play out in the context of particular tort issues. The value of these particularized sections cannot be overemphasized. Accompanying these sections are detailed “comments” and “illustrations” that offer practical application of the sig-

64. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 (1969).

65. *See infra* note 66.

nificant relationship test. In these sections, one may find an elaboration of the policies that underlie some of the more common tort rules, together with discussion of the various states that might be interested in applying their law to a problem. Furthermore, one finds helpful annotations of relevant case law from other jurisdictions.

But these particularized sections do more than merely elaborate on analysis under the “significant relationship” test. Many of them also contain choice-of-law *presumptions* (or recommendations) that call for application of the traditional LLD law unless some other state has a more significant relationship to the tort issue.⁶⁶ Indeed, there is an overarching presumption for “personal injuries” — contained in section 146 — that provides:

In an action for a personal injury, the local law of the state where the injury occurred determines the rights and liabilities of the parties, unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in section 6 . . . in which event the local law of the other state will be applied.⁶⁷

The *Restatement's* use of the LLD presumption as a starting point for many tort issues constitutes a methodologically important — and controversial — step. Taken literally, this presumption has potential to reinstitute the influence of the territorialist touchstone whose predominance in the past was thought to be the very reason for undertaking a new restatement.

66. The presumption of, or preference for, application of the law of the state of injury is evidenced in those sections addressing: the tortious character of conduct, RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 156 (1969); the standard of care, *id.* § 157; the types of protected legal interests, *id.* § 158; the duty owed to the tort victim, *id.* § 159; principles of causation, *id.* § 160; conditions for liability, *id.* § 162; contributory fault, *id.* § 164; assumption of risk, *id.* § 165; imputed negligence, *id.* § 166; and joint liability, *id.* § 172. On occasion, the *Restatement (Second)* sets forth an alternative presumption or preference, as in the case of intra-family immunity, where the family members' domicile is “usually” the applicable law. *Id.* § 169. On still other occasions, there is no presumption or preference set forth in the black-letter sections; nonetheless, the comments and illustrations accompanying such sections often do emphasize that a particular locale will usually govern an issue. *See, e.g., id.* § 168 cmt. b (stating “most” cases apply law of place of conduct and injury to determine existence of charitable immunity).

67. *Id.* § 146.

The reporter to the *Restatement (Second)* has made clear that the LLD presumption is neither premised on antiquated “vested rights” jurisprudence nor co-equal with the “significant relationship” test. The LLD presumption is just that — a presumption that is always subject to displacement under the “significant relationship” test.⁶⁸ But this presumption serves several important functions.

First, to the extent that the *Restatement* is, at least in part, a “restatement” of what the courts were doing at the time of its promulgation, recognition of the LLD presumption is an accurate description of case-law reality.⁶⁹ Second, the LLD presumption is often perceived as a “fair” outcome, insofar as persons intuitively assume that they become subject to a state’s laws when they enter its territories and are involved in tortious occurrences.⁷⁰ Third — and here the justifications tie in more specifically to the “significant relationship” methodology — the LLD state often *is*, according to the *Restatement*, the state that will have the dominant interest in applying its law to a tortious occurrence.⁷¹ Fourth, application of the LLD presumption, consistent as it is with prevailing conflicts theory in many states and simple as it usually is to apply, will serve two of the principles set forth in section 6, namely, the attainment of a predictable and simple means of resolving tort disputes.⁷² In some sense, the

68. See Reese, *supra* note 17, at 514–17.

69. As has been observed, the only “law” that could plausibly be “restated” at the time of the *Restatement (Second)*’s adoption was territorialism. See RICHMAN & REYNOLDS, *supra* note 6, at 211.

70. See Reese, *supra* note 17, at 514.

71. See *id.* Although the *Restatement* continually affirms that the state of injury often has a strong interest in applying its law to tort issues, it is difficult to square this conclusion with the operation of conventional interest analysis. As previously indicated, the litigants’ *domicile* is usually far more important in determining whether a state is “interested,” and the LLD state is often deemed to be “uninterested” in applying its law unless that state’s law is intended to regulate specific in-state conduct. See *supra* text accompanying notes 37–44. Professor Leflar has openly criticized the LLD preference as set forth in the specific *Restatement* sections:

[The presumptive sections] ha[ve] the doubtful virtue of maintaining a tie with the Bealian past. If our purpose is to break away from that past, and actually to use “most significant relationship” in its section 6 sense as our choice-of-law test, a fair question is whether the narrow sections are of much help. They seem to give a delusive appearance of certainty, which, in the torts choice-of-law area, is neither real nor desirable.

Leflar, *supra* note 7, at 274.

72. See Reese, *supra* note 17, at 513 (development of definite “rules” for choice of law will make choice-of-law process easier and promote certainty, predictability, and uniformity of result).

section 6 principles stressing predictability and simplicity shore up the argument for following the LLD presumption.⁷³

The recognition of a LLD presumption raises a critical question of methodology: Exactly how does a litigant overcome the presumption?

Comment to section 146 (which, again, recognizes an overarching LLD presumption for personal injury actions) states that the determination of whether a state has a more significant relationship to the tort issue than does the LLD state depends “[i]n large part” upon whether that state “has a greater interest in the determination of the particular issue than the state where the injury occurred.”⁷⁴ The reference to some form of interest analysis seems unmistakable. According to the *Restatement's* reporter, the LLD presumption is rebutted when the state of injury has *no* interest in the tort issue.⁷⁵ Thus, the “false conflict” analysis discussed earlier remains a useful means of resolving tort disputes.

It is less certain how the LLD presumption should be handled when a “true conflict” exists. Discussion accompanying section 6 would indicate that a court should seek to apply the law of the state with a “dominant” interest in a torts issue,⁷⁶ but nowhere does the *Restatement (Second)* provide a means of weighing or ranking interests. Furthermore, interest analysis is not the sole criterion of the “significant relationship” test, and when one adds to the analysis the predictability and simplicity principles — with their implicit appeal to straightforward solutions like the LLD presumption — the proper means of resolving “true conflicts” becomes more debatable.

At the same time, certain means of resolving true conflicts probably can be ruled out under the *Restatement (Second)* and so reduce the field of uncertainty somewhat. Nowhere in the *Restatement* is there recognition of the principle that a court should fall back on *lex fori* (the law of the forum) when it is confronted with a “true conflict.” In this respect, the *Restatement (Second)* rejects the solution to “true conflicts” proffered by the leading exponent of interest anal-

73. See *infra* text accompanying note 95.

74. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 146 cmt. c (1969).

75. See Reese, *supra* note 17, at 510–11.

76. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 cmt. c (1969). The weighing of interests is also suggested by the express language of principle 6(2)(c), insofar as it refers to the “relative interests” of concerned states.

ysis, Professor Currie.⁷⁷ Similarly, the *Restatement (Second)* does not authorize a court to apply “the better law” (which in practice might translate into a *lex fori* solution given courts' predictable preference for their own state's law), a solution that has been advocated by one of the committee members who worked on the *Restatement*.⁷⁸

E. A Tentative Approach to Methodology under the *Restatement (Second)*

Although the matter is not free of controversy, one might sketch out the methodology of the *Restatement (Second)* as follows. In the resolution of most tort issues, a court will begin with the presumption that the law of the place of injury applies. The court will then consider the section 6 principles — through which the state of the most “significant relationship” is determined — foremost of which are those calling for a determination of which states are “interested” in applying their law. If only one state is “interested” in the tort issue, the court should apply the law of the interested state whether it be the state of injury or some other state. If two or more states are interested, then the court should attempt to ascertain which state has the “dominant” interest in the issue. If the state of dominance can in fact be determined, then that state's law should apply. If no state's interest is clearly dominant, however, this equilibrium should arguably be resolved by reversion to the presumptive rule (which incidentally serves the section 6 principles of predictability and simplicity.)⁷⁹

If a court is confronted with one of the appreciable number of tort issues lacking a presumption,⁸⁰ or if the place of injury is not one of the several interested states, the court must by necessity

77. *See supra* text accompanying note 45.

78. *See* Robert A. Leflar, *Conflicts Law: More on Choice-Influencing Considerations*, 54 CAL. L. REV. 1584, 1587–88 (1966).

79. *See supra* text accompanying note 66. There is an additional variation. If two states are interested in applying their law, but neither of these states is the place of injury, the court would have no choice but to resolve the conflict without reference to the presumptive rule.

80. *See supra* note 66.

engage in a relatively unguided exercise in interest analysis.⁸¹ At this point, a court that sincerely attempts to hew to the *Restatement (Second)* methodology may find itself hoping that, somewhere in the comments or illustrations accompanying the relevant *Restatement* section, the drafters have already devised a solution.

One has profound sympathy with those courts who must negotiate this relatively complex methodology. One must also wonder whether the Florida Supreme Court appreciated the nature of its leap when in 1980, it ceased “clinging” to the “inflexible *lex loci* doctrine” and reached for the “more rational significant relationships test.”⁸²

III. APPLICATION OF THE RESTATEMENT (SECOND) BY FLORIDA COURTS

A. The *Restatement (Second)* in the Florida Supreme Court

Since its inaugural decision in *Bishop v. Florida Specialty Paint Co.*,⁸³ the Florida Supreme Court has been asked to apply the *Restatement (Second)* on five occasions. On two of these occasions, the court characterized the issue in dispute as a “contractual” rather than a “tort” issue and declined to apply the methodology of the *Restatement (Second)*.⁸⁴ As a consequence, one is left with a small handful of court opinions from which to glean some methodological instruction in applying the *Restatement*.

The decision in *Bishop* itself contains far more quotation of the *Restatement (Second)* than interpretation, perhaps reflective of the fact that the court remanded the case for further application of the newly adopted conflicts test.⁸⁵ But the court's description of *its* view

81. As noted earlier, the interest-analysis principles and the predictability and simplicity factors are usually the only relevant concerns in tort cases. *See supra* text accompanying notes 32–59. When the place of injury is an uninterested state, or when there is no presumption set forth in the relevant *Restatement (Second)* section, the court would seem to be left with little more than interest analysis. While this may be “textually” true, however, one wonders whether the LLD reserve solution might not be appealing as a means of resolving a seemingly insoluble conflict of interests. *See infra* text accompanying notes 135–53.

82. *State Farm Mut. Auto. Ins. Co. v. Olsen*, 406 So. 2d 1109, 1110 (Fla. 1981); *see Bishop v. Florida Specialty Paint Co.*, 389 So. 2d 999, 1001 (Fla. 1980).

83. *Bishop*, 389 So. 2d at 999.

84. *See infra* text accompanying notes 246–49.

85. *Bishop*, 389 So. 2d at 999. In *Bishop*, the court quoted in full *Restatement* §§ 6,

of *Restatement* methodology is significant:

The conflicts theory set out in the Restatement does not reject the “place of injury” rule completely. The state where the injury occurred would, under most circumstances, be the decisive consideration in determining the applicable choice of law. Indeed, the rationale for a strict *lex loci delicti* rule is also reflected in the same Restatement's section 6, where “certainty, predictability and uniformity of result,” and “ease in the determination and application of the law to be applied” are cited as major factors in determining the proper choice of law.⁸⁶

The court in *Bishop* did not discuss whether the *lex loci delicti* presumption was rebutted in the case before it, although the court's earlier statement that the place of injury was a “happenstance,” and its recitation that all the parties were from Florida and that the guest/host relationship arose in Florida, all but indicate that the presumption was rebutted.⁸⁷ Nor did the court allude to the appropriate role of interest analysis, although the facts in *Bishop* presented a classical “false conflict.”⁸⁸

The supreme court reaffirmed its territorialist bent one year later in *State Farm Mutual Automobile Insurance Co. v. Olsen*.⁸⁹ In *Olsen*, the court was asked to determine whether, pursuant to uninsured motorist coverage, the plaintiff could recover from the insurer for the death of her husband in an Illinois automobile accident. Both the plaintiff and her husband were Floridians (where the policy had been taken out), but the uninsured tortfeasor was an Illinois resident. The issue presented to the court was whether to apply Illinois'

145, and 146 (setting forth general presumptive rule for personal injury issues). In point of fact, there are two other *Restatement* provisions that more specifically address the issue of “guest statutes” that was presented in *Bishop*. Both of these sections, § 156 and § 159, refer to the guest-statute issue in their comments. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 156 cmt. f (1969). Both provide that “[t]he applicable law will usually be the local law of the state where the injury occurred.” *Id.* §§ 156 cmt. b, 159.

86. *Bishop*, 389 So. 2d at 1001.

87. *Id.* at 1000.

88. The place of the aviation injury in *Bishop* (South Carolina) would have no interest in regulating conduct (in fact, it excused misconduct of the defendants by making them liable only for reckless behavior) and would have no interest in compensating or immunizing nonresidents. By comparison, the state of Florida had an obvious interest in seeing that its citizens were compensated for their injuries.

89. *State Farm Mut. Auto. Ins. Co. v. Olsen*, 406 So. 2d 1109 (Fla. 1981).

law (which had been interpreted by the lower courts as recognizing the contributory negligence defense) or Florida's law of comparative negligence.⁹⁰

Although the plaintiff was suing under her insurance policy (a contract claim), the court determined that the coverage of the insurer was dependent on the underlying tort liability of the uninsured motorist (who was not a party). Thus, the court treated the issue as a "tort" issue, and applied the *Restatement (Second)*.⁹¹

The court's opinion in *Olsen*, insofar as it offers methodological instruction, consists largely of verbatim quotation from *Restatement* sections 6, 145, and 146 and from *Bishop*.⁹² The court's ensuing analysis is exceedingly brief:

Certainly, Illinois has the most significant relationship with the occurrence since the accident happened there. Furthermore, regarding the various policies enumerated in section 6, Illinois has an interest in the rights of its citizens who are subject to subrogation by the insurer on any uninsured motorist coverage [it] pays, which interest, in this case, is paramount to the relevant policies of Florida as the forum state. Finally, to reiterate our position in *Bishop*, for reason of uniformity and ease in determination and application of the law (barring other factors, not existent here, which may outweigh the place of the injury as a controlling consideration), we deem Illinois law to be controlling.⁹³

Other commentators have persuasively argued that the decision in *Olsen* is correct as a matter of statutory construction, even though this rationale is not set forth in the opinion.⁹⁴ For present purposes, it will suffice to highlight several aspects of the court's conflicts analysis.

First, the court does offer a snippet of interest analysis. This snippet, admittedly, does not adequately discuss all the interests involved (i.e., the plaintiff-Floridian's), nor does it explain why Illinois' interest is "paramount" to that of Florida. There is the language of interest weighing, but no indication of how this weighing has oc-

90. *Id.* at 1110.

91. This characterization in *Olsen* will be discussed later in this Article. *See infra* text accompanying notes 260–64.

92. *Olsen*, 406 So. 2d at 1110–11.

93. *Id.* at 1111.

94. *See* Southerland & Waxman, *supra* note 1, at 501–27.

curred.

More important, the opinion is heavily tilted toward application of the law of the LLD state. Not only are the “uniformity” and “ease” factors of section 6 cited in favor of the *lex loci* presumption, but the court flatly states that Illinois has the most significant relationship “since the accident happened there.”⁹⁵ Taken literally — which it probably should not be — this statement seems to have collapsed the significant relationship test into the traditional territorialist rule.

If the *Olsen* opinion is succinct in its application of the significant relationship test, the subsequent decision of the court in *Hertz Corp. v. Piccolo*⁹⁶ is nothing short of glib. In *Hertz*, the Court was asked to determine whether, pursuant to Louisiana law, a plaintiff-Floridian who had been injured as the result of an accident in Louisiana could maintain a direct action against the tortfeasor's insurer (*Hertz*).⁹⁷ Under Florida law, such direct actions were prohibited.

The court permitted maintenance of the direct action.⁹⁸ Perhaps pivotal to the court's analysis was its willingness to follow the precise methodological directions of the *Restatement (Second)*. Although the *Restatement (Second)* generally views procedural issues as governed by the law of the forum,⁹⁹ the direct-action issue is an express exception.¹⁰⁰ Direct action issues are viewed as substantive tort issues governed by the more general “significant relationship” test.

