Eclecticism in Methods for Resolving Tort and Contract Conflict of Laws: The United States and the European Union

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This Article analyzes the three types of eclecticism found in choice of law. The first type, second-look eclecticism, is employed by courts when an initial choice-of-law method (territorialism, personal-law theory, or the better law approach) yields no conclusive result and so a second inquiry, based on a different choice-of-law method, is undertaken. The second type, called dépeçage eclecticism, occurs when courts use one choice-of-law theory to resolve most of the issues in an area of law, but a different theory for particular issues arising out of the same area of law. The final type, big-mix eclecticism, finds expression in the center of gravity approach, where a court looks to the law of the state with the most contacts, including territorial, personal-law; and even “better law” considerations. After fleshing out each type of eclecticism and analyzing courts’ treatment of cases under each type, the Article concludes that eclecticism is essential to the interest analysis method. An eclectic use of one-shot territorialism or the use of center of gravity is acceptable. Big-mix eclecticism underlying sections 145 and 188 of the Second Restatement also makes sense. Finally, this Article demonstrates that second-look switching from interest analysis to lex loci as done in Schultz v. Boy Scouts is indefensible, and most other instances of eclecticism are at least dubious.

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I. INTRODUCTION

To simplify, there are three different theories employed in choice-of-law methodology to allocate to a state’s control over resolution of a litigated claim or issue within a claim through applications of its substantive law. The first theory is territorialism, which provides that a sovereign should have control through its laws because an event has occurred in the land of the sovereign, regardless of from which state the actors are.¹ The First Restatement’s approach to choice of law in the areas of torts and contracts illustrates the territorialism theory.²


² See, e.g., Restatement of Conflict of Laws §§ 371, 377 (1934) (adopting a territorial approach regarding breach of alternative contracts and for alleged torts). With respect to family law issues such as status, the First Restatement’s approach to choice of law was primarily the personal law approach in looking to the domicile of a party or parties, not territorialism. See, e.g., id. § 137 (stating that the legitimacy of a child is determined by the
second theory is the personal-law theory, which is that a sovereign
state wants to, and thus to an extent possible, gets to employ its
protective laws for the benefit of its own people, its domiciliaries, even
when they get involved in a dispute due to the concurrence of events
outside of the sovereign. 3 This approach was the basis for identifying
false conflicts as defined by Brainerd Currie. 4 Under this theory, if the
domicile of the plaintiff and of the defendant is the same with regard to
an issue or claim, conflicting laws of the place of injury in tort or place
of making a contract are disregarded. 5 The third theory for allocating
sovereignty accords to a state having a connection to a dispute control
of the resolution of a litigated issue if its laws best achieve a desired
social goal. 6 Sometimes that state will be the domicile of a party;
sometimes its connection will be territorial, as the place of an
accident. 7 The pure "better law" version of Professor Leflar's five
choice-influencing considerations as once employed in Minnesota
illuminates the third theory embodied in a choice of law method, 8 as
does the approach called favor contractus, sometimes applied where
validity of a contract is in dispute. 9

law of the domicile of the parent in question). The First Restatement thus could be viewed as
an eclectic document, but the term is not used in conflicts literature to describe a mixing of
methodologies at that level. Rather, it is used to describe a mixture of approaches within an
area of law, like torts and contracts, where the First Restatement usually employed a purely
territorial approach.