The court was compelled, accordingly, to determine whether Florida or Louisiana had the most significant relationship to the dispute. The court's answer was contained in one sentence: “[C]learly in the instant case Louisiana has a more significant relationship to the issue than Florida.”¹⁰¹

The only clue to the court's summary conclusion may be found in its reference to section 146 of the *Restatement* and the LLD presumption. As in *Olsen*, the court resolved a somewhat challenging

95. *Olsen*, 406 So. 2d at 1111.

96. *Hertz Corp. v. Piccolo*, 453 So. 2d 12 (Fla. 1984).

97. *Id.* at 13.

98. *Id.* at 13–14.

99. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 122 (1969).

100. *Hertz*, 453 So. 2d at 14 (quoting RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 125 (1969) to the effect that *lex fori* will not be applied). The comment to § 125 makes clear that the court was correct on this point.

101. *Id.* at 14.

conflict of "interests" (which were never referred to in the opinion) by reverting to territorialism.¹⁰²

The next opinion of the Florida Supreme Court to address application of the *Restatement (Second)* to torts is *Bates v. Cook*.¹⁰³ In *Bates*, the court took the sensible step of conforming Florida's "borrowing statute" pertaining to the statute of limitations in tort suits to the "significant relationship" methodology of the *Restatement (Second)*.¹⁰⁴ As in *Hertz*,¹⁰⁵ the court demonstrated a deferential attitude to the *Restatement's* analysis of the legal issue, even though the leading district court decision viewed the issue as one within the province of the Florida Legislature that had enacted the borrowing statute.¹⁰⁶ Because the court was responding to a certified question from federal court, it did not have the occasion to apply the "significant relationship" test to the underlying dispute.

The most recent treatment of the *Restatement (Second)* by the Florida Supreme Court is found in the trilogy of cases reported in *Celotex Corp. v. Meehan*.¹⁰⁷ In *Meehan*, the court was called upon to apply the Florida borrowing statute to asbestos litigation. In the

102. The case is not an easy one to classify under interest analysis. Louisiana's direct-action statute might, under more conventional interest analysis, be deemed unimplicated since the plaintiff was a Floridian. On the other hand, that statute might also be read to cover *any* accident occurring on Louisiana highways, thus giving Louisiana an "interest" in the issue. *Hertz*, 453 So. 2d at 13 n.2 (quoting statute to the effect that right of direct action shall exist "provided the accident or injury occurred within the State of Louisiana"); see Southerland & Waxman, *supra* note 1, at 554-56 (discussing Louisiana's interest).

Florida, at the same time, might have an interest in applying its law to Hertz based on either Hertz's business presence in the state, or based on the fact that the forum was a Florida court (assuming Florida's law is intended to regulate litigation conduct). See *infra* text accompanying notes 207-13; see also *Hertz*, 453 So. 2d at 16 (Shaw, J., dissenting). On the other hand, depending on the state of incorporation and principal place of business of Hertz (which are not mentioned in the opinion), Florida might lack a pro-domiciliary protective interest.

It is exceedingly difficult, then, to determine what type of conflict — true, false, or unprovided for — is presented by the *Hertz* facts.

103. *Bates v. Cook*, 509 So. 2d 1112 (Fla. 1987).

104. In particular, the court ruled that § 95.10 of the *Florida Statutes* which calls for the "borrowing" of a shorter statute of limitations of the state where a claim "arises," is to be interpreted in accordance with the methodology of the *Restatement (Second)* applicable to substantive tort issues. *Id.* at 1114.

105. *Hertz*, 453 So. 2d 12 (Fla. 1984).

106. See *Pledger v. Burnup & Sims, Inc.*, 432 So. 2d 1323 (Fla. 4th Dist. Ct. App. 1983), *rev. denied*, 446 So. 2d 99 (Fla. 1984).

107. *Celotex Corp. v. Meehan*, 523 So. 2d 141 (Fla. 1988).

trilogy of cases, the court was presented with a mixture of factual scenarios involving plaintiff-Floridians who had been exposed to asbestos in one state, but who had discovered their contraction of asbestos-related illness in some other state. The question presented by Florida's borrowing statute was: Where did the plaintiffs' claim "arise" for purposes of determining the applicable statute of limitations?¹⁰⁸ As *Bates* had indicated, this question was to be answered by application of the *Restatement (Second)* methodology applicable to torts.¹⁰⁹

Meehan is not an easy case. At the outset, the court was presented with factual scenarios where the place of the "injury" was unclear and hence, where application of the LLD presumption was uncertain. If "injury" was defined as exposure to the asbestos, then at least two of the legal claims had arguably expired.¹¹⁰ If "injury" was defined as onset of the plaintiff's disease, then further medical testimony would be required to identify the time at which the asbestos first began to take effect on the plaintiff's person.¹¹¹ Finally, if "injury" was defined as discovery of the plaintiffs' illness, then two of the plaintiffs could proceed with their actions while the third — a Floridian who had been exposed to asbestos in the state of Florida but discovered his illness elsewhere — would find his action barred.¹¹²

The court ruled, over vigorous dissent by Justice Barkett, that the two plaintiffs who had been exposed in New York and Virginia but diagnosed in Florida would be governed by the limitations periods of the places of exposure (which would preclude suit by at least

108. Under the laws of two "exposure" states, it was arguable that two of the plaintiffs' claims were barred since those states did not "toll" the statute of limitations in the years intervening between the time of exposure and diagnosis of the illness. *See id.* at 144–47. By comparison, the limitations law of Florida — where the illnesses in these two cases were diagnosed — did toll the running of the limitations period during the period when the illness was yet undiagnosed.

In the third case involved, the plaintiff has been exposed to asbestos in Florida (whose limitations statute permitted suit), but had been diagnosed in a state whose limitations period had expired. *See id.* at 147–48.

109. *See Bates v. Cook*, 509 So. 2d 1112 (Fla. 1987).

110. This has been described as the "exposure" rule and appears to be followed by a small number of states. *See Meehan*, 523 So. 2d at 150 (Barkett, J., dissenting).

111. This approach was described by the dissent as the "medical evidence" rule. *Id.*

112. This approach was described by the dissent as the discovery rule and had been followed by the courts of Florida in nonconflicts disputes. *Id.* at 149.

one of the plaintiffs).¹¹³ By comparison, the plaintiff who had been exposed in his home state of Florida but diagnosed in Tennessee would be governed by Florida's limitations period (thus permitting suit).¹¹⁴

Not surprisingly, the majority did not cite to or discuss the LLD presumption. But this did not signal the inconsequence of territorialist connections. Instead, the court interjected territorialism through a form of *contact counting*. Illustrative is the court's analysis of the claim of the representative for the deceased Mr. Meehan, who had moved to Florida some 25 years after being exposed to asbestos in the Brooklyn Navy Yard.¹¹⁵ In finding that New York had the most significant relationship to the plaintiff's claim, the court noted that New York was the deceased's residence at the time of exposure, the employer's domicile at the time of exposure, and the place of exposure.¹¹⁶ The only significant contacts of Florida, by comparison, were that the illness manifested itself and was discovered in Florida.¹¹⁷

The court's analysis was devoid of any discussion of interests. While the court's identification of factual connections might have provided the predicate for some form of interest analysis, there was no attempt to relate these facts to the interests or policies of the relevant states.¹¹⁸

The dissent was quick to call the majority to task for its methodological shortcomings. Alluding to the majority's reliance on bare contact enumeration, Justice Barkett observed that these contacts were relevant insofar as they related to section 6 policies.¹¹⁹ Justice Barkett then proceeded to identify the mix of "interests" presented by the complex fact patterns of the litigation.

Initially, the dissent recognized that "Florida clearly has an interest in protecting its residents."¹²⁰ While this point seems

113. Because of New York's recent enactment of legislation reviving claims for asbestos exposure — whose constitutionality had yet to be determined — the court permitted the New Yorker's claim to proceed. *See id.* at 146.

114. *Id.* at 147.

115. *Id.* at 144.

116. *Id.* at 145.

117. *Id.* at 146.

118. Noteworthy is that the court did not consistently side with the Florida plaintiffs, as is often a tendency with interest analysis given its pro-domiciliary bent.

119. *Meehan*, 523 So. 2d at 151 (Barkett, J., dissenting).

120. *Id.*

uncontroversial, it conceals a yet unresolved issue: to what extent should a court consider the residence of a litigant that is established *after* a tortious occurrence (as was true of two of the plaintiffs in *Meehan*)? Contemporary courts continue to disagree about the relevance of an after-acquired domicile, notwithstanding its obvious importance in applying a conflicts methodology like interest analysis that often pivots about the litigants' domicile.¹²¹ Regarding the problem of after-acquired domicile, the *Restatement (Second)* does not take a position.¹²²

A similar problem arises when the dissent analyzes interests in the corporate defendants. For one thing, the dissent again casually concludes that the defendants' domicile must be considered as it existed "both at the time of the plaintiff's exposure *and* at the time of the litigation."¹²³ The dissent also suggests that Florida might have an interest in applying its law to a corporate defendant based on the fact that the corporation does business ("resides") in the state of Florida.¹²⁴ Yet, the dissenting opinion further refers to the corporation's "principal place of business" and its place of "incorporation" as factors that might give rise to state interests.¹²⁵ The questions arise: Which state is "interested" in a corporation that does extensive business in many states? The state of incorporation? The state of its principal place of business? Any state where it does business?

The problem of identifying which state is "interested" in a corporation or business is not of the dissent's making. It pervades choice-of-law methodologies in which "domicile" is important.¹²⁶ Moreover, the *Restatement (Second)* is notably ambiguous on this issue. One of the primary factual references applicable to tort issues addresses "the domicil, residence, nationality, place of incorporation,

121. See generally LEA BRILMAYER & JAMES MARTIN, *CONFLICT OF LAWS: CASES AND MATERIALS* 286-94 (3d ed. 1990).

122. RESTATEMENT (SECOND) OF CONFLICT OF LAWS ch. 7 intro. cmt. 2, at 414 (1969) ("The problem is not dealt with in the Restatement . . . because existing authority is too sparse to warrant doing so.").

123. *Meehan*, 523 So. 2d at 151 (Barkett, J., dissenting).

124. *Id.*

125. *Id.* It seems obvious that the litigants failed to adequately brief the issue of corporate "domicile," and Justice Barkett's discussion was necessarily limited to raising possibilities. *Id.*

126. See Jack L. Goldsmith, Note, *Interest Analysis Applied to Corporations: The Unprincipled Use of a Choice of Law Method*, 98 YALE L.J. 597 (1989) (suggesting that uncertain "domicile" of corporations often operates to their notable disadvantage).

and place of business of the parties.”¹²⁷ While comments to the *Restatement* indicate that “a corporation's principal place of business is a more important contact than the place of incorporation,” the same comments suggest that the “place of business” is an important contact concerning “business” issues.¹²⁸ Obviously, given the prevalence of multi-state businesses in tort litigation (insurance companies and product manufacturers, for example), there is serious uncertainty for a court that would seek to ascertain the relevant states' interests in corporate litigants.¹²⁹

Thus, while the dissent does a better job in identifying the appropriate methodology for resolving the limitations issue under the *Restatement (Second)*, discussion of this methodology reveals significant problems in its application. One is hard pressed to sort out the possible array of “interests” presented by the complex facts in *Meehan*, and one is daunted by the task of determining which state's interest is “dominant.” The facts in *Meehan* present a problem where the *Restatement (Second)* provides no escape to simplicity.

What tentative conclusions can one draw from the limited Florida Supreme Court precedent interpreting the *Restatement (Second)*? First, other than in the situation of a simple and conspicuous “false conflict” (like *Bishop*), the court shows a continual propensity to return to the territorialist rule of *lex loci delicti*.¹³⁰ In so doing, the court attaches substantial significance to the *Restatement's* pre-

127. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145(2)(c) (1969) (emphasis added).

128. *Id.* § 145 cmt. 3; *see id.* § 150 (stating that corporation's principal place of business usually has most significant relationship in cases of multi-state defamation).

129. Another problem is suggested by Justice Barkett's dissent. In employing the *Restatement* factor in § 145(2)(d) that focuses on “the place where the relationship, if any, between the parties is centered,” the dissent concluded that relationship “clearly is centered in Florida” with respect to the issue of damages. *Meehan*, 523 So. 2d at 151 (Barkett, J., dissenting). Yet, her support for this position is summarized as follows: “[T]he plaintiff had been a Florida resident for eight years before the disease manifested. All of the witnesses and testimony on damages will be in Florida.” *Id.* It is difficult to see what “relationship *between the parties*” is suggested by this factual recitation. Indeed, the *Restatement (Second)* indicates that the “relationship” contact is relevant “when the injury was caused by an act done in the course of the relationship.” RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 cmt. e (1969). There is no indication that the parties' “relationship” at the time of the defendant's “act[s]” — which was an employment relationship — had anything to do with Florida. *Id.* § 145(2)(d).

130. Even *Meehan* has the “flavor” of a territorialist solution. The court consistently applied in *Meehan* the law of the state where everything the defendants conceivably *did* to inflict “injury” on the plaintiffs had been done. *See Meehan*, 523 So. 2d at 141.

sumptive choice of law, as well as to those section 6 principles favoring a predictable and simple solution.

Second, the court evidences little willingness to engage in even a moderately sophisticated form of interest analysis. In no opinion to date has the court adequately discussed the full range of interests presented by a dispute,¹³¹ nor has it suggested any means of resolving conflicting interests — other than abandoning the effort and falling back upon the territorialist presumption.

Third, the court has demonstrated a high degree of deference to the judgment of the *Restatement* authors, as illustrated by its adoption of the solutions offered in specific *Restatement* sections as well as its repeat references to *Restatement* commentary. This may suggest that, to the extent that the *Restatement (Second)* provides relatively straightforward solutions to discrete conflicts issues, the court is prone to follow them.

It would be premature at this point to conclude that the court's "version" of *Restatement* methodology is fully settled. The court's treatment of the *Restatement* is still relatively limited, and there is a much greater body of state court and federal court precedent that still may shape Florida's final rendition of the *Restatement*. It is to this precedent that discussion now turns.

B. The *Restatement (Second)* in the Lower Courts¹³²

1. General Observations

At the outset, it must be conceded that the methodologies employed by the lower courts are too varied for the detection of a "majority rule," even though certain trends are suggested. Virtually every imaginable variation on *Restatement* methodology can find support in some lower court decision. This is true of both state and

131. Indeed, *State Farm Mutual Automobile Insurance Co. v. Olsen* is the sole majority opinion of the supreme court to even mention interest analysis. See *State Farm Mut. Auto. Ins. Co. v. Olsen*, 406 So. 2d 1109 (Fla. 1981).

132. This section of the Article examines the reported decisions of the Florida district courts of appeal (i.e., the intermediate appellate courts for the state of Florida), the federal district courts within the state of Florida, and the 11th Circuit. Under applicable United States Supreme Court precedent, federal courts applying state law are obligated to apply the choice-of-law methodology of the state in which the federal trial court is located. See *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941), *cert. denied*, 316 U.S. 685 (1942).

federal court opinions.

If the *Restatement (Second)* has a saving grace in the lower courts, it is found in the highly specific sections devoted to particular tort issues. These sections, together with their comments and illustrations, have often disciplined the lower courts' analysis even when they employ questionable methodology.¹³³ These specific provisions may, in the long run, present the *Restatement's* greatest hope for the development of a more uniform and predictable body of case law.

Still, even these specific guideposts in the *Restatement* have not brought great order to conflicts doctrine.¹³⁴ Upon reviewing lower court precedent, one discovers a myriad of approaches including contact counting, interest analysis, and ever-present territorialism. Moreover, there is considerable variation even among those courts whose methodology can be loosely classified under one of these approaches.