3. See SCOLES, HAY, BORCHERS & SYMEONIDES, supra note 1, at 26-27.
4. See id. at 28-29.
5. See id.
6. See id. at 53-54.
7. Compare Bolgren v. Stich, 196 N.W.2d 442, 443-44 (Minn. 1972) (holding that
Minnesota's prorogation law applied where a Minnesota defendant injured a North Dakota
guest in South Dakota even though North and South Dakota law denied recovery), with
Milkovich v. Saari, 203 N.W.2d 408, 413-16 (Minn. 1973) (holding that Minnesota's
prorogation law applied as the place of injury even though Ontario, the domicile of the
plaintiff and defendant, denied recovery).
8. See, e.g., Milkovich, 203 N.W.2d at 412-14, 416-17 (holding the first three
considerations inapplicable in tort cases; and holding the fourth, the forum's governmental
interest, stated to be doing justice, the same as the fifth consideration, which instructs the
court to apply the "better rule of law"); Robert A. Leflar, Choice-Influencing Considerations
principle of favor contractus "means that, whenever possible, a solution should be adopted [to
the choice of law problem] in favour of the valid existence of the contract." C.M. BIANCA &
M.J. BONELL, COMMENTARY ON THE INTERNATIONAL SALES LAW: THE 1980 VIENNA SALES
CONVENTION 81 (1987). The Second Restatement adopts this approach in some situations.
See, e.g., RESTATMENT (SECOND) OF CONFLICTS OF LAWS § 200 cmt. c (1971) ("[T]he validity
of a contract should be sustained whenever this can be done by application of the local law of
a state having a substantial relationship to the transaction and the parties... ."); id. § 188 cmt.
Eclecticism in choice of law occurs when a court combines two (or all three) of the theories for allocating sovereignty to create a modern method of choice of law to resolve a multiple-state claim or issue that is a part of the claim. There are three primary ways in which the mixing can occur.

The first type can be called second-look eclecticism. The court initially sees what choice-of-law result it gets under one method (e.g., territorialism) but, if no conclusive resolution of the issue at hand appears, makes a second choice-of-law inquiry using a different method (e.g., one based on the personal law theory), which may result in reversing the tentative solution (if any) obtained by the first "look" at an involved jurisdiction's laws. This type of eclecticism is illustrated by the First Restatement’s choice-of-law approach to the issue of whether a marriage is valid. First, reference is made under a territorial theory to the place where the contract of marriage was completed. If its law holds the marriage invalid, the inquiry ends, but if the marriage is valid under that law, a second "look" for invalidating law is made by consulting the marriage law of the domicile of the would-be spouses. Another illustration is New York’s choice-of-law approach in tort cases under Neumeier v. Kuehner, as implemented in Schultz v. Boy Scouts of America, Inc. The court first checks the tort law of the domicile states of the plaintiff and defendant under the personal-law approach; if these laws get the same result, the inquiry ends. If the conflict is nonfalse, a second look is made to the tort law of the place of injury, using the territorial approach. But that law

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b (stating that party expectations should not be frustrated by applying a law that invalidates the contract).

10. See Scoles, Hay, Borchers & Symeonides, supra note 1, at 81.
11. See Restatement of Conflict of Laws § 121.
12. See id. §§ 121-122.
13. See id. § 132. Actually, this multilook example involves three, not just two, "looks," as section 132 directs the court to check "the law of the state of domicile of either party" that might render the marriage void. Id.
15. 480 N.E.2d 679, 685 (N.Y. 1985). More specifically, the illustration is the New York high court's implementation of Neumeier Rule 3 in the plaintiffs' action against the defendant Franciscan Brothers of the Poor, Inc., which had been joined as a defendant in the suit against the Boy Scouts for litigation purposes. See Schultz v. Boy Scouts of Am., Inc., 476 N.Y.S.2d 309, 311 (App. Div. 1984), aff'd, 480 N.E.2d at 689.
17. This is a generic term used in this Article to refer to both the true conflict (where the plaintiff wins under his or her law and the defendant wins under the law of his or her domicile) and the zero-interest case (where each party loses under the law of his or her domicile).
18. See Neumeier, 286 N.E.2d at 457.
too can be displaced by a third look. *Schulze* indicates the law of the place of injury will yield to the law of the center of gravity if it is elsewhere than in the state where injury occurred.19

The second type of mixing can be called dépeçage eclecticism, as when one theory is employed in a case to resolve most of the issues arising in an area of the law, but a different theory is used with respect to a particular issue arising out of the same area of law.20 An example would be a state that uses interest analysis in tort cases so that the law of the domicile of either the plaintiff or the defendant is used to decide most tort issues (personal-law theory) yet chooses the law applicable to conduct-regulating tort rules based on the place of the misconduct (territorialism), without regard to the domicile of the parties.21

Center of gravity itself is a prime example of the third type of eclecticism, which I will call big-mix eclecticism. The court under this approach looks to the state having the most contacts by examining territorial contacts, such as the place of negotiation, making, and performance of a contract, as well as personal law connections, such as the domicile states of the parties to the contract.22 The primary Second Restatement sections dealing with choice of law in tort and contract cases, sections 145 and 188 respectively, employ this mix of territorial and personal law contacts.23 It is possible to read the overarching section 6 of the Second Restatement as offering up an even bigger

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19. 480 N.E.2d at 687.

20. Dépeçage is to be distinguished from a departure from the basic choice-of-law method to decide what some scholars call the "incidental question." See, e.g., ROGER CRAMTON ET AL., CONFLICT OF LAWS: CASES, COMMENTS, QUESTIONS 373 (4th ed. 1987). With the incidental question, the issue for which a governing law must be found arises outside the area of law which predominates in the case. For example, a lex loci court uses the law of the place of injury to decide the tort issues. See RESTATEMENT OF CONFLICT OF LAWS § 377 (1934). If the defense of spousal immunity is raised, however, the court needs to be informed whether the plaintiff and defendant were lawfully married, requiring an answer to a family law question, which will invoke the laws of the domicile of the alleged spouses in addition to the place of celebration of the alleged marriage. See id. §§ 121 cmt. b, 122.

21. See infra notes 140-159 and accompanying text (discussing how New York and California apply interest analysis to find the law applicable to most tort issues, while classifying some as conduct-regulating and referring territorially to the law of the place of the alleged tortfeasor's misconduct for the applicable law); see also infra notes 135-151 and accompanying text (discussing dépeçage-type eclecticism in New York and California contract conflicts cases).


23. See infra notes 25-30 and accompanying text.
eclectic mix by adding in consideration of the justice-seeking theory of allocating sovereign control over multistate legal disputes.24

II. SECOND-LOOK ECLECTICISM: FROM THE SENSIBLE TO THE SENSELESS

A. Choice of Law for Validity-of-Marriage Issues Under the First Restatement

A quite sensible use of second-look eclecticism is employed in the First Restatement of Conflict of Laws in stating rules for determining the validity of a marriage. Viewing marriage as a matter of contract, the initial choice of law is to the place of celebration, which coincides with the territorial theory's major rule of lex loci contractus.25 If that law invalidates the marriage, the inquiry is over.26 If the marriage is valid under that law, the eclectic approach shifts from the territorial theory for allocating sovereign control to the personal-law theory and calls for a second look—this time to the law of the domicile of both participants in the marriage ceremony.27 If the law of either party's domicile finds the marriage polygamous or so incestuous as to violate a strong public policy of the domicile state, or if a statute of the domicile state provides that the type of marriage celebrated out

24. See Restatement (Second) of Conflict of Laws § 6 (1971). Section 6(2)(e) calls on a court to consider "the basic polices underlying the particular field of law." Id. A court that views spreading the risk of injury via purchased insurance or self insurance by a manufacturer of products as such a basic policy could find in subsection 6(2)(e) favoritism for applying a prorecovery rule (better law). Similarly, the court could consider freedom of contract a basic policy of contract law and find the subsection tilting in favor of application of a prorecovery law in breach of contract suits. I have explained elsewhere how subsections (2)(b) and (c) are capable of being read as, and are viewed by many courts as, interjecting into section 6 judicial recognition of the false conflicts under the personal law theory of interest analysis. See William A. Reppy, Jr., Codifying Interest Analysis in the Torts Chapter of a New Conflicts Restatement, 75 Ind. L.J. 591, 591-94 (2000). A boost for applying the law of the place of injury under the territorial approach to allocating sovereign control via choice-of-law decision making surely can be found in subsection 6(2)(d)'s recognition of the importance of protecting justified expectations and subsection 6(2)(f)'s call to respect a choice of law that achieves "certainty, predictability and uniformity of result." Restatement (Second) of Conflict of Laws § 6.