The following discussion will attempt to offer some useful observations about what is a fairly disordered body of case law. These observations are presented with a note of caution. In order to synthesize a heterogeneous body of case law, one depends upon the reported decisions to thoroughly set forth the facts of the controversy, fully explicate the pertinent legal rules in dispute, together with the policies they implement, and achieve a modicum of internal consistency. These characteristics are too often lacking. Whether the

133. As noted earlier, the comments and illustrations accompanying the *Restatement (Second)* often explain how the significant relationship test should be applied in various factual scenarios. *See supra* text accompanying notes 65–68. Thus, even when a court errs in its understanding of proper methodology, the guidance and examples provided by the *Restatement* may still lead the court to a proper choice of law. *See generally* Beattey v. College Centre of Finger Lakes, Inc., 613 So. 2d 52 (Fla. 4th Dist. Ct. App. 1993) (applying specific *Restatement* rule on wrongful death damages); Aerovias Nacionales de Colombia, S.A. v. Tellez, 596 So. 2d 1193 (Fla. 3d Dist. Ct. App. 1992) (applying specific *Restatement* rule on procedural issues); Wal-Mart Stores, Inc. v. Budget Rent-a-Car Sys., 567 So. 2d 918 (Fla. 1st Dist. Ct. App. 1990) (applying specific *Restatement* rule on vicarious liability); Pennington v. Dye, 456 So. 2d 507 (Fla. 2d Dist. Ct. App. 1984) (applying specific *Restatement* rule on spousal immunity); Steele v. Southern Truck Body Corp., 397 So. 2d 1209 (Fla. 2d Dist. Ct. App. 1981) (applying specific *Restatement* rule on wrongful death recovery).

134. As noted earlier, not all tort issues are governed by a specific provision, and even those that are may lack a presumptive rule. *See supra* note 66. Moreover, many courts fail to mention the specific *Restatement* provisions that pertain to discrete legal issues.

fault lies with the courts, the attorneys who brief the conflicts issues, or the *Restatement* drafters who have devised the methodology, is unclear.

2. *The Continuing Influence of Territorialism*

As previously observed, both the *Restatement (Second)*¹³⁵ and the Florida Supreme Court¹³⁶ give a prominent role to the territorialist rule of LLD. It is not surprising, then, to discover that the conflicts analysis of lower courts has often lead them to apply the law of the place of injury.

The most literal way in which the place of injury has figured into lower court analysis is through the frequent citation to the territorialist presumptions of *Restatement* section 146 and other specific sections.¹³⁷ In addition, courts often observe — quite accurately¹³⁸ — that supreme court precedent signals application of the law of the place of injury in most cases.¹³⁹

The important consideration, however, is not how often the courts refer to the territorialist presumption or even how often they apply the law of the place of injury. More important is the *type* of dispute in which they use the territorialist presumption. If the law of the place of injury is applied often in instances of “true conflict,” then it may be that, for sake of predictability and simplicity, the

135. See *supra* text accompanying notes 66–72.

136. See *supra* text accompanying notes 84–102.

137. See, e.g., *Florida Steel Corp. v. Whiting Corp.*, 677 F. Supp. 1140, 1141 (M.D. Fla. 1988); *Walsh v. Arrow Air, Inc.*, 629 So. 2d 144, 146 (Fla. 3d Dist. Ct. App. 1993); *Steele*, 397 So. 2d at 1211. Only one court has suggested confusion in interpreting the presumptive effect of the LLD rule contained in the *Restatement (Second)*. Thus, in *Proprietors Insurance Co. v. Valsecchi*, the majority concluded that “the place of injury takes precedence *only* when a comparison of the competing state's contacts reveals that [the state of injury] is the state most significantly connected to the particular issue in the litigation.” *Proprietors Ins. Co. v. Valsecchi*, 435 So. 2d 290, 294 (Fla. 3d Dist. Ct. App. 1983), *rev. denied*, 449 So. 2d 265 (Fla. 1984). As pointed out by Judge Schwartz in his dissent, application of the presumptive rule appears to be called for not only when the LLD state is the most interested state, but also where there is no other state that clearly has a greater interest. *Id.* at 303 n.11 (Schwartz, J., dissenting). In other words, a “true conflict” involving states of apparently equal interests should be resolved by reversion to the “place of injury” presumption.

138. See *supra* text accompanying notes 84–102.

139. See, e.g., *Whiting Corp.*, 677 F. Supp. at 1141 (“A survey of the Florida cases . . . suggests that the law of the state in which the injury occurred will almost always govern the issue in dispute.”) (citing *State Farm Mut. Auto. Ins. Co. v. Olsen*, 406 So. 2d 1109 (Fla. 1981)).

courts are declining to engage in the more complex identification and balancing of “interests” that is ostensibly called for by the *Restatement*. This result would signal the re-emergence of territorialism, tempered by a modest form of interest analysis in those cases where the place of injury is a pure fortuity. If, on the other hand, the law of the place of injury is also being applied in cases of “false conflict” when the state of injury has no interest, then territorialism has undermined one of the leading principles of the *Restatement (Second)* — that uninterested states not apply their law to the exclusion of interested states.¹⁴⁰

The latter issue — resolution of false conflicts — is more easily addressed. With few exceptions, the lower courts have *refused* to apply the law of the place of injury when that state lacks any interest in the disputed issue.¹⁴¹ Interestingly, some of those courts displacing the law of the place of injury in false conflicts have done so without employing interest analysis.¹⁴² These cases suggest that,

140. See *supra* text accompanying notes 42–43.

141. See, e.g., *Judge v. American Motors Corp.*, 908 F.2d 1565 (11th Cir. 1990); *Chierchia v. Treasure Cay Serv.*, 738 F. Supp. 1386 (S.D. Fla. 1990); *Watts v. National Ins. Underwriters*, 540 F. Supp. 488 (S.D. Fla. 1982); *Beattley v. College Centre of Finger Lakes, Inc.*, 613 So. 2d 52 (Fla. 4th Dist. Ct. App. 1993); *Wal-Mart Stores, Inc. v. Budget Rent-a-Car Sys.*, 567 So. 2d 918 (Fla. 1st Dist. Ct. App. 1990); *Stallworth v. Hospitality Rentals, Inc.*, 515 So. 2d 413 (Fla. 1st Dist. Ct. App. 1987); *Pennington v. Dye*, 456 So. 2d 507 (Fla. 2d Dist. Ct. App. 1984); *Krasnosky v. Meredith*, 447 So. 2d 232 (Fla. 1st Dist. Ct. App. 1983); *Harris v. Berkowitz*, 433 So. 2d 613 (Fla. 3d Dist. Ct. App. 1983). The last four Florida decisions, it should be noted, involve classical false conflicts in which the litigants are all domiciled in one state (the “common domicile” scenario), and the state of injury is adventitious with no interest in applying its law to the nonresident parties.

The only obvious case where a Florida court has applied the law of the place of injury to a dispute where the LLD state had no interest is *Jones v. Cook*, 587 So. 2d 570 (Fla. 1st Dist. Ct. App. 1991) (applying limitations law of Georgia in tort suit between Florida residents involved in accident in Georgia while independently there on business). The result in *Jones* is based on a contact-counting approach and fails to identify or discuss any of the various states' interests. See *Barker v. Anderson*, 546 So. 2d 449 (Fla. 1st Dist. Ct. App. 1989) (arguably applying *lex loci delicti* law in absence of any state interest, based on methodology of contact counting); *infra* note 142.

142. See, e.g., *Watts*, 540 F. Supp. at 488 (contact enumeration); *Krasnosky*, 447 So. 2d 232 (Fla. 1st Dist. Ct. App. 1983) (contact enumeration); *Futch v. Ryder Truck Rental, Inc.*, 391 So. 2d 808 (Fla. 5th Dist. Ct. App. 1980) (contact enumeration). There are two cases employing contact counting, however, where it is at least arguable that the courts applied the law of the place of injury even though that state lacked any interest in the legal issue. In *Barker*, the court applied the law of the place of injury (Georgia) even though the claim for tortfeasor contribution was asserted by a Floridian against a Delaware corporation with its principal place of business in Arkansas. Ostensibly, this case is a false conflict given Georgia's apparent lack of interest in either party.

even when courts engage in contact counting and ignore related interests, the sheer preponderance of factual contacts may direct them away from the state of injury.¹⁴³ Thus, to the extent that *Bishop*¹⁴⁴ inaugurated use of the *Restatement (Second)* to avoid application of the *lex loci delicti* in obvious false conflicts, the court has largely achieved its purpose.¹⁴⁵ Remaining to be seen is the role that territorialism has played in resolving more challenging disputes

Barker, 546 So. 2d at 449. The court appeared to find the corporate defendant sufficiently connected with the state of Georgia to support application of Georgia law. Only if the defendant's business activities in Georgia were deemed to entitle it to protection of Georgia law as a "resident" would Georgia seem to be "interested" in the defendant. Under this view of Georgia's interest, the case would constitute a true conflict.

In *Avis Rent-a-Car Systems, Inc. v. Abrahantes*, the court applied the law of the place of injury (Cayman Islands) to all tort issues even though the plaintiffs were Floridians and the defendant, Avis, was of unstated domicile. *Avis Rent-a-Car Sys., Inc. v. Abrahantes*, 517 So. 2d 25 (Fla. 3d Dist. Ct. App. 1988). If Avis was not a domiciliary of the place of injury, then the court may have applied the law of an "uninterested" state and sacrificed the interest of the state of the plaintiff's domicile (depending upon the particular issue that might arise at trial).

143. A critical factor affecting the result in contact-counting courts may be how great a "happenstance" the occurrence of an injury in a particular state is. When, for example, a vehicular accident or airplane crash occurs in a state that was nothing more than a point of transition in a journey, that state's contact with the tort issue is apt to be outweighed by other contacts like the litigants' domicile and related conduct. *See, e.g., Watts*, 540 F. Supp. at 488 (airplane crash); *Krasnosky*, 447 So. 2d at 232 (vehicular accident); *Futch*, 391 So. 2d at 808 (vehicular accident). By comparison, when the accident occurs in a state that is more than just a point of transition, additional contacts may be identified which, though irrelevant to the state's interests, combine with the accident site to counterbalance such factors as the litigants' domicile. *See, e.g., Barker*, 546 So. 2d at 449 (when defendant corporation was engaged in business in state of injury, that state was not "completely fortuitous"); *Abrahantes*, 517 So. 2d at 25 (vehicle rented from local rental agency in state of injury).

To some extent, the *Restatement's* commentary discussing the importance of fact connections to a tort issue may obviate poor results for those contact-counting courts who make use of it. That is, even when courts fail to address the interests implicated by factual contacts, *Restatement* commentary may inform them of the relative importance of certain facts and thus introduce a tacit form of interest consideration. *See, e.g., Default Proof Credit Card Sys., Inc. v. State Street Bank & Trust Co.*, 753 F. Supp. 1566, 1570-71 (S.D. Fla. 1990) (relying on discussion of factual contacts contained in comments to *Restatement* § 145 regarding issue of trade secrets).

144. *Bishop v. Florida Specialty Paint Co.*, 389 So. 2d 999 (Fla. 1980).

145. It should be emphasized that the characterization of a case as a "false conflict" is premised on an accurate and comprehensive description of such facts as the parties' domicile, as well as an accurate description of state policies underlying their laws. As noted later, several cases are difficult to classify because courts omit salient facts or articulate dubious purposes for state law. *See infra* note 149. Thus, the Author's characterization of conflict types is necessarily limited by the scope of information reported in the cases.

involving true conflicts.

As noted previously, the presumptive rules of the *Restatement (Second)* as well as supreme court precedent could be interpreted as calling for application of territorialism in “close” cases, i.e., where there is not an obvious false conflict.¹⁴⁶ The principal alternative to a territorialist resolution is for courts to engage in the “weighing” of interests, as seemingly called for by section 6 of the *Restatement*.¹⁴⁷

A review of case law¹⁴⁸ reveals what may objectively be termed a “trend.” The law of the place of injury is usually applied when the interests of more than one state are implicated.¹⁴⁹ This trend pertains, interestingly, even in those courts that are consciously engaged in some form of interest analysis.¹⁵⁰ While those cases often purport to be assessing state interests, most of them also make explicit reference to the LLD presumption in reaching their conclusion.¹⁵¹ The LLD resolution is also noted in those cases that employ a methodology other than interest analysis, such as contact counting.¹⁵²

146. These may include both true conflicts and unprovided-for cases.

147. See *supra* text accompanying note 77.

148. See *supra* notes 141–43.

149. In determining whether two states are interested, the Author has either relied on the facts presented in the reported cases or adopted the court's own view that it has a “true” conflict. When neither the facts of the case nor the court's own description of the case suggest the type of conflict involved, the Author has not included that decision. See, e.g., *Aerovias Nacionales de Colombia, S.A. v. Tellez*, 596 So. 2d 1193 (Fla. 3d Dist. Ct. App. 1992) (rejecting application of law of plaintiff's domicile; neither defendant's domicile nor the content of rejected law identified).

Cases of true conflict where the law of the place of injury was applied include *Garcia v. Public Health Trust*, 841 F.2d 1063 (11th Cir. 1988); *Florida Steel Corp. v. Whiting Corp.*, 677 F. Supp. 1140 (M.D. Fla. 1988); *Emmart v. Piper Aircraft Corp.*, 659 F. Supp. 843 (S.D. Fla. 1987); *Peoples Bank & Trust Co. v. Piper Aircraft Corp.*, 598 F. Supp. 377 (S.D. Fla. 1984); *AIU Insur. Co. v. Reese*, 498 So. 2d 966 (Fla. 2d Dist. Ct. App. 1986); *Ploor v. Greyhound Lines, Inc.*, 474 So. 2d 1280 (Fla. 3d Dist. Ct. App. 1985); *Steele v. Southern Truck Body Corp.*, 397 So. 2d 1209 (Fla. 2d Dist. Ct. App. 1981).

150. See, e.g., *Garcia*, 841 F.2d at 1063; *Emmart*, 659 F. Supp. at 843; *Peoples Bank & Trust*, 598 F. Supp. 377; *AIU Ins. Co. v. Reese*, 498 So. 2d 966 (Fla. 2d Dist. Ct. App. 1986).

151. See, e.g., *Garcia*, 841 F.2d at 1065 (quoting § 146 and emphasizing LLD in *Bishop*); *Emmart*, 659 F. Supp. at 843–44, 847 (quoting § 146 and noting *lex loci* presumption); *Peoples Bank & Trust*, 598 F. Supp. at 378–79, 381 (quoting presumptive rules and noting *lex loci* presumption).

152. The decisions in *Ploor*, 474 So. 2d at 1280, and *Steele*, 397 So. 2d at 1209, appear to be based primarily on the *lex loci delicti* presumption. This is made express in *Steele* (where there is also a considerable amount of contact counting) and is suggested

This finding gives one pause. Does the prevalence of a territorialist solution under all approaches suggest that territorialism has an ineluctable appeal to judges that transcends *Restatement* methodology? Or does the *Restatement (Second)*, with its abundance of presumptive rules and territorialist-directed commentary overwhelm the weighing of interests and counting of contacts?¹⁵³ The answer, quite probably, is that the territorialist solution results from both judicial intuition and the continued nudging of the *Restatement*.

If, in fact, the *Restatement (Second)* achieves its primary reform in the limited field of false conflicts, one is pressed to consider a further question: Does a court that works its way through the rela-

in *Ploor* by virtue of the court's conclusory citation to *Steele* and supreme court precedent. *Ploor*, 474 So. 2d at 1280. These decisions, of course, do not contain any suggestion that the courts considered the type of conflict involved or engaged in any form of interest analysis. Their description as "true conflicts" is the Author's characterization based on the facts and legal rules reported.

There remain a few cases whose type of conflict is difficult to label. In *Proprietors Insurance Co. v. Valsecchi*, for example, the majority applied Florida law, rather than the law of the place of injury, based on its finding that the *lex loci delicti* state lacked an interest in the wrongful death issue. *Proprietors Ins. Co. v. Valsecchi*, 435 So. 2d 290, 294–95 (Fla. 3d Dist. Ct. App. 1983). Under the majority's view, the case could be classified as a false conflict thus supporting the application of Florida law (which favored the Florida defendants). *Id.* By comparison, the dissent rejected the argument that Florida had an interest in immunizing its domiciliaries (while agreeing with the majority that the state of injury also lacked an interest), and thus would have resolved this unprovided-for case by reversion to the *lex loci delicti* presumption. *Id.* at 302–03 (Schwartz, J., dissenting). It should be noted that both views are consistent with the trends noted in the text if one adopts the respective positions of the majority or dissent concerning the relevant state interests.