25. Restatement of Conflict of Laws § 122 (1934) (applying "any mandatory requirement" of the marriage law of the state in which the marriage is celebrated). A modern court would hold that where domiciliaries of state A marry in state B and the union is valid under A law but invalid under B law, only A law should be considered pertinent, because A's interest overwhelms that of B. See Donlann v. Maegurn, 55 P.3d 74, 78 (Ariz. Ct. App. 2002).

26. See Restatement of Conflict of Laws § 122.

27. Id. § 132.
of state is void. 28 This use of second-look eclecticism recognizes first that marriage is not just an issue of contract but also of status law, and, second, that the interest of the domicile states should not be subsumed by territorial purism. 29


In 1963, in Babcock v. Jackson, the New York Court of Appeals adopted interest analysis—a choice-of-law method based on the personal-law theory for allocating sovereignty in multistate cases—to resolve the great bulk of choice-of-law issues. 30 Babcock involved a false conflict because both the plaintiff and defendant were domiciliaries of the same state. 31 Babcock offered dictum that in cases

28. Many states now have such a statute directed at same-sex marriages celebrated in Massachusetts. See William A. Reppy, Jr., The Framework of Full Faith and Credit and Interstate Recognition of Same-Sex Marriages, 3 Ave Maria L. Rev. 393, 443-62 (2005).

29. Although the second look is taken solely for the purpose of finding a possible invalidating law, I do not view this example of eclecticism as including use of the third theory for designing a choice-of-law method, advancing a substantive goal. Rather, the second look recognizes the strong interest of the domicile states and is intended to police deliberate evasions of the legitimate regulatory interests of those states, rather than simply determining a law is “better.”

30. Compare the First Restatement’s choice-of-law rule where the question is whether a bastard child has been legitimated by his father. Restatement of Conflict of Laws § 137. The sole theory employed is the personal-law theory; there is no eclectic use of territorialism as is employed when the issue is validity of marriage. Thus, if a man domiciled in state D publicly declares, orally, while in state X, that he is the father of a named child, the child can be legitimated only under D’s law. If the statement is sufficient to legitimize under that law, the law of X where the father acted will not be consulted even though that law may hold the act done quite insufficient to legitimize because, for example, a notarized writing is required. The different treatment of choice of law for legitimacy and for marriage validity in the First Restatement apparently is based on the fact that the man declaring he is the child’s father acts unilaterally; there is no contract and hence no basis for employing the territorially based lex loci contractus rule. American jurisdictions employing the First Restatement in family law matters could sensibly expand that Restatement’s handling of the legitimacy issue by creating a new second-look-eclectic approach that incorporates the “doing justice” theory of sovereignty in combination with territorialism. In the hypothetical above, if the law of D, domicile of the father, holds the statement made by the father in X insufficient to legitimize, yet under X’s law it does legitimate, a public policy in favor of legitimation supports use of a place-of-legitimation territorial reference to give effect to the declaration the father made in X.

31. 191 N.E.2d 279, 283-84 (N.Y. 1963). The Babcock opinion was laced, however, with an ample dose of center-of-gravity theory. For example, the court stated that the automobile involved in the accident involving solely New York domiciliaries was “garaged, licensed and undoubtedly insured in New York.” Id. at 284; see infra note 35 and accompanying text (discussing the area of tort laws the Babcock court held would still be subject to choice-of-law rules using the territorial method). The place of “garagement” of a car is quite irrelevant under interest analysis.

32. See 191 N.E.2d at 284.
of nonfalse conflicts "the disposition of other issues must turn ... on the law of the jurisdiction which has the strongest interest in the resolution of the particular issue presented." That is, there would be a weighing of interests if the issue did not present a false conflict. "Other" referred to issues not to be decided by territorial rules, such as rules of the road. Thus, Babcock envisioned applying to these "other" issues—the bulk of tort law issues—the law of either the plaintiff's or the defendant's domicile.

In 1969, Judge Fuld in a concurring opinion laid out choice-of-law rules for tort cases involving guest statute issues. Three years later, these rules were adopted by a majority of the New York Court of Appeals, widely known as the Neumeier rules. Originally dealing with guest statute cases, the rules were held by New York's high court in 1985 to apply by analogy to all loss-distribution issues in tort cases. The rules were not artfully written, but federal and lower New York courts understood the overall theory of the rules, and thus, decisions by such lower courts worked out that Rule 1 was intended to recognize false conflicts of both the same-domicile and different-domicile-same-law varieties. Likewise, while Rule 2 provided no

33. Id. (emphasis added).
34. Id.
35. Tooker v. Lopez, 249 N.E.2d 394, 404-12 (N.Y. 1969) (Fuld, J., concurring). At issue in Babcock was a guest statute of the place of injury, Ontario, invoked by the New York defendant, that allowed his guest passenger no recovery no matter how serious the host driver's misconduct was. 191 N.E.2d at 280 (quoting the Ontario statute as precluding the guest from recovering for "any loss or damage," apparently even if caused by the willful misconduct of the host driver). In Tooker, the guest statute of the place of injury did allow the guest to recover from the host driver upon a showing of "willful misconduct or gross negligence of the driver." 249 N.E.2d at 395 (majority opinion). New York law allowed recovery by the guest upon proof of simple negligence. Id. at 396. Thus, after he thought about the matter, Judge Fuld should have realized that guest statute cases, for which he was writing choice-of-law rules in his concurring Tooker opinion, could arise where three different tort rules were in conflict. Examples would be (1) a case where a New York guest was injured by a Michigan host by accident in Ontario and (2) a case where an Ontario guest was injured by a Michigan driver by accident in New York. In each example, the law of the place of injury introduces a rule of law far more favorable to one of the parties than the laws of the two domiciliary states. We shall see that Judge Fuld apparently did not, in writing the rules laid out in his Tooker concurrence, think about the three-way conflict.
38. Id. Rule 1 as written failed to recognize that a false conflict is presented not only when the tort victim and the perpetrator "are domiciled in the same state," Neumeier, 286 N.E.2d at 457, but also when they are domiciliaries of different states having the same law that differs from that of the place of injury. See William M. Richman & William L. Reynolds, Understanding Conflict of Laws 270 (3d ed. 2002) (arguing that it is "clearly wrong in terms of policy" for this type of false conflict not to be covered by Rule 1 but instead to fall into Rule 3). Lower courts corrected this by holding that, although the
choice-of-law answer in true conflicts where the alleged tortfeasor acted in his domicile, whose tort law rendered him not liable, while the victim was injured in his domicile, whose law provided for recovery, the lower courts found a solution: the ultimate reference in Rule 3 to the place of injury meant that the law of plaintiff's domicile state prevailed over the law of the defendant's state. As a result, the Neumeier "rules" were converted into a choice-of-law method for tort cases. False conflicts are recognized, but where the conflict is nonfalse either (1) the law of the place of injury is consulted to break the tie between the domicile states or (2) the law of the place of injury is actually applied even if it differs from the law of both domicile states.