153. *Restatement* commentary is explicit in its belief that the place of injury will often have a prevailing interest in a tort issue. This results, in considerable part, from the fact that the place of injury will usually also be the place of conduct, thus combining the influence of those two factual connections. As noted in comment d to § 145,

This state will usually be the state of dominant interest, since the two principal elements of the tort, namely, conduct and injury, occurred within its territory. The state where the defendant's conduct occurs has the dominant interest in regulating it and in determining whether it is tortious in character. Similarly, the state where the injury occurs will, usually at least, have the dominant interest in determining whether the interest affected is entitled to legal protection.

RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 cmt. d (1969). In this respect, the "interest analysis" of the *Restatement (Second)* varies considerably from the interest analysis typically employed by conflicts scholars and non-*Restatement* courts. More conventional interest analysis places greater emphasis on the litigants' domicile, particularly where — as with many tort issues — the goal of loss allocation is more important than that of conduct regulation. See *infra* text accompanying notes 176–78.

tively complex apparatus of the *Restatement (Second)* in resolving true conflicts get sufficient return for the effort? Stated differently, is the methodology too complex for the task?

This question is central to a latter-day evaluation of the wisdom of the *Restatement (Second)*. Before considering this larger question, however, it will be helpful to examine in further detail the experience of lower courts in employing the two approaches that most often complement territorialism — contact counting and interest analysis.

3. Contact Counting

As already mentioned, the methodology characterized as “contact counting”¹⁵⁴ continues to have an inscrutable hold on a significant number of lower courts. This is true of both state courts¹⁵⁵ and federal courts.¹⁵⁶

The phenomenon of contact counting usually takes the form of a court's enumeration of the various facts that associate a dispute with particular states, together with a summary conclusion that one state has the most “significant relationship” with a tortious occurrence. Some courts give primary emphasis to the facts specifically enumerated in section 145 of the *Restatement (Second)*,¹⁵⁷ while other courts “pile on” whatever facts are available to support their conclusion that a particular state has the most significant relationship.¹⁵⁸

154. A more euphemistic description of contact counting is the “center of gravity” or “grouping of contacts” approach. See *Kay*, *supra* note 5, at 557.

155. See, e.g., *Walsh v. Arrow Air, Inc.*, 629 So. 2d 144, 146 (Fla. 3d Dist. Ct. App. 1993); *Aerovias Nacionales de Colombia, S.A. v. Tellez*, 596 So. 2d 1193, 1194 (Fla. 3d Dist. Ct. 1992); *Jones v. Cook*, 587 So. 2d 570, 572 (Fla. 3d Dist. Ct. App. 1991); *Futch v. Ryder Truck Rental, Inc.*, 391 So. 2d 808, 809 (Fla. 5th Dist. Ct. App. 1980).

156. See, e.g., *Garcia v. Public Health Trust*, 841 F.2d 1062, 1064–65 (11th Cir. 1988) (employing both contact counting and interest analysis); *Liberty Mut. Ins. Co. v. Electronic Sys., Inc.*, 813 F. Supp. 802, 805 (S.D. Fla. 1993); *Florida Steel Corp. v. Whiting Corp.*, 677 F. Supp. 1140, 1141 (M.D. Fla. 1988); *Hayden v. Krusling*, 531 F. Supp. 468, 469 (N.D. Fla. 1982).

157. See, e.g., *Walsh*, 629 So. 2d at 146; *Jones*, 587 So. 2d at 572. The facts enumerated in § 145 include the place of the injury, the place of conduct causing the injury, the domicile or business locale of the parties, and the place of the parties' relationship. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145(2) (1969).

158. See, e.g., *Barker v. Anderson*, 546 So. 2d 449, 450 (Fla. 1st Dist. Ct. App. 1989) (noting that defendant's driver was resident of that state whose law was selected, and that defendant's vehicle was operating out of one of its distributional centers located in

Often, the enumeration of contacts is offered to support use of the LLD presumption. Thus, courts evidence a willingness to apply the law of the place of injury when additional facts demonstrate that such place was not pure “happenstance.”¹⁵⁹ Whatever its particular manifestation, the phenomenon of contact counting is distinguished by the absence of any discussion of why the enumerated facts have pertinence to the relevant state policies.

While Florida courts are not alone in aggregating factual contacts to ascertain the place of the most “significant relationship,”¹⁶⁰ their perpetuation of this practice in the face of clear direction to the contrary¹⁶¹ is somewhat perplexing. Why do courts continue to count contacts? Part of the explanation may lie in the *Restatement (Second)* itself. As has been noted, section 145 of the *Restatement* arose out of pioneering judicial practices in the courts of New York where contact aggregation often was employed by the courts.¹⁶² Although section 145 now cautions that its enumerated contacts must be considered in reference to section 6 policies,¹⁶³ the practical means of coupling these sections requires a degree of methodological sophistication that can be elusive.¹⁶⁴ Moreover, the comments and

that state); *Avis Rent-a-Car Sys., Inc. v. Abrahamantes*, 517 So. 2d 25, 26 (Fla. 3d Dist. Ct. App. 1988) (noting that chosen state was where plaintiff took out temporary driver's license, where “initial medical treatment” was obtained, and where lawyers who drafted the car rental agreement resided); *Proprietors Ins. Co. v. Valsecchi*, 435 So. 2d 290, 295 (Fla. 3d Dist. Ct. App. 1983) (noting that chosen state was where plaintiffs had become acquainted, where plaintiffs' ancillary estates were opened, and where instant lawsuit had been filed); *Steele v. Southern Truck Body Corp.*, 397 So. 2d 1209, 1210 (Fla. 2d Dist. Ct. App. 1987) (noting that chosen state was where deceased tort victim's estate was opened, where accident was investigated by local authorities, and where all witnesses resided).

159. See, e.g., *Jones*, 587 So. 2d at 572; *Barker*, 546 So. 2d at 450; *Steele*, 397 So. 2d at 1210.

160. See generally *Kay*, *supra* note 5, at 557–58.

161. On several occasions, judges have expressly commented that the *Restatement (Second)* repudiates a contact-counting approach. See, e.g., *Judge v. American Motors Corp.*, 908 F.2d 1565, 1569 (11th Cir. 1990) (“[W]e cannot simply add up the factors delineated in § 145(2) and then apply the law of the sovereign with the greatest numerical total.”); *Valsecchi*, 435 So. 2d at 301 (Schwartz, J., dissenting) (application of *Restatement* “consists of much more than . . . quantifying and comparing the gross number of ‘contacts’ a given case has with multiple jurisdictions.”). These occasions are far outnumbered, however, by the incidences of unexplained contact enumeration.

162. See *supra* text accompanying notes 22–23.

163. See *supra* text accompanying notes 24–25.

164. This statement is by no means intended to detract from the intellectual sophistication of either lawyers or judges. As a practical matter, members of the bar encounter conflicts problems infrequently, and so do not have the opportunity to cultivate an

illustrations to the *Restatement (Second)* tend to reinforce the importance of factual contacts in their own right, even though they may not intend to.¹⁶⁵

A court that emphasizes contacts over interests might respond that the evils of contact counting are exaggerated. There is plausible support for this response. As noted above,¹⁶⁶ the disposition of both “false” and “true conflicts” appears similar under both interest-oriented and contact-oriented approaches. This may result in part from the fact that the *Restatement* provides considerable guidance as to which contacts “matter” (i.e., interest analysis is built in to some degree),¹⁶⁷ and in part from the fact that a state in which contacts are centered often *will* have an interest in applying its law to a legal issue.¹⁶⁸ Arguably, then, contact counting frequently achieves the goals of the *Restatement (Second)* through indirection.

In rejoinder to this defense of contact counting, one might cite both pragmatic consequences and institutional values. Although contact counting may not, in cumulative effect, produce markedly different results from other approaches,¹⁶⁹ in particular cases it may — and has.¹⁷⁰ Moreover, the *Restatement (Second)* does *not* sanction contact counting and *does* call for some form of interest analysis. To contend that the literal requirements of legal doctrine are inconsequential so long as the right result is reached is to ultimately suggest that the written law does not matter — a proposition that may be in fashion among “post-modernists,” but is hardly good for the institutional integrity of the courts.¹⁷¹

At a minimum, courts should at least acknowledge their aware-

understanding of the subject — as they might have, by comparison, with the rules of negligence or no-fault insurance. Moreover, conflicts doctrine is in a constant state of flux, so that even the most conscientious of lawyers and judge would have difficulty remaining current in the subject area. Suffice it to say that conflicts doctrine does not lend itself well to the development of professional expertise, and this problem is only exacerbated when the jurisdiction's approach is a hybrid one like the *Restatement (Second)*.

165. See *supra* text accompanying notes 71, 153.

166. See *supra* note 143 and accompanying text.

167. See *supra* text accompanying notes 37–44.

168. See Reese, *supra* note 17, at 514.

169. While this appears to be the case at the present time, the relatively small number of reported cases suggests caution in generalizing that methodological differences do not affect substantive results.

170. See *supra* notes 143–45 and accompanying text.

171. See *infra* text accompanying notes 242–45.

ness that interest analysis is relevant under the *Restatement (Second)* methodology. Even when courts are understandably perplexed about the implications of interest analysis (a matter that will be considered shortly), they might at least follow their enumeration of contacts with a chaser — a statement to the effect that “[h]aving considered the above-mentioned contacts and the related interests, we find.” If such a statement conceals befuddlement as to the case relevance of interest analysis, at least the court will have affirmed for future litigants the possible relevance of something beyond fact counting.

4. Interest Analysis

In recent years, interest analysis has come under vigorous attack by a number of conflicts scholars. They variously argue that interest analysis is based on unpersuasive notions of legislative intent, produces undesirable results, and is unconstitutionally discriminatory against nonresidents.¹⁷²

The United States Supreme Court appears to have rejected the claim that interest analysis is unconstitutional because of its working assumption that states seek to benefit their own residents.¹⁷³ Whatever the problems with interest analysis, the Constitution is not one of them. Nor is there any indication that contemporary challenges to interest analysis threaten to dislodge it from its place in the *Restatement (Second)*; not only have some conflicts scholars recently come to the defense of interest analysis, but there is no replacement approach that has achieved anything close to consensus.¹⁷⁴

The role of interest analysis in the *Restatement (Second)* may be greatly reduced, however, if courts in Florida continue to emphasize territorialist solutions to the more complex problems of interest analysis. If this trend continues, interest analysis may come to serve the more limited purpose of disposing of obvious false conflicts —

172. See generally Lea Brilmayer, *Interest Analysis and the Myth of Legislative Intent*, 78 MICH. L. REV. 392 (1980); Ely, *supra* note 40; Douglas Laycock, *Equality and the Citizens of Sister States*, 15 FLA. ST. U. L. REV. 431 (1987).

173. See *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981). In *Hague*, the Court incorporated a form of interest analysis into its constitutional theory for assessing the appropriate application of state law and expressly recognized state interests that are based on the protection of residents. *Id.*

174. See Kramer, *supra* note 38, at 279.

primarily “common domicile” cases, where the place of injury is mere happenstance.¹⁷⁵ Such a role would dilute considerably the *Restatement's* command to apply the law of the place with the “dominant” interest, with its underlying assumption that state interests can be successfully identified and compared.

The ultimate role of interest analysis in Florida conflicts doctrine may come down to one consideration: Can the judiciary develop a relatively simple and predictable approach to the application of interest analysis, particularly in cases of factual complexity? If it cannot, then one suspects that courts will naturally tend toward the territorialist solution.

Two principal problems have arisen in the application of interest analysis by the lower courts in Florida: (1) the problem of accurately identifying the interests of a state, and (2) the problem of determining which state's interests are “dominant” within the meaning of the *Restatement (Second)*. These problems will now be considered in that order.

a. Determining a State's Interest

Conventional interest analysis largely breaks down the policies of state law into two categories. On one hand, there are *conduct-regulating* policies that are intended to induce or deter certain forms of conduct. Such policies are typically said to be implicated — thus giving rise to a state interest — when the conduct that precipitates litigation *occurs* within the state that enacted the policy.¹⁷⁶ The other principal type of policy is characterized as *loss allocating* and is intended to distribute the costs of wrongful conduct between the pertinent parties.¹⁷⁷ Such policies are typically said to be implicated

175. See *supra* note 143 and accompanying text.

176. See *supra* text accompanying note 37; see also Joseph Singer, *A Pragmatic Guide to Conflicts*, 70 B.U. L. REV. 731, 752 (1990).

177. See, e.g., *Judge v. American Motors Corp.*, 908 F.2d 1565, 1572 n.9 (11th Cir. 1990) (discussing distinction between “conduct-regulation” and “loss-distribution” rules). As noted in *Judge*, conduct-regulating laws are often illustrated by “rules of the road” (e.g., DUI-related liability laws), where the state imposes civil liability to serve a strong admonitory policy. Generally speaking, courts do not view common negligence law or immunity law as regulatory of conduct. *Id.* at 1565. Given the unplanned nature of negligent occurrences, the state's ability to admonish through imposition of liability is thought to be small. Thus, negligence recovery is typically characterized as solely a loss-allocating policy. Some critics of interest analysis dispute this point, however, and would find that both loss-allocating and conduct-regulating policies underlie negligence theory.

in the following manner: (1) if a state's policy is "compensatory" (i.e., the law authorizes the plaintiff to recover damages for the injuries suffered at the hands of the defendant), then that state is "interested" in applying its law when to do so will permit recovery by a domiciliary plaintiff; and (2) if a state's policy is "immunizing" (i.e., the law grants the defendant immunity from liability notwithstanding the wrongfulness of its behavior), then that state is interested in applying its policy when to do so will immunize a domiciliary defendant. As is evident, conventional interest analysis posits that state policies directed to loss allocation are generally enacted to *benefit* locals.¹⁷⁸

If courts agree to this basic scheme of state policies, then there is usually a fair amount of consensus about the state interests involved in a conflicts dispute. Most Florida courts do, in fact, follow the basic tenets of interest identification insofar as they recognize a state's interest in protecting its residents. Thus, virtually all courts have agreed that a state is interested in applying its pro-recovery

See generally RICHMAN & REYNOLDS, *supra* note 6, at 226–27.

As discussed later, while such broad attribution of legal policy is imminently plausible, it would substantially undermine the practical utility of interest analysis by transforming many "false conflicts" into true ones. *See infra* text accompanying notes 184–93. Moreover, the more moderate attribution of policies mentioned in *Judge* seems to be the prevailing practice among courts employing interest analysis. *See supra* note 141.

178. It is this postulate that has prompted some conflicts scholars to argue that interest analysis unconstitutionally "discriminates" against nonresidents. *See, e.g.,* Ely, *supra* note 40; Laycock, *supra* note 172; *see also* RUSSELL WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 293–96 (3d ed. 1986) (providing examples of how interest analysis discriminates against nonresidents).

Although conventional interest analysis recognizes the existence of state interests that are not tied to the parties' domicile, in the resolution of actual conflicts it appears that domiciliary-based interests receive predominant — and oftentimes exclusive — emphasis. *See* Ely, *supra* note 40, at 194–97.

It is important to emphasize that, although conventional interest analysis postulates that states generally enact legislation to benefit locals, this does *not* entail that a local court should apply any law that will benefit local residents. For example, if a state adopts a contributory negligence rule (which favors defendants whose tort victims have also engaged in negligent conduct) and the particular plaintiff in the lawsuit is a resident of that state, then that state will have no interest in the suit insofar as the plaintiff is concerned. In essence, the state has declined to adopt a legal rule (e.g., comparative negligence) that would benefit local plaintiffs. Thus, a more accurate description of conventional interest analysis might be that *if* a person is to be protected by a loss-allocating rule, it will be the rule of his home state. If his state affords him no protection (as is the case with local plaintiffs in contributory negligence states), then he may not call upon the protection of another state's laws.

laws to benefit resident plaintiffs.¹⁷⁹ Similarly, courts generally agree that a state is interested in applying its immunity laws when such will benefit resident defendants.¹⁸⁰

In several cases, however, the courts have interjected a note of complexity when addressing state laws that serve loss-allocating policies. In particular, some courts appear to accept the proposition that states have an interest in imposing liability on resident defendants,¹⁸¹ granting recovery to nonresident plaintiffs¹⁸² and immunizing nonresident defendants.¹⁸³ In other words, some courts have severed loss-allocating rules from their typical pro-resident moorings.