Solution (1) is a sensible "big-mix" type of eclectic dépeçage recognizing that where one of the domicile states also is the state of injury, it usually will have a greater connection to the tort than that of the other domicile state. Solution (2) presents legal schizophrenia. If the basic principal for making a choice of law is based on interest analysis and the personal-law theory of allocating sovereignty, eclecticiscm (looking tentatively to the place of injury) can be used to fashion a tie-breaking approach for resolving nonfalse conflicts, which solution (1) does. Because this can be done, there is simply no reason, instead, to drop interest analysis and the personal-law theory like a superheated potato and revert to Bealian territorialism as the theoretical basis for deciding the case.

The choice between solutions (1) or (2) will be academic in the two-state conflict, as the state of injury is one of the domicile states. But the choice can be crucial to the outcome in the three-state conflict where the parties have separate domiciles with different laws and the place of injury is a third state if the law of the place of injury consists of a rule different from that of both domicile states.


40. See SCOLES, HAY, BORCHERS & SYMEONIDES, supra note 1, at 777-85.
The three-state scenario was presented to the highest court of New York soon after its adoption of the Neumeier rules. In Towley v. King Arthur Rings, Inc., the plaintiff guest was from Iowa, the defendant host driver from New York, and Colorado was the place of accident.41 Colorado had a guest statute in place at the time of the accident, and, although not mentioned by the court, so did Iowa, while New York did not.42 The Towley court announced that Neumeier required application of Colorado law, consistent with solution (2)’s understanding of what the ultimate reference to place of injury means.43 But, if, as seems likely, the plaintiff guest, unable to prevail under Colorado’s guest statute, also would have lost under the law of Iowa, his domicile state, the case would not present an occasion to decide whether solution (1) or (2) is part of New York choice-of-law methodology in tort cases because the result is the same under both.

The next three-state case in the New York Court of Appeals, decided in 1985, involved applying the Neumeier rules by analogy to the issue of charitable immunity.44 The defendant Franciscans had “supplied” Brother Coakley, their trainee, as a teacher to a New Jersey school attended by Richard and Christopher Schultz, and through this appointment, Coakley quickly became the boys’ scoutmaster.45 On scouting trips to New York, Coakley sexually molested the boys, allegedly leading to Christopher’s suicide in New Jersey and to Richard suffering mental anguish.46 The theory for recovery against

43. Towley, 351 N.E.2d at 730.
45. Id. at 680.
46. Id. at 681. The complaint conceded that Coakley continued to molest the boys in New Jersey, after the New York camping trips. Id. at 683. This provided the defendant Franciscans the curious yet legally tenable “defense” that it was Coakley’s post-New York molestations of Christopher that ultimately broke him down mentally and caused his suicide. See id. Schultz explained that with the Neumeier rules expanded to apply to loss-distribution issues involved in all kinds of torts, reference to “where the [accident] occurred” in Neumeier Rule 3 meant the place of injury, defined in First Restatement terms: “the place where the last event necessary to make the actor liable occurred.” Id. at 682-83; RESTATEMENT OF CONFLICT OF LAWS § 377 (1934) (“[T]he state where the last event necessary to make an actor liable for an alleged tort takes place.”). But in wrongful death cases, the First Restatement did not apply the last-act theory and chose the law of the place where the injury was inflicted that led to the death, “not . . . the place of death.” Id. § 391 cmt. b. Thus, had the defense pursued the strategy of blaming the suicide on New Jersey conduct, the jury would have had to decide whether Christopher would have killed himself had the New York molestation by Coakley been the last act that made suicide certain to occur. On the assault
the Franciscans was its involvement in the negligent hiring of Coakley, 
for which New Jersey law applied the complete defense of charitable 
immunity.\textsuperscript{47} The Franciscan order was held to be a "domiciliary" of 
Ohio, the tort law of which, like that of New York, provided no 
charitable immunity defense.\textsuperscript{48}

The \textit{Schultz} court held \textit{Neumeier} Rule 3 called for applying New 
York law, subject to Rule 3's escape clause, apparently reading solution 
(2) into Rule 3, under which interest analysis is abandoned as the 
choice-of-law method when a conflict is nonfalse and the courts revert 
to First Restatement territorialism.\textsuperscript{49}