There is nothing in interest analysis that would deny a legislature's power to enact loss-allocating laws that broadly benefit all persons regardless of residence. Indeed, some conflicts scholars argue for a broad-based definition of "state interests" that includes, among other things, a state's "moral interest" in seeing justice done to all persons regardless of their residence.¹⁸⁴ In addition, the interest analysis anticipated by the *Restatement (Second)* does not appear to be limited to the view that loss-allocating rules depend for their application on the residence of the litigants. For example, commentary to section 146 of the *Restatement* indicates that, regarding "most" issues pertaining to personal injury torts, the law of the place of injury and place of conduct (which are usually the same) will have the "dominant interest" in resolving the issue.¹⁸⁵ There appears to be

179. See, e.g., *Digioia v. H. Koch & Sons*, 944 F.2d 809, 813 (11th Cir. 1991); *Celotex Corp. v. Meehan*, 523 So. 2d 141, 151 (Fla. 1988) (Barkett, J., dissenting); *Stallworth v. Hospitality Rentals, Inc.*, 515 So. 2d 413, 418 (Fla. 1st Dist. Ct. App. 1987).

180. See, e.g., *Judge*, 908 F.2d at 1570; *Emmart v. Piper Aircraft Corp.*, 659 F. Supp. 843, 847 (S.D. Fla. 1987); *State Farm Mut. Auto. Ins. Co. v. Olsen*, 406 So. 2d 1109, 1111 (Fla. 1981).

181. See, e.g., *Beattley v. College Centre of Finger Lakes, Inc.*, 613 So. 2d 52, 54 (Fla. 4th Dist. Ct. App. 1992) (New York had interest in imposing liability on its defendant corporation); *Wal-Mart Stores v. Budget Rent-a-Car*, 567 So. 2d 918, 921-22 (Fla. 1st Dist. Ct. App. 1989) (reciting Florida interest in "holding" resident car lessors "responsible for their torts," but declining to decide whether liability extends to nonresident plaintiffs).

182. See, e.g., *Judge*, 908 F.2d at 1570-71 (citing Michigan state interest in providing recovery to nonresidents against Michigan defendant).

183. See, e.g., *Emmart*, 659 F. Supp. at 847 (invoking immunity law of Ohio to immunize nonresident defendant).

184. See generally Joseph Singer, *Real Conflicts*, 69 B.U. L. REV. 1 (1989).

185. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 146 cmt. d (1969). It should be apparent that, under conventional interpretation of interest analysis, the state

no domiciliary connection in this general view of interest analysis.¹⁸⁶

The task of tying state legal interests to factual connections becomes critical at this point. If one adopts a liberal set of connecting facts, then the range of state interests is magnified, and with it, the range of *true conflicts*.¹⁸⁷ A simple illustration will demonstrate this point.

Assume that two Floridians are involved in an automobile crash while both are traveling through Georgia. Although Floridian *A* was partially negligent in causing the accident (10%), Floridian *B* was primarily at fault (90%). Under Georgia law, the partial negligence of Floridian *A* bars his recovery, i.e., Georgia follows the common law rule of contributory negligence. Florida, on the other hand, would permit recovery by the partially at-fault plaintiff based on its rule of comparative negligence.

Under conventional interest analysis, this case presents a “false conflict” because the rule of contributory fault is classified as loss-allocating and the State of Florida — the plaintiff’s state of residence — permits recovery. By comparison, conventional interest analysts would conclude that Georgia is uninterested in applying its immunity policy, since there is no Georgia defendant to immunize.

If a court adopts a more expansive view of state interests, however, and finds that Georgia is interested in applying its rule prohibiting recovery either because (a) Georgia is interested in applying its view of “justice” to all persons having some relationship to the state, or (b) Georgia is interested in applying its law because it is the state of conduct and injury (as suggested by the *Restatement (Second)*),¹⁸⁸ then the court is faced with a “true conflict.”

Identifying facts that implicate a state’s legal policy would, in ideal circumstances, be a matter of discovering actual legislative intent. Such “true” intent is seldom discoverable, however, because legislatures rarely consider the choice-of-law implications of their legal enactments.¹⁸⁹ Thus, courts must *attribute* meaning to the

of either the conduct or the injury lacks any interest per se in applying its law when the litigants do not reside in the place of conduct or injury.

186. On rare occasions, the parties’ domicile is given preference in the *Restatement’s* presumptive rules. See *RESTATEMENT (SECOND) OF CONFLICT OF LAWS* § 169 (1969) (law of parties’ “domicil” is presumptively applicable to issue of intra-family immunity).

187. See generally Singer, *supra* note 184.

188. See *supra* text accompanying note 153.

189. See generally Brilmayer, *supra* note 172, at 392.

legislature, that is, they must infer what facts the legislature would, if it had addressed the subject, find sufficient to justify application of the state's legal policy.

Critics of interest analysis properly observe that its proponents construct rather than discover state interests and that the constructed interests are often more limited than they need to be.¹⁹⁰ Professor Larry Kramer has recently argued, however, that such a constructive process is not only sensible, but underlies the interpretation of all law. According to Professor Kramer, constructive presumptions about the extra-territorial effects of state law are no different from other tools of legislative interpretation used in determining the applicability of such laws in purely "domestic" cases.¹⁹¹ As Professor Kramer asserts, there is inevitably a certain amount of *judgment* that must be employed in determining the scope of the application of any law, even though conflicts disputes often present more "hard cases" for exercise of this judgment.¹⁹² The assumption that most state laws are enacted primarily for the benefit of state citizens, moreover, is a reasonable starting point in the constructive process.¹⁹³

For present purposes, one observation merits special emphasis. In ascertaining a state's "interest" in applying its legal rule to a controversy, courts should be fully aware that they are, to some extent, engaged in a constructive process and that their construction has *significant* consequences for the ultimate fate of choice-of-law doctrine. While there may be a temptation to broadly construe state laws (particularly local ones) to work the greatest "justice" for the most persons, this temptation will eventually undermine the utility

190. See, e.g., Singer, *supra* note 184.

191. See Kramer, *supra* note 38, at 290-304.

192. See *id.* at 301. Professor Kramer has asserted:

An act of *judgment* is called for, and judgment is seldom something about which there is no room to disagree. But if the objection is that judges cannot determine statutory purposes, or that their decisions are necessarily arbitrary, I disagree. Experience demonstrates that courts generally are able to determine the underlying purposes of laws based on language, structure, legislative history (if such exists) and background.

Id.

193. The interpretive assumption that legislature is primarily concerned with the welfare of state residents is not unprecedented in Florida conflicts law. To the contrary, under the traditional "public policy" exception to conflicts doctrine governing contractual issues, Florida courts have often invoked Florida law to protect state residents, while denying protection to nonresidents. See *infra* text accompanying notes 302-09.

of interest analysis in resolving choice-of-law problems.

It is suggested, then, that the more expansive definitions of state interests that have occasionally surfaced in Florida opinions should be avoided in the absence of clear legislative intent that such was intended.¹⁹⁴ Simply as a matter of developing a workable system for resolving choice-of-law problems, it is preferable to limit the attribution of state interests.

Interest analysis can also go askew when courts fail to carefully examine how the content of state law interacts with conventional policies. For example, interest analysis recognizes that some state laws are intended to regulate conduct rather than to allocate losses between the parties. A prominent illustration of such regulatory policy is state law permitting the imposition of punitive damages in tort litigation. When the wrongful conduct of a defendant has occurred within a state that provides for punitive damages recovery by its victims, that state will have a recognized interest in applying its laws to admonish tortfeasors even if the victim is not a local resident.

It should be obvious that when the law of the state of misconduct would *preclude* recovery of punitive damages, it has no conduct-regulatory policy at stake. While the state does seek to immunize defendants from liability — and thus would have an interest in ap-

194. In response to the suggestion that limiting the interests of state legal policy to the protection of domiciliaries is “parochial and self-serving,” Professor Kramer observes that the opposite may be true. That is, by limiting the application of state law to its residents, states will accommodate other states who seek to regulate their residents in a different way. See Kramer, *supra* note 38, at 302 (“Rather than being parochial, applying a state’s law only when it advances the policy justifying the law in the state is a means of accommodating the laws of other states. If the state were being parochial, it would apply its law whenever the Constitution permitted it to do so.”).

Whether attribution of pro-domiciliary policy is parochial will also depend on how the state courts resolve conflicting state interests. Given the prevalence of the *lex loci delicti* presumption in Florida case law, for example, the resolution of many conflicts will have *nothing* to do with whose resident will benefit. Thus, when Florida is “interested” in applying its law to protect its residents, but some other state has a conflicting interest in protecting its residents, Florida courts will usually invoke the law of the place of injury, which has often worked to the disadvantage of the Floridian. See *infra* text accompanying note 233.

Finally, it should be noted that contemporary conflicts disputes seldom present situations where application of some other state’s law will work patent injustice. Technical, arbitrary rules limiting tort recovery have largely disappeared from the jurisprudence of the various states. Moreover, it is difficult to see why it is patently unjust to apply a state resident’s home law to the resident’s legal dispute, when that law would presumably govern the resident’s more frequent legal relationships at home.

plying its policy *if* the defendant is a local domiciliary — it assuredly has no interest in encouraging misconduct by immunizing nonresident defendants.¹⁹⁵ Stated differently, immunity policies insulate resident defendants from liability, but they do not “regulate” conduct by encouraging defendants to do wrong.¹⁹⁶

This distinction appears to have eluded some courts. Thus, in *Peoples Bank & Trust Co. v. Piper Aircraft Corp.*, the court concluded that the law of Ohio should be applied to determine whether an Ohio plaintiff could recover punitive damages from a Florida defendant based on an airplane crash occurring in Ohio.¹⁹⁷ According to the court, Ohio had “a substantial interest in promoting airplane safety . . . [and] a strong interest in not suffering airplane crashes which kill its own citizens.”¹⁹⁸ The law of Ohio, however, appeared to *preclude* the recovery of punitive damages!¹⁹⁹

Thus, Ohio's interest in safety was negated by the presumed content of its law.²⁰⁰ The lesson is a simple one. The interest of a state in applying its legal policies requires careful consideration not only of connecting facts like domicile and conduct, but also the manner in which those policies would be promoted by their application to

195. Again, this configuration of interests is based on conventional application of interest analysis.

196. Some courts have suggested that immunity laws promote another form of conduct, encouraging defendant businesses to locate in the state. *See, e.g.*, *Judge v. American Motors Co.*, 908 F.2d 1565, 1572–73 (11th Cir. 1990). Under this view, a state that immunizes defendants would have an interest in applying its laws to any suit that arises out of business conducted in that state. In *Judge*, the court rejected that interest as having too attenuated a connection to the facts before it. *Id.*

While such a conduct-regulating interest may underlie some tort immunity laws, it was not mentioned in the Florida decision discussed in the ensuing text. The “conduct” emphasized in that case was the *tortious* conduct at issue in the litigation and not the *business* conduct that might be more generally promoted by a broader reading of the purposes of the state immunity rule. *See Stallworth v. Hospitality Rentals, Inc.*, 515 So. 2d 413, 417 n.4 (Fla. 1st Dist. Ct. App. 1987) (immunity rule tied to defendants' residence); *Proprietors Ins. Co. v. Valsecchi*, 435 So. 2d 290, 303 (Fla. 3d Dist. Ct. App. 1983) (Schwartz, J., dissenting) (stating immunity law not intended to encourage conduct).

197. *People Bank & Trust Co. v. Piper Aircraft Corp.*, 598 F. Supp. 377 (S.D. Fla. 1984).

198. *Id.* at 381.

199. *Id.* at 379 (noting that it was uncertain whether Ohio, like Florida, would permit recovery of punitive damages).

200. *See Digioia v. H. Koch & Sons*, 944 F.2d 809, 814 (11th Cir. 1991) (applying statute of limitations of place of conduct in manner that precluded recovery by plaintiff).

the facts of a case.²⁰¹ Otherwise, the factual connections constitute nothing more than bare territorialist references.

Finally, in discussing the identification of state interests, it is necessary to return to the problem presented in *Celotex Corp. v. Meehan*: Who is interested in interstate corporations?²⁰² Is it the state of incorporation, the corporation's principal place of business, any state in which the corporation is doing business, or perhaps *all* of the above?

Insofar as the courts' elaboration of case facts suggests their view of state interests, the answer would seem to be that a corporation is commonly viewed as a domiciliary of those states where (1) it has its principal place of business, and (2) it is incorporated.²⁰³ This would suggest that a corporation can benefit from the law of *either* state, thus theoretically doubling a corporation's chance of identifying a favorable law.²⁰⁴

To the extent that interest analysis seeks to tie a state's interests to those who have a substantial relationship with the state — whether deemed “residents,” “citizens,” or domestic corporations — the *principal place of business* should have preference. The *Restatement (Second)* offers support for this position when it observes, “At

201. At times, one is left with the impression that dubious interests are invoked to rationalize a court's decision. For example, in *Beatty v. College Centre of Finger Lakes, Inc.*, the court observed that the state where the defendant had taken out an insurance policy had an interest in applying its tort law to permit recovery because its residents “may rely on and expect [the state's] insurance coverage to apply even when travelling out-of-state.” *Beatty v. College Centre of Finger Lakes, Inc.*, 613 So. 2d 52, 55 (Fla. 4th Dist. Ct. App. 1992). But this alleged interest is difficult to square with the facts. If the court was referring to the protection of its *plaintiff*-resident's insurance coverage, the statement is inapposite — the plaintiff was seeking to recover under the *defendant's* insurance policy. On the other hand, if the court was referring to the protection of its *defendant*-resident's insurance coverage, the statement is also irrelevant — the defendant was arguing against its liability and thus would require no insurance coverage if its legal position was upheld.

202. *Celotex Corp. v. Meehan*, 523 So. 2d 141 (Fla. 1988); *see supra* text accompanying notes 107–29.

203. *See, e.g.*, *Chierchia v. Treasure Cay Services*, 738 F. Supp. 1386, 1389 (S.D. Fla. 1990); *Florida Steel Corp. v. Whiting Corp.*, 677 F. Supp. 1140, 1141 (M.D. Fla. 1988); *Stallworth v. Hospitality Rentals, Inc.*, 515 So. 2d 413 (Fla. Dist. Ct. App. 1987). The courts' use of both the state of incorporation and principal place of business may be influenced by the definition of corporate “citizenship” found in federal statutes governing diversity-of-citizenship jurisdiction. *See* 28 U.S.C. § 1332(c)(1) (1988).

204. To date, no Florida court appears to have been presented with the problem of identifying state interests where there is a difference between the laws of the state of incorporation and those of the principal place of business.

least with respect to most issues, a corporation's principal place of business is a more important contact than the place of incorporation, and this is particularly true in situations where the corporation does little, or no, business in the latter place.²⁰⁵ This view represents the sensible position that the corporation's principal place of business is often the state most likely to experience the economic consequences of liability decisions pertaining to the corporation and is the state that may have the greatest concern in regulating the conduct of the corporation.²⁰⁶ Furthermore, emphasis on the principal place of business seems a fair means of according corporations the protection of one state, but *only* one.

On occasion, Florida courts have suggested that a state might have interest in applying its law based upon a corporation's business *presence* (or "residence") in that state. This view was intimated by the dissenting justice in *Celotex Corp. v. Meehan*²⁰⁷ and is suggested by the decision of one district court of appeal. Thus, in *Barker v. Anderson*, the court denied recovery to a plaintiff-Floridian based on Georgia's more limited version of comparative negligence.²⁰⁸ The defendant protected in *Barker* was Wal-Mart Stores, which, though incorporated in Delaware with a principal place of business in Arkansas, was conducting business operations in Georgia that gave rise to the tortious occurrence in litigation.²⁰⁹

Admittedly, one can make a plausible argument that states have an "interest" in any corporation engaged in local business. Georgia arguably has some concern with the economic well-being of

205. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 cmt. e (1969). It should be observed, however, that the state of incorporation is virtually always given the power to regulate matters pertaining to the "internal affairs" of a corporation. Thus, the state of incorporation will govern relations between and among the corporation, its officers, its directors, and its shareholders. *Id.* §§ 301-310.

206. See, e.g., *Judge v. American Motors Co.*, 908 F.2d 1565, 1568 n.3 (11th Cir. 1990).

207. See *Celotex Corp. v. Meehan*, 523 So. 2d 141, 151 (Fla. 1988) (Barkett, J., dissenting); see *supra* text accompanying notes 125-28.