But like \textit{Towley}, \textit{Schultz} cannot be viewed as a definitive holding 
that solution (2) will prevail over solution (1) when both approaches to 
the meaning of Rule 3 are presented to the court. Solution (1) in 
\textit{Schultz} would have had the court consult New York law as the place of 
injury, conclude that it imposed liability, just as did Ohio law, and then 
apply Ohio law under interest analysis. The basis for breaking the 
zero-interest conflict, the court would explain, was that the parties had 
greater contacts to prorerecovery law (domicile of defendant plus place 
of injury) than to nonrecovery law (the New Jersey domicile of the 
plaintiffs). This process introduces territorialism not as a second-look 
choice-of-law method but as a consideration in breaking nonfalse 
conflicts by a court that rejects Brainerd Currie's method for breaking 
nonfalse conflicts by applying forum law as unfairly biased. 
Eclecticism is involved, but it is not of the "second-look" type. Only 
one method is used, New York-style interest analysis, which under 
solution (1) represents "big-mix" eclecticism in that both personal law 
and territorial theories of sovereignty are combined into the one 
method.

Using New York law to boost the claim for application of Ohio 

law is similar in some respects to the process I term "lumping," which 

the Second Restatement calls for in tort cases.\textsuperscript{50} A comment to section 
145 of that Restatement states: "When certain contacts involving a 
tort are located in two or more states with identical local law rules on

\textsuperscript{47} \textit{Schultz}, 480 N.E.2d at 681.
\textsuperscript{48} \textit{Id. at 683.}
\textsuperscript{49} \textit{Id. at 687.} The court did escape to New Jersey law, so the Franciscans prevailed.
\textsuperscript{50} \textit{RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 cmt. i (1971).}
the issue in question, the case will be treated for choice-of-law purposes as if these contacts were grouped [together] in a single state.\textsuperscript{51}

Schultz is not a definitive rejection of solution (1) to explain what the ultimate reference to the place of injury means now that Neumeier has been converted from guest-statute-case rules to a choice-of-law method for tort cases.\textsuperscript{52} The Schultz plaintiffs did not ask for application of Ohio law, and, hence, the court never considered solution (1).\textsuperscript{53} The court stated, "a choice-of-law issue is presented because New Jersey recognizes the doctrine of charitable immunity and New York does not."\textsuperscript{54} Further, "[t]he choice is between the law of New York and the law of New Jersey."\textsuperscript{55}

Given what the court said, although not definitively, in Towley and Schultz, one would expect federal courts and lower New York

\begin{itemize}
  \item 51. \textit{Id.} Thus, in a case where section 145 was the primary section applicable because the type of tort involved did not fall under any of the subsequent sections that provided presumptions as to what contact was most important in certain tort or certain tort issues, if the plaintiff was domiciled and injured in state \( A \), which provided for recovery, and the defendant was a domiciliary of state \( B \), where his tortious conduct occurred and whose law would not impose liability, if the parties formed a relationship in state \( C \) related to the tort, a reference to the law of \( C \) breaks the apparent "tie" between states \( A \) and \( B \). \textit{See id.} § 145(2)(d). If \( C \)'s law granted recovery, the \( A-C \) combination has more significant contacts than state \( B \) has. The lumping together of the \( A-C \) contacts considers that it is the contacts of the case to law and not to a geographic territory that constitute the significant contacts to be analyzed.
  \item 52. \textit{See Schultz}, 480 N.E. at 681-82.
  \item 53. \textit{See id.}
  \item 54. \textit{Id.} at 681.
  \item 55. \textit{Id.} at 682. It is interesting to consider whether, had consulting the law of the place of injury led the court to hold that Rule 3 called for application of Ohio law, the court still would have escaped to New Jersey. I think not, if the record showed that it was in Ohio that the Franciscans negligently certified Brother Coakley to be qualified to teach in a school populated by young boys and sent him off to New Jersey to interact with the Schultz youths.