208. *Barker v. Anderson*, 546 So. 2d 449 (Fla. 1st Dist. Ct. App. 1989).

209. *Id.* at 450. It should be noted that the court did not expressly apply interest analysis in *Barker* and appears to have based its decision on a combination of territorialism and contact counting. If the court had applied conventional interest analysis, it would have viewed the case as a "false conflict" — at least insofar as the dispute centered on the choice between Florida and Georgia law. Florida, on one hand, had an interest in compensating its resident-plaintiff, and Georgia had no interest in compensating a corporation that was incorporated elsewhere and had its principal place of business elsewhere. Furthermore, Georgia had no conduct-regulating interest in the dispute.

Wal-Mart regardless of where it is incorporated or conducts the principal part of its business. Yet, if courts were to follow the suggestion of *Meehan* and *Barker*, application of the *Restatement's* methodology would be immeasurably complicated. For one thing, multistate businesses — like Wal-Mart, GM, or McDonald's — would have numerous domiciles and arguably, numerous home states with an interest in protecting them. A court would either be forced to single out one state for attribution of domicile²¹⁰ or extend to a corporation the protections of every state in which it does business.²¹¹ Conversely, the ability to attribute differing “residences” to multistate corporations could dilute their ability to find protection under interest analysis. In *Meehan*, for example, the suggestion that the corporate defendant was a “resident” of Florida by virtue of its business presence appeared to be laying the premise for applying the law of Florida, which was the plaintiff's residence and whose law favored recovery.²¹² As has been noted by one commentator, such shifting identification of corporate domicile has usually worked to the distinct disadvantage of corporate litigants.²¹³

The problem of identifying which state is interested in multistate corporations raises pragmatic concerns similar to those previously identified when discussing the greater problem of identifying

210. The most logical candidate, of course, would be the state of the principal place of business.

211. This view would give multistate businesses a significant advantage in litigation, since they could call upon the protection of the laws of the most protective state in which they do business. Supreme Court precedent indicates, however, that applying a state's law merely because a corporation does business there is violative of the Constitution. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 818 (1985).

212. By viewing Celotex Corporation as a Floridian, the Court would transform the case into a “false conflict” involving co-domiciliaries, and so invoke the law of Florida.

213. *See* Goldsmith, *supra* note 128. It has sometimes been argued that a state in which a corporation is engaged in business may have an interest in protecting that corporation insofar as the liability-related conduct occurred in that state. That is, a state may seek to immunize corporate conduct for the purpose of inducing increased business activity within the state, regardless of what principal place of business that corporation has. When such conduct regulation can be identified, then that state would have a plausible claim to apply its law. But note that such a state interest is premised on the corporation's specific *conduct* in the state that relates to litigation and *not* upon its mere business presence in the state. *Compare* *Judge v. American Motors Co.*, 908 F.2d 1565, 1572–73 (11th Cir. 1990) *with* *Celotex Corp. v. Meehan*, 523 So. 2d 141, 151 (Fla. 1988) (Barkett, J., dissenting). Thus, in *Judge*, the court recognized that Mexico might have an interest in immunizing a Michigan corporation from liability for conduct occurring *in* Mexico. On the facts of the case, however, the court was not persuaded that this interest was truly implicated. *Judge*, 908 F.2d at 1572.

state interests.²¹⁴ If the methodology of interest analysis is to work in a relatively simple and predictable manner, courts must agree on certain working assumptions. These assumptions are admittedly a “construct” of the courts and may be rebutted by evidence of contrary legislative intent. Their role in transforming the *Restatement (Second)* into a manageable doctrine, however, should not be underestimated.

b. Determining the “Dominant” State Interest

Assuming that courts can agree on the means of identifying state interests, there remains the question of how those interests can be weighed in the case of “true conflicts” to determine the state of “dominant interest.”²¹⁵ This is probably the most difficult question facing courts that employ a conflicts methodology incorporating some form of interest analysis.²¹⁶

It is difficult to draw any useful methodological lessons from Florida state court decisions addressing “true conflicts.” The fact is that there is virtually *no* case law in which “true conflicts” have been disposed of through reasoned elaboration and comparison of interests. Florida Supreme Court precedent addressing true conflicts is totally conclusory in identifying the state of the “most significant relationship.”²¹⁷ Similarly, lower state court precedent either summarily concludes that one state has a “superior” interest²¹⁸ or ignores the conflicting interests altogether and engages in contact enumeration.²¹⁹ Of perhaps even greater practical significance, these cases seem to uniformly select the law of the place of injury.²²⁰

Federal court precedent evidences no more success than state court precedent in discovering a means to weigh, or balance, conflicting state interests. Some of the federal precedent simply fails to

214. See *supra* text accompanying notes 125–29.

215. See *supra* text accompanying note 76 (noting that *Restatement* calls for application of law of state with dominant interest in issue).

216. See generally RICHMAN & REYNOLDS, *supra* note 6, at 216–25.

217. See *supra* text accompanying notes 85–102.

218. See, e.g., *AIU Ins. Co. v. Reese*, 498 So. 2d 966 (Fla. 2d Dist. Ct. App. 1986).

219. See, e.g., *Aerovias Nacionales de Colombia, S.A. v. Tellez*, 596 So. 2d 1193 (Fla. 3d Dist. Ct. App. 1992); *Ploor v. Greyhound Lines, Inc.*, 474 So. 2d 1280 (Fla. 3d Dist. Ct. App. 1985); *Steele v. Southern Truck Body Corp.*, 397 So. 2d 1209 (Fla. 2d Dist. Ct. App. 1981).

220. See *supra* notes 149–52.

discuss the conflicting state interests and, apparently following the lead of many Florida state courts, reverts to contact counting and the LLD presumption.²²¹ Other federal courts acknowledge the existence of state interests, but ultimately emphasize factual contacts in resolving the dispute.²²² But perhaps the most common approach is that of returning to the law of the place of injury when, upon analysis, two states are found to be interested in applying their law to the legal dispute.²²³ That is, these courts appear to abandon any effort to weigh interests or identify a “dominant” state.²²⁴ Whatever the ap-

221. See, e.g., *Florida Steel Corp. v. Whiting Corp.*, 677 F. Supp. 1140, 1141 (M.D. Fla. 1988).

222. See, e.g., *Default Proof Credit Card Sys., Inc. v. State Street Bank & Trust Co.*, 753 F. Supp. 1566, 1571 (S.D. Fla. 1990) (ruling mixed residence of litigants “neutralizes” residence factor).

223. See, e.g., *Peoples Bank & Trust Co. v. Piper Aircraft Corp.*, 598 F. Supp. 377, 381 (S.D. Fla. 1984) (applying law of place of injury when states have “equal interests”); see also *Digioia v. H. Koch & Sons*, 944 F.2d 809, 813 (11th Cir. 1991) (ruling that when two states are interested because of varying places of residence, law of place of injury, or place of conduct when place of injury is unknown, controls). The case of *Garcia v. Public Health Trust*, 841 F.2d 1062 (11th Cir. 1988), is difficult to classify. In *Garcia*, the court applied the law of the place of injury, Florida, which was also the forum. The court appears to have interpreted the Florida workers compensation statutes to mandate the result it reached and also drew upon support from specific *Restatement* provisions governing the issue. See *Garcia*, 841 F.2d at 1064–65.

224. An arguable case of interest weighing is found in *Judge v. American Motors Corp.*, 908 F.2d 1565 (11th Cir. 1990). In *Judge*, a divided circuit court panel addressed a conflict between Mexican law — which denied recovery for wrongful death injuries suffered in Mexico — and the laws of either Florida (the plaintiffs' domicile) or Michigan (the defendants' domicile) — which recognized wrongful death recovery. *Id.* The court ultimately concluded that Mexico lacked an interest in the suit based on the court's scrutiny of alleged interests. *Id.* First, the court rejected the relevance of Mexico's alleged interest in reducing litigation, since the instant suit had been filed in the courts of the United States rather than Mexico. *Id.* at 1571. Second, the court minimized Mexico's interest in immunizing nonresident corporations from liability for wrongful death for the purpose of encouraging business investment. *Id.* According to the court, there was no factual evidence to suggest that the plaintiff's recovery for wrongful death, alone, would adversely affect business investment in Mexico. *Id.* at 1573. Finally, the court declined to reach a decision regarding which of the two remaining states had a dominant interest in applying its law to the suit. *Id.*

The majority's position in *Judge* is plausible and suggests some relative weighing of state interests. At the same time, its analysis is not wholly persuasive. It is true that the conduct-regulating interest of Mexico (business encouragement) may not be seriously impaired as a result of the decision in *Judge*. However, this argument might be applied to many conduct-regulating policies. That is, a court can often conclude that its *specific* ruling in a conflicts dispute will not undermine state regulatory policy and thus reason away that state's interest. After all, conflicts disputes are relatively infrequent and do not have major precedential impact. Under this view, however, conduct-regulating policies may lose their importance through case-by-case attrition.

proach ostensibly taken by the federal courts in resolving true conflicts, the consequence is usually the same. The majority of federal courts ultimately apply the law of the place of injury.²²⁵

Conflicts commentators and courts have argued for decades about the appropriate method for resolving “true conflicts.” Some have argued for the application of forum law,²²⁶ some have continued to advocate a weighing or balancing of interests,²²⁷ others have called for a “comparative impairment” approach to resolving state interests,²²⁸ and still others have reiterated the approach of Florida courts in applying the law of the place of injury.²²⁹

The courts in Florida have shown no inclination to develop any sort of weighing methodology for resolving true conflicts and seem to have come to the LLD solution almost by default. While a literalist might criticize the courts for failing to do what the *Restatement (Second)* quite clearly commands, it is difficult to assail a court for refusing to publicly muddle through one of the more irresolvable conflicts issues to appear in the past quarter century. This is especially true given the considerable amount of ambiguity and indecision contained in the *Restatement's* very elaboration of state “interests.”²³⁰ Thus, in the continued absence of any straightforward solution to the identification and resolution of conflicting interests, emphasis on the law of the place of injury seems as good a response as any.

C. The Future for the *Restatement (Second)* in Florida Courts

In 1984, two of the earliest commentators on the Florida courts' experience with the *Restatement (Second)* foresaw a trend under which the LLD presumption would apply in all disputes other than

225. The only case discussed above where the law of the place of injury was not applied is the decision in *Judge v. American Motors Corp.* See *supra* note 224.

226. See Brainerd Currie, *Notes on Methods and Objectives in the Conflict of Laws*, 1959 DUKE L.J. 171, 176.

227. See RICHMAN & REYNOLDS, *supra* note 6, at 224–25.

228. See William Baxter, *Choice of Laws and the Federal System*, 16 STAN. L. REV. 1 (1963).

229. See SOUTHERLAND & WAXMAN, *supra* note 1, at 552–58.

230. See, e.g., *supra* text accompanying notes 51–53. Cases will occasionally arise where the LLD state is uninterested in applying its law, but where two other states have an interest in the controversy. See *Judge*, 908 F.2d at 1565 (declining to apply law of place of injury, Mexico, and remanding case for determination of whether to apply law of plaintiff's or defendant's domicile). These cases will necessitate that the courts improvise some solution to the “true conflict.”

“false conflicts.”²³¹ Ten years later, this trend has been substantially affirmed by the results of the courts' choice-of-law decisions, if not by their expressed rationales.

Reflecting on the substantive results of Florida conflicts decisions, one finds much to commend the contemporary approach. It appears, for example, that Florida decisional law avoids some of the criticisms that have been levied at many contemporary conflicts theories.²³² Thus, a review of this law reveals no systematic bias (1) in favor of forum residents,²³³ (2) in favor of forum law,²³⁴ or (3) in favor of plaintiff recovery.²³⁵ Moreover, as tempered by the “false-conflict” solution, Florida's approach to choice of law reveals none of the travesties of justice that served as the rallying point for attacks on earlier forms of territorialist doctrine.²³⁶

What is most surprising about the trend in Florida conflicts decisions is the similarity of results in the absence of a prevailing

231. See SOUTHERLAND & WAXMAN, *supra* note 1, at 524–27.

232. See generally Harold L. Korn, *The Choice-of-Law Revolution: A Critique*, 83 COLUM. L. REV. 772, 780 (1983); SOUTHERLAND & WAXMAN, *supra* note 1, at 528–30.

233. This is evident in cases of “true conflict,” where party Floridians seem to have lost as often as they have prevailed. See, e.g., *Jones v. Cook*, 587 So. 2d 570 (Fla. 1st Dist. Ct. App. 1991); *Wal-Mart Stores v. Budget Rent-a-Car*, 567 So. 2d 918 (Fla. 1st Dist. Ct. App. 1990); *AIU Ins. Co. v. Reese*, 498 So. 2d 966 (Fla. 2d Dist. Ct. App. 1986); *Steele v. Southern Truck Body Corp.*, 397 So. 2d 1209 (Fla. 2d Dist. Ct. App. 1981).

234. This is indicated by “true conflicts” in which Florida courts have applied the law of some other state. See, e.g., *Hertz Corp. v. Piccolo*, 453 So. 2d 12 (Fla. 1984); *State Farm Mut. Auto. Ins. Co. v. Olsen*, 406 So. 2d 1109 (Fla. 1981); *Jones*, 587 So. 2d at 570; *Reese*, 498 So. 2d at 966; *Steele*, 397 So. 2d at 1209.

235. See, e.g., *Jones*, 587 So. 2d at 570; *Reese*, 498 So. 2d at 966. The lack of systematic bias in favor of Floridians, Florida law, or recovery, is also illustrated by the mixed application of law in *Celotex Corp. v. Meehan*, 523 So. 2d 141 (Fla. 1988); see *supra* text accompanying notes 107–18.

One author has recently summoned case data that purports to show, among other things, that Florida decisional law tends to favor state residents, forum law, and plaintiff recovery generally. See Borchers, *supra* note 28, at 370–71. Borchers's data collection, however, reveals a significant problem with his conclusion. At no place does Borchers control for the existence of “false conflicts,” which occur with high frequency in the reported decisions. See *supra* notes 141–42 and accompanying text. If Florida courts are in fact applying the law of the only interested state when presented with false conflicts, see *supra* text accompanying notes 141–43, these cases should not be included within a data base that purports to demonstrate some other motivation for the courts' choice of law. Particularly given the small sample of cases reported in the Borchers' study, the inclusion of false-conflict decisions significantly skews his study results. In any event, this Author's review of reported conflicts decisions in Florida clearly rebuts the suggestion of outcome-bias in the decisional law.

236. See RICHMAN & REYNOLDS, *supra* note 6, at 173 (discussing *Alabama Great Southern R.R. v. Carroll*, 11 So. 803 (Ala. 1892)).

methodology for applying the *Restatement*. Regardless of whether courts emphasize the territorialist presumptions, factual contacts, interests, or *Restatement* commentary, the results are largely the same.²³⁷ If this trend holds constant throughout the present decade, it has much to say about the resilience of territorialism — and possibly the irrelevance of parts of the *Restatement (Second)*.

Given the results reached under the *Restatement (Second)*, one might think that criticisms of the courts' methodology are largely academic. It is suggested, however, that the consequences of methodological confusion in the courts are quite real. While overall trends in conflicts decisions may give general comfort, they may also conceal an appreciable number of poor results in specific cases.²³⁸ More important, methodological confusion may have its most undesirable effects in the offices of attorneys who would resolve disputes short of full case adjudication. In the absence of predictable methodology and relatively predictable application of state law, attorneys may resolve cases badly — or may not resolve them at all. The professional cost of uncertain conflicts methodology can thus be considerable, even if it is not prominent in the reported case law.

As previously demonstrated, at some pivotal points, the *Restatement (Second)* fails to provide the clarity and simplicity one would hope for.²³⁹ This is true of the uncertain association it creates between presumptive rules and the significant relationship test and is also true of the *Restatement's* relatively unguided call for application of the law of the state with a “dominant interest” in a legal issue. Moreover, although intended as a “transitional” document,²⁴⁰ little has been done during the past two decades to update the various rules and commentaries that had questionable currency even at the time of the *Restatement's* adoption.²⁴¹

In retrospect, it is arguable that the Florida Supreme Court could have achieved more manageable reform in conflicts doctrine by adopting a more modest modification of territorialism. The court

237. *But see supra* note 143 and accompanying text (noting increased potential for error in “false-conflict” cases when contact counting is emphasized).

238. *See supra* note 143 and accompanying text.

239. *See supra* text accompanying notes 19–82.

240. *See supra* text accompanying note 18.

241. As evidenced by the revisions to the *Restatement (Second)* contained in the pocket part to the official publication (dated 1989), there has been *no* revision of the *Restatement's* sections applicable to torts.

might, for example, have reaffirmed the rule of LLD, subject to its displacement when the place of injury has no articulable interest in governing a conflicts dispute. Certainly such an approach would be a less circuitous route to the doctrinal resting place where Florida courts now find themselves.

Having formally adopted the *Restatement (Second)*, however, it is now incumbent upon the courts to make it work and to speak with a unified voice. Two steps in particular are important. First, the courts should reaffirm the points on which the *Restatement (Second)* does reach a fair amount of consensus — including the specialized relevance of factual contacts,²⁴² the value of particularized rules where such rules are provided,²⁴³ and the role of the “false conflict” analysis.²⁴⁴ Second, the courts should recognize the constructive role they must play in giving operative meaning to the more open-ended provisions of the *Restatement* and should attempt to reach some consensus among themselves. This includes consensus about the role of territorialist presumptions in conflicts analysis — about which there already appears to be a working agreement — as well as consensus about the proper definition and reconciliation of state interests.²⁴⁵

The more modest role for interest analysis suggested by Florida case law — and endorsed by this Author — will surely disappoint those who prefer to see the courts engage in a broad-ranging policy analysis. In essence, state interests will continue to be defined by a limited emphasis on the parties' domicile and the place of a tortious occurrence. And in the case of true conflicts, courts will essentially abandon the effort to weigh or balance interests and will usually default to the rule of *lex loci delicti*.

In constructing their version of the *Restatement (Second)*, the Florida courts must by necessity take sides in unresolved debates. This is true about the proper emphasis to be given to territorialist presumptions, and it is also true about the content of interest analysis. Whatever choices the courts make, academic acclaim and jurisprudential conviction will elude them. Nonetheless, the courts still may succeed in developing a choice-of-law methodology for Flor-

242. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145(2) (1969).

243. See *supra* text accompanying note 65.

244. See *supra* text accompanying notes 42–43.

245. See *supra* text accompanying notes 221–30.

ida that is relatively simple and predictable and that produces no patently wrong results. Relative to the experience of other state courts that have strived for more ambitious accomplishments, the limited achievements of simplicity and predictability may have much to commend them.

IV. THE INTERRELATIONSHIP OF TORT AND CONTRACT DISPUTES

On its first occasion to address the applicability of the *Restatement (Second)* to contractual issues, *Sturiano v. Brooks*, the Florida Supreme Court refused to abandon the territorialist rule of “lex loci contractus,” notwithstanding its concession that the rule was “inflexible.”²⁴⁶ Indeed, the court thought such inflexibility “necessary” in contractual relations and chided the *Restatement (Second)*'s failure “to adequately provide security to the parties to a contract.”²⁴⁷

The court's decision in *Sturiano* is significant to the present discussion of conflicts in tort for two reasons. First, it suggests misgivings on the court's part about the perceived indeterminacy of the *Restatement (Second)*²⁴⁸ and indicates that the court will not further abandon territorialism in the swift and casual manner demonstrated in *Bishop*.²⁴⁹

246. *Sturiano v. Brooks*, 523 So. 2d 1126, 1129 (Fla. 1988).

247. *Id.* In an earlier article, this Author argued that, contrary to the suggestion that the *Restatement (Second)* introduces instability in contractual relations, its provisions seem no more unstable than Florida's territorialist doctrine, riddled as it is with escape devices and argumentative ploys. Finch & Smeltzly, *supra* note 1, at 270–79.

248. It may be significant that the majority in *Sturiano* quoted, by way of rejecting, the more general, contact-enumerating section of the *Restatement (Second)* rather than the specific presumptive section that was applicable to the issue before the Court. *Compare id.* at 1129 (quoting § 188) *with id.* at 1131 (Grimes, J., concurring) (quoting presumptive rule applicable to insurance contracts). The majority's opinion suggests considerable insolicitude for the extension of the significant relationship test to contractual problems.

249. As has been previously observed, *Bishop* adopted the *Restatement (Second)* approach to torts with virtually no discussion of its relative merit. See Finch & Smeltzly, *supra* note 1, at 264–65.

The court's opinion about the traditional conflicts rule applicable to contracts appears to have altered dramatically between 1981 and 1988. In 1981 (contemporaneous with the court's adoption of the *Restatement (Second)* for tort issues), the court stated that the traditional rules that focus on the place of contracting and performance are “today of little practical value since these contacts are so easily manipulated in our mobile society.” *Continental Mtg. Inv. v. Sailboat Key, Inc.*, 395 So. 2d 507, 510 (Fla. 1981). By 1988, the court seemed to have rediscovered the value of the territorialist doctrine:

Second, the court's bifurcation of state conflicts doctrine into part-territorialism and part-*Restatement (Second)* has given new prominence in tort-related litigation to the process of *characterization*. Because tort-related litigation often engenders problems in both tort (e.g., the extent of tortfeasor liability) and contract (e.g., the scope of insurance coverage), considerable dispute may be directed toward the question of whether a legal issue is a "tort" issue, and hence, amenable to a more malleable conflicts resolution under the *Restatement (Second)*, or a "contract" issue, and hence, governed by the more restrictive "lex loci contractus" rule. The problem of characterization has indeed produced a surprising amount of litigation in tort-related litigation since *Bishop* and merits further discussion.

A. Characterization in Tort-Related Litigation

One of the principal criticisms leading to the abandonment of the territorialist methodology of the first *Restatement* was the importance it attached to the labeling, or characterization, of a legal issue.²⁵⁰ Nonetheless, characterization still occupies a prominent role in contemporary conflicts doctrine. For example, when applying the *Restatement (Second)*, courts must characterize the disputed issue to determine which specific *Restatement* rule governs.²⁵¹ And when, as in Florida, the courts employ a hybrid approach to the resolution of conflicts issues, the characterization process may lead the courts to markedly different choice-of-law methodologies.

The process of characterization can produce a rather complex resolution of conflicts issues in a single lawsuit. According to the widespread practice of "depecage,"²⁵² each issue in a lawsuit must be independently resolved, and this leads to the possibility that the laws of different states may apply to different issues. As a result, it is not at all uncommon to find that courts in a single lawsuit apply the laws of two different states depending upon whether a specific

"Although lex loci contractus is old, it is not yet outdated. The very reason [the plaintiff] gives as support for discarding lex loci contractus, namely that we live in a migratory, transitory society, provides support for upholding that doctrine." *Sturiano*, 523 So. 2d at 1129.

250. See generally SCOLES & HAY, *supra* note 42, at 580–83.

251. See *supra* note 65 and accompanying text.

252. See SCOLES & HAY, *supra* note 42, at 35, 37.

issue is characterized as “tort” or “contract.”²⁵³

On occasion, this bifurcation in tort and contract issues occurs when both tort and contract claims are asserted against the same tortfeasor.²⁵⁴ But more commonly, mixed tort/contract disputes arise when issues of *insurance contract* coverage arise incidentally to issues of tortfeasor liability.²⁵⁵

In truth, the process of characterization is seldom a difficult one. In most cases where a characterization issue is raised, the proper resolution seems fairly obvious. Yet, the persistent raising of the characterization issue, and the relatively frequent overturning of lower court decisions,²⁵⁶ indicate that there remains a fair amount of confusion about the process.

To a large extent, the lower courts' confusion about characterization can be traced back to supreme court precedent, particularly the decision in *State Farm Mutual Automobile Insurance Co. v. Olsen*.²⁵⁷ As noted in an earlier part of this Article, the court in *Olsen* determined that the liability of an insurer for uninsured motorist coverage presented a “tort” issue that was to be resolved under the *Restatement (Second)*.²⁵⁸ The decision in *Olsen*, more than any other precedent, appears to have perpetuated the contention that insurance coverage issues are to be governed by the same law as the underlying tort.²⁵⁹

The decision in *Olsen* has been interpreted far too expansively

253. See, e.g., *Sturiano*, 523 So. 2d at 1126 (applying mixed state law to contract and tort issues); *Colhoun v. Greyhound Lines, Inc.*, 265 So. 2d 18 (Fla. 1972) (applying mixed state law to contract and tort issues).

254. See *Colhoun*, 265 So. 2d at 18 (negligence and implied contract claims asserted against bus line as result of vehicular accident).

255. See, e.g., *Sturiano*, 523 So. 2d at 1126; *Amica Mut. Ins. Co. v. Gifford*, 434 So. 2d 1015 (Fla. 5th Dist. Ct. App. 1983).

256. See, e.g., *Lumbermens Mut. Casualty Co. v. August*, 530 So. 2d 293 (Fla. 1988); *Herndon v. Government Employees Ins. Co.*, 530 So. 2d 516 (Fla. 5th Dist. Ct. App. 1988); *New Jersey Mfrs. Ins. Co. v. Robertazzi*, 473 So. 2d 235 (Fla. 4th Dist. Ct. App. 1985); *Andrews v. Continental Ins. Co.*, 444 So. 2d 479 (Fla. 5th Dist. Ct. App. 1984).

257. *State Farm Mut. Auto. Ins. Co. v. Olsen*, 406 So. 2d 1109 (Fla. 1981).

258. See *supra* text accompanying note 91.

259. In most cases where the characterization problem arises, the tortious accident has occurred in Florida, but the contract pertinent to insurance coverage was consummated in another state. See, e.g., *Lumbermens Mut. Casualty Co. v. August*, 530 So. 2d 293 (Fla. 1988); *Herndon v. Government Employee's Ins. Co.*, 530 So. 2d 516 (Fla. 5th Dist. Ct. App. 1988); *New Jersey Mfrs. Ins. Co. v. Robertazzi*, 473 So. 2d 235 (Fla. 4th Dist. Ct. App. 1985); *Andrews v. Continental Ins. Co.*, 444 So. 2d 479 (Fla. 5th Dist. Ct. App. 1984).

by some lawyers²⁶⁰ and courts. As other commentators have persuasively argued,²⁶¹ the decision in *Olsen* to apply tort law principles in defining the scope of uninsured motorist (UM) coverage was reflective of the particular wording and history of Florida's insurance statutes. Specifically, Florida law requires that insurance policies delivered in Florida contain UM coverage that provides the insured benefits based on the damages that the insured is "legally entitled to recover" from an uninsured tortfeasor.²⁶² In other words, the amount of UM coverage is defined by reference to the legal liability of the tortfeasor.

Since the insurer is obligated to pay no more than the tortfeasor would have to pay, the amount of contractual liability depends upon the hypothetical *tort* liability of the uninsured motorist.²⁶³ Thus, in defining contractual liability, the Florida statutes "incorporate" a tort issue.²⁶⁴ This is the reason why *Olsen* viewed the liability of the insurer as governed by the significant relationship test applicable to torts.

The decision in *Olsen* does *not* stand for the proposition that insurance contract issues arising out of tortious occurrences are generally governed by the choice-of-law principles applicable to the tort. The particular issue in *Olsen* was anomalous and must be confined to its special statutory setting. Any doubt about this has been dispelled by the court's later decisions in *Sturiano v. Brooks*²⁶⁵ and *Lumbermens Mutual Casualty Co. v. August*,²⁶⁶ where the court did not hesitate in characterizing the insurance coverage issues as contractual in nature, notwithstanding the presence of tort liability issues in the background. As emphasized by the court in *Lumbermens*

260. In the case of attorneys, it is likely that many characterization issues result from their understandable desire to obtain application of a law more favorable to their clients. The characterization process provides an opportunity for avoiding the law of the place of contracting, which in most cases, is less favorable than the law of the place of injury (usually Florida, in the reported decisions).

261. See SOUTHERLAND & WAXMAN, *supra* note 1, at 501-07.

262. *Id.* at 502 (quoting FLA. STAT. § 627.727(1) (1983)). There are, of course, specific statutory limits concerning the amount of the tortfeasor's legal liability the insurer must assume.

263. As noted by Southerland and Waxman, some states require that the insured actually recover a judgment from the uninsured tortfeasor prior to obtaining UM benefits. *Id.* at 504 n.263.

264. FLA. STAT. § 95.10 (1993).

265. *Sturiano v. Brooks*, 523 So. 2d 1126 (Fla. 1988).

266. *Lumbermens Mut. Casualty Co. v. August*, 530 So. 2d 293 (Fla. 1988).

Mutual Casualty:

Although we recognize that an action to recover uninsured motorist benefits is not strictly an action dealing with a contract . . . we agree . . . that the rights and obligations of the parties under an insurance policy are governed by contract law since they arose out of an insurance contract. . . . That the insured stands in a tort relationship to the uninsured motorist does not change the fact that an action by the insured against the insurer arises out of an insurance contract between the parties. Accordingly, the *lex loci contractus* rule determines the choice of law for interpretation of provisions of uninsured motorists clauses in automobile insurance policies just as it applies to other issues of automobile insurance coverage.²⁶⁷

Most district courts of appeal have appreciated the limited scope of *Olsen*, although many have been called upon to correct errors in the rulings of trial courts. Thus, appellate courts have properly recognized that a “contract” characterization is appropriate for such issues as: the validity of “other insurance” clauses in liability policies;²⁶⁸ the existence of particular forms of coverage under so-called “umbrella” policies;²⁶⁹ the amount of coverage provided by an insurance policy;²⁷⁰ the scope of risks insured by a policy;²⁷¹ the recoverability of pre- and post-judgment interest in policy-related litigation;²⁷² the conditions precedent for recovery under an insurance policy;²⁷³ and the validity of subrogation liens.²⁷⁴

The infrequent occasions when the district courts have charac-

267. *Id.* at 295.

268. *See Aetna Casualty & Sur. Co. v. Diamond*, 472 So. 2d 1312 (Fla. 3d Dist. Ct. App. 1985).

269. *See Continental Ins. Co. v. Howe*, 488 So. 2d 917 (Fla. 3d Dist. Ct. App. 1986).

270. *See, e.g., New Jersey Mfrs. Ins. Co. v. Woodward*, 456 So. 2d 552 (Fla. 3d Dist. Ct. App. 1984); *State Farm Mut. Auto. Ins. Co. v. Davella*, 450 So. 2d 1202 (Fla. 3d Dist. Ct. App. 1984).

271. *See New Jersey Mfrs. Ins. Co. v. Robertazzi*, 473 So. 2d 235 (Fla. 4th Dist. Ct. App. 1985).

272. *See, e.g., Herndon v. Government Employees Ins. Co.*, 530 So. 2d 516 (Fla. Dist. Ct. App. 1988) (pre-judgment interest); *State-Wide Ins. Co. v. Flaks*, 233 So. 2d 400 (Fla. 3d Dist. Ct. App. 1970) (post-judgment interest).

273. *See Bennett v. Granite State Ins. Co.*, 526 So. 2d 187 (Fla. 3d Dist. Ct. App. 1988); *see also Lunsford v. Allstate Ins. Co.*, 637 So. 2d 345 (Fla. 5th Dist. Ct. App. 1994).

274. *See Amica Mut. Ins. Co. v. Gifford*, 434 So. 2d 1015 (Fla. 5th Dist. Ct. App. 1983).

terized insurance coverage disputes as “tort” issues are either mistaken or anomalous. Thus, in *Commerce Insurance v. Atlas Rent A Car*, the court characterized as a “tort” issue whether a car rental agency could exercise its statutory authority under Florida law — the place where the rental contract was consummated — to shift primary coverage from its insurance policy to that of its lessee.²⁷⁵ The dispute in *Atlas* arose between two insurance companies whose relative liability presented an issue of which insurance policy provision would take precedence.²⁷⁶ The liability of the underlying tortfeasor had no relevance to this issue. Citing *Olsen*, however, the court concluded that the issue was one in tort.²⁷⁷ It is difficult to find a supporting rationale for the court's characterization in *Atlas*.

In *Andrews v. Continental Insurance Co.*, the court addressed the issue of the enforceability of Florida's “collateral source” rule to an insurance policy consummated in Maine.²⁷⁸ Although the court ultimately applied Maine law to uphold the Maine insurance contract (and thus did not apply the collateral source rule of Florida, the place of tort injury), the court felt compelled to analyze the issue under *both* a contractual and tort characterization.²⁷⁹ The uncertainty of the court in *Andrews* is more easily appreciated. Because the claim in *Andrews* arose under an uninsured motorist clause, *Olsen* arguably limited the insured's recovery to the amount he would have been “legally entitled” to recover from the tortfeasor.²⁸⁰ Because the tortfeasor could have invoked the collateral source rule had there been an actual tort suit, the insurer arguably retained the same option when it contractually assumed the liability of the tortfeasor. In any event, there are plausible arguments for both the tort

275. *Commerce Ins. v. Atlas Rent A Car*, 585 So. 2d 1084 (Fla. 3d Dist. Ct. App. 1991).

276. *Id.* at 1086.

277. *Id.* The *Atlas* court distinguished contractual precedent by stating that “this is not an action by an insured against its insurer.” *Id.* at 1086 n.4. It is difficult to see what significance this distinction has. Although the dispute was one between two insurers, resolution ultimately turned upon whether the liability-shifting clause in the Florida rental agreement would be enforced. How this in any way involved principles of tort liability is unclear. Nor is the court's citation to *Stallworth v. Hospitality Rentals, Inc.*, 515 So. 2d 413 (Fla. 1st Dist. Ct. App. 1987), persuasive. In *Stallworth*, the issue concerned the liability of a car rental agency to a third-party under tort principles of *vicarious liability*. See *id.* There was no such tort issue presented in *Atlas*.

278. *Andrews v. Continental Ins. Co.*, 444 So. 2d 479 (Fla. 5th Dist. Ct. App. 1984).

279. *Id.* at 481–83.

280. See *supra* text accompanying note 91.

and contract characterizations, and in this respect, *Andrews* represents an unusual occurrence of a mixed contract/tort issue like that which arose in *Olsen*.

In the great majority of cases, however, arguments for a tort characterization of issues pertaining to insurance coverage do not withstand scrutiny. It would greatly assist the resolution of conflicts issues arising in tort-related insurance litigation if this characterization controversy were put to rest.²⁸¹

The proper characterization of insurance issues as contractual does not altogether obviate the mischief that can be done through the characterization process. Indeed, as the Author has previously written, characterization *within* the subject of contracts has sometimes lead to some unexpected results.²⁸² This stems from the fact that the Florida Supreme Court has identified three sub-characterizations of contract issues that may lead to the application of differing state laws. Thus, the court has stated that issues pertaining to the “validity and interpretation of contract” are governed by the law of the place of contracting, issues pertaining to the performance of a contract are governed by the place of performance, and issues pertaining to remedies are governed by the law of the forum.²⁸³

The potential for confusion is best illustrated by the court's 1976 decision in *Government Employees Insurance Co. v. Grounds*.²⁸⁴ In *Grounds*, the insured had taken out his auto insurance policy in Mississippi and had subsequently been involved in an accident in Florida that resulted in suit and judgment against him in Florida state court. The insured later alleged in a second suit he brought against his insurer that, because of the insurer's negligent representation of him in the prior tort litigation, he had incurred unneces-

281. For a highly dubious invocation of the “tort” characterization by a litigant, reference is made to the case of *Herndon v. Government Employees Ins. Co.*, 530 So. 2d 516 (Fla. 5th Dist. Ct. App. 1988). In *Herndon*, the insurer succeeded in persuading a North Carolina court to apply North Carolina law — where the insurance contract was consummated — so as to limit the company's liability. *Id.* at 518. When, however, the insured sought to obtain pre-judgment interest from the insurer under North Carolina law, the insurer argued that *Florida* law (the place of the tortious injury) should govern that issue — which, not surprisingly, would deny the insured the recovery of interest. *Id.* The court applied North Carolina law. *Id.*

282. Finch & Smeltzly, *supra* note 1, at 273–75.

283. *Id.* at 271.

284. *Government Employees Ins. Co. v. Grounds*, 332 So. 2d 13 (Fla. 1976).

sary liability. The insured's suit for negligent representation was permitted under Florida insurance law, but not under the law of Mississippi.

The supreme court upheld the insured's claim, although the court disagreed with the lower court that had characterized the claim as one in "tort."²⁸⁵ While the court recognized the insured's claim as based on contract, it found the issue to be one of "performance" and hence, governed by the "law of the place of performance," which was deemed to be Florida, the place where the insurer had defended the insured.²⁸⁶

It is surprising that the decision in *Grounds* has not had noticeable impact on conflicts litigation pertaining to insurance issues. Arguably, a variety of issues pertaining to insurance claims might plausibly be characterized as "performance" or even "remedial" issues so as to circumvent the place-of-contracting rule.²⁸⁷ It is a good sign for the development of stable conflicts doctrine in Florida that this potential has not been realized and that more recent decisions like *Sturiano*²⁸⁸ and *Lumbermens Mutual Casualty*²⁸⁹ repudiate artful uses of the characterization device. In the context of later decisions, therefore, *Grounds* is best interpreted as a wayward use of the characterization device.

In summary, recent court decisions signal no willingness to circumvent the rule of *lex loci contractus* with inventive characterizations.²⁹⁰ The consequence is that, in the great majority of cases, the choice of law applicable to issues of insurance coverage will be resolved by a relatively straightforward application of the *lex loci contractus* rule.

285. *Id.* at 14–15.

286. *Id.* at 15.

287. One might argue, for example, that issues like the reduction of "collateral sources" from policy benefits, the awarding of pre- and post-judgment interest, or the awarding of attorneys fees are "performance" (or even "remedial") issues. Similarly, one might argue that the amount of UM coverage to be awarded under a policy is a "performance" issue that is dependent on the law of the place where the tort occurred. Case law reveals no decision, however, where these issues have been governed by the "performance" or "remedial" characterizations.

288. *Sturiano v. Brooks*, 523 So. 2d 1126 (Fla. 1988).

289. *Lumbermens Mut. Casualty Co. v. August*, 509 So. 2d 352 (Fla. 4th Dist. Ct. App. 1987).

290. *See supra* text accompanying notes 268–74.

B. The Public Policy Defense

Earlier discussion of the *Restatement (Second)* indicated that the legal policies of concerned states play a prominent role in the determination of which state has the most “significant relationship” to a tort issue.²⁹¹ This discussion also revealed how a state’s “interest” in applying its law is often dependent on whether the state’s residents would benefit from such application. Modern interest analysis is obviously not a part of traditional territorialist rules like *lex loci contractus*. Yet even under territorialism, there has always been recognition that, at some point, the legal policies of the *forum* should displace the law of the state mandated by conventional choice-of-law rules. This variation on territorialist methodology is commonly referred to as the “public policy exception.”²⁹²

As invoked in contractual disputes in Florida, the public policy exception has three distinguishing characteristics: (1) it is almost always invoked to protect *Florida residents*; (2) it is usually invoked by *individual* as distinct from corporate litigants; and (3) it is invoked only when the courts find the forum’s legal policy to be “*fundamental*.”²⁹³ It should be apparent that, whatever the similarities between interest analysis and the public policy exception, they are quite distinct doctrines. Thus, the public policy exception does not call for consideration of the policies of states *other* than those of the forum, nor does it apply generally to all forum policies, only “fundamental” ones.²⁹⁴

Insurance contract disputes constitute the single largest body of cases in which the public policy exception has been invoked. Reflecting on the above-described characteristics of the doctrine, it is apparent that insurance disputes often involve the claims of individuals asserted against corporate entities (the insurers) and that the legal policies underlying basic insurance protection may be deemed “fundamental” to the welfare of the state citizenry.²⁹⁵

291. See *supra* text accompanying notes 35–50.

292. See COLES & HAY, *supra* note 42, at 72–74; Finch & Smeltzly, *supra* note 1, at 277–79.

293. See Finch & Smeltzly, *supra* note 1, at 277–78.

294. *Id.* at 278–79 (discussing Florida Supreme Court’s reluctance to recognize “fundamental” character of state legal policies in recent litigation).

295. The Author has discovered no contemporary decision in which a court has scrutinized insurance law protection to determine whether it represents “fundamental” public

Thus, there are numerous cases in which residents of Florida have successfully invoked the public policy exception to obtain the protection of Florida law, notwithstanding the fact that their insurance policies were contracted for in another state.²⁹⁶ Public policy has been invoked, for example, to strike down “other insurance” clauses that would limit the insured's recovery,²⁹⁷ to increase the amount of uninsured motorist benefits provided the insured,²⁹⁸ and invalidate exclusionary clauses in insurance policies.²⁹⁹ By comparison, courts have usually rejected the public policy argument when the insured is not a resident of Florida.³⁰⁰

Perhaps the most contentious issues to arise when applying the public policy exception center upon the “resident” connection.³⁰¹ In particular, there has been considerable litigation concerning whether the state is interested in extending public policy protection to persons recently arrived in Florida, seasonal residents, and residents who are identified in policies that have been taken out by nonresidents.

The supreme court has more or less identified the outside boundaries of “resident” protection. In *Sturiano v. Brooks*, the court refused to extend the protection of Florida insurance laws to winter residents of the state, at least where they had not notified their insurer of the winter domicile.³⁰² By comparison, in *Gillen v. United Service Automobile Ass'n*, the protection of Florida insurance law was extended to new residents of Florida who had notified their

policy. The “fundamental” nature of insurance law seems to be assumed.

296. See *supra* notes 283–86.

297. See *Gillen v. United Servs. Auto. Ass'n*, 300 So. 2d 3 (Fla. 1974).

298. See *Decker v. Great Am. Ins. Co.*, 392 So. 2d 965 (Fla. 2d Dist. Ct. App. 1979).

299. See *Petrik v. New Hampshire Ins. Co.*, 379 So. 2d 1287 (Fla. 1st Dist. Ct. App. 1979).

300. See, e.g., *H.S. Equitie, Inc. v. Hartford Accident & Indem. Co.*, 334 So. 2d 573 (Fla. 1976); *Aetna Casualty & Sur. Co. v. Diamond*, 472 So. 2d 1312 (Fla. 3d Dist. Ct. App. 1985); *Amica Mut. Ins. Co. v. Gifford*, 434 So. 2d 1015 (Fla. 5th Dist. Ct. App. 1983).

301. Florida insurance statutes sometimes contain language that purports to define the territorial coverage of insurance regulation. For example, UM coverage must be included in policies “delivered or issued for delivery in this state with respect to any . . . motor vehicle registered or principally garaged in this state.” FLA. STAT. § 627.727(1) (1994). Although it has been argued that such statutory provisions by definition do not apply to policies issued in other states, the supreme court has indicated that the coverage provisions of the insurance statutes are *not* intended to exclude coverage to persons having some residential connection with the state. See *Gillen*, 300 So. 2d at 6.

302. *Sturiano v. Brooks*, 523 So. 2d 1126 (Fla. 1988).

insurer of their relocation and had paid premiums on a policy that was issued subsequent to their move.³⁰³

Although the application of Florida public policy to new or part-time residents is highly dependent on the specific facts of the controversy, a few useful generalizations can be offered. First, case law reveals that the public policy exception is far more likely to succeed when the insured has become a full-time Florida resident. In such situations, a Florida court is most likely to discover a "paramount interest in protecting its own."³⁰⁴ Second, case law does recognize a countervailing interest in assuring that insurance companies have reasonable notice that insurance coverage is now centered in a new state and that the locale of the insured "risk" has changed. Thus, when insured parties have relocated to Florida, but have either failed to notify their insurers of their changed domicile³⁰⁵ or have affirmatively represented to the insured that their relocation is temporary,³⁰⁶ courts have been unwilling to apply Florida's insurance laws. These decisions demonstrate that while the *lex loci contractus* rule may be somewhat compromised upon relocation of the insured party, the insurer is entitled to notice of the relocation so that it can renegotiate applicable premiums or, if it so chooses, withdraw from the insurance relationship.³⁰⁷

The insurance cases also adopt the position that even when the person or entity procuring insurance is not a resident of Florida, it may be appropriate to apply Florida law when the persons and risks covered by insurance are located in Florida. Thus, general policies providing for employee³⁰⁸ or family³⁰⁹ coverage may be sub

303. *Gillen*, 300 So. 2d at 6. Although the new policy issued upon the plaintiffs' move to Florida would transform Florida into the *lex loci contractus* state with respect to that policy, at issue in *Gillen* was also the meaning of a second policy that had been taken out in the plaintiff's prior state of residence. *Id.* at 5-6.

304. *See id.* at 7.

305. *See New Jersey Mfrs. Ins. Co. v. Woodward*, 456 So. 2d 552 (Fla. 3d Dist. Ct. App. 1984) (although insured sent insurer change of address form, insurer was not notified that insured was effecting change in permanent residence).

306. *See State Farm Mut. Auto. Ins. Co. v. Davella*, 450 So. 2d 1202 (Fla. 3d Dist. Ct. App. 1984).

307. *Cf. Tennessee Farmers Mut. Ins. Co. v. Meador*, 467 So. 2d 471 (Fla. 5th Dist. Ct. App. 1985) (insurer not subject to jurisdiction of Florida courts when, upon receiving notice of insured's relocation to Florida, insurer sent notice of intent not to renew insurance policy).

308. *See Decker v. Great Am. Ins. Co.*, 392 So. 2d 965 (Fla. 2d Dist. Ct. App. 1979).

309. *See Petrik v. New Hampshire Ins. Co.*, 379 So. 2d 1287 (Fla. 1st Dist. Ct. App.

ject to Florida insurance law when, with the *knowledge* of the insurer, persons or risks covered by the policy are located in the state. As can be seen, these cases reflect the position that the *lex loci contractus* rule will be modified when to do so will secure protection of Florida residents without unfairly altering the expectation interests of the insurer.

In summary, it appears that the conflicts principles applicable to insurance contract issues are far more stable and predictable than those applicable to tort issues. For the most part, the rule of *lex loci contractus* will be followed by the courts, subject to a specifically limited form of resident protection embodied in the public policy exception. As a consequence, the opportunities for dispute and contention so common under the *Restatement (Second)* are dramatically reduced when an issue can be characterized as contractual.

V. CONCLUSION

Since its promulgation in 1969, the *Restatement (Second)* has been an overwhelming success. Today, it is estimated that twenty-four states have adopted the *Restatement (Second)* in some form.³¹⁰ Yet, despite its success, there is widespread agreement that the *Restatement (Second)* is so “spongy”³¹¹ that courts employing it find support for highly divergent methodologies.³¹²

One seriously questions whether, upon adopting the *Restatement (Second)*, the Florida Supreme Court appreciated the breadth of possibilities to be found within the document.³¹³ The court's particular interpretation of the *Restatement (Second)* appears less an affirmation of a new methodology than a tempered modification of the first *Restatement*. It might well be described as territorialism without the sharp edges.

In refusing to reinvent conflicts doctrine within the possibilities of the *Restatement (Second)*, the supreme court has probably taken a wiser tack. There is noticeable disorder in both contemporary conflicts scholarship and in the *Restatement (Second)* provisions that

1979).

310. See Borchers, *supra* note 28, at 370. Professor Borchers estimates that 15 states continue to follow the first *Restatement*.

311. See BRILMAYER, *supra* note 10, at 68.

312. See Kay, *supra* note 5, at 559–62.

313. See *supra* text accompanying notes 83–88.

attempt to incorporate aspects of this scholarship. Despite their superficial appeal to modernity, contemporary conflicts theories usually generate as much dissent as traditional ones.³¹⁴ And worse, they are far more difficult to apply at the working level of attorneys and trial court judges.

Florida courts should continue to emphasize the territorialist solution they have provided for all but “false conflicts,” at least until someone — preferably the authors of the *Restatement* — devises an alternative approach that attains some degree of acceptance in the conflicts literature. The courts should affirm territorialism, however, with regard for the methodological framework in which their solution is offered. Fidelity to the core concepts and structure of the *Restatement (Second)* remains possible in most cases and presents the only hope for achieving uniformity within the decisional law. At this point in time, it is less important that the courts devise a “correct” methodology than that they articulate with relative clarity what they are doing.

314. See Bruce Posnak, *Choice of Law: Interest Analysis and Its “New Critics”*, 36 AM. J. COMP. LAW 681 (1988).