According to the intermediate appellate court in Schultz, "the alleged wrongful hiring . . . took place in New Jersey." Schultz \textit{v.} Boy Scouts of Am., Inc., 476 N.Y.S.2d 309, 310 (App. Div. 1984). This surely means that the school acted there on the negligent misrepresentation made by the Franciscans, not that the Franciscans did any tortious acts in New Jersey. The Court of Appeals stated that the Franciscans sent their teachers to New Jersey, implying the Franciscans did not act in New Jersey. Schultz, 480 N.E.2d at 687. Neither the high court nor the appellate division opinion indicates from whence Brother Coakley was "sent," but it certainly could have been from Ohio. The high court's escape from New York to New Jersey was based on New York's having only "isolated and infrequent contacts" with the molestation problem compared to New Jersey. \textit{Id.} Suppose, though, the issue was instead whether to escape from Ohio to New Jersey. It could not be said that Ohio was "isolated" with respect to the tort in the same way New York was. Most importantly, under interest analysis, it was a domicile state, like New Jersey, whereas New York was not. As the state of misconduct by the Franciscans, Ohio would seem to have had as important a territorial connection as did New Jersey as the place of some injury, but not the injury the plaintiffs were relying on for recovery. \textit{See id.} at 683.
courts to assume solution (2) was incorporated into Neumeier Rule 3, but for one significant dictum in the 1993 case Cooney v. Osgood Machinery, Inc.,\textsuperscript{56} which is important in the development of New York's choice-of-law methodology in tort cases. Cooney involved not a three-state conflict but a true conflict between two domiciliary states, New York and Missouri, concerning the law of contribution between joint tortfeasors.\textsuperscript{57} The true conflict was broken by the Cooney court in favor of Missouri on the theory that the injury involved in the case occurred there.\textsuperscript{58} Explaining what it was doing in looking to Missouri as the place of injury, the court said, "[T]he situs of the tort is appropriate as a 'tie breaker'" to resolve the tie between two states, each of which has an "interest ... in enforcing its law [that] is roughly equal" to the interest of the other state.\textsuperscript{59}

Subsequent to Cooney, at least one, and possibly two,\textsuperscript{60} lower New York courts have decided three-state conflicts in which the result

\textsuperscript{56} 612 N.E.2d 277 (N.Y. 1993).
\textsuperscript{57} Id. at 279.
\textsuperscript{58} Id. at 283. This conclusion seems wrong. The injury complained of in Cooney was potential financial harm to a New York company that had been sued in tort and would have to pay all of the damages to the Missouri tort victim unless it could get contribution from a Missouri company that was alleged to be just as negligently responsible for the tort as was the New York party seeking contribution. Id. at 279. So, the place of injury in the contribution suit decided by the Cooney court was New York; that the worker whose injury created potential liability for both a New York and Missouri party was injured in Missouri was not a relevant factor.
\textsuperscript{59} Id. at 281. A leading treatise can be read as criticizing Cooney's characterization of the reference to the place of injury as a tie-breaker device apparently on the theory that the solution (2)'s interpretation of Neumeier Rule 3 is inconsistent with the language of Rule 3. Scoles, Hay, Borchers & Symeonides, supra note 1, at 840 ("The fact is that Rule 3 resorts to the lex loci not as a tie breaker, but rather as the rule that was in place before Babcock"). This comment is made in connection with the treatise's discussion of the three-state conflict in the Bodea case. See Bodea v. Trans Nat Express, Inc. 731 N.Y.S.2d 113, 113 (App. Div. 2001). But New York's high court adopted the Neumeier rules as governing law in a case where the place of the tort was in a domicile state, and there is no reason to think the judges had in mind a three-state conflict where the law of the place of the tort was far different from that of the domicile states that created the conflict. In the two-state conflict, application of the law of the place of injury (a domicile state) can indeed be seen as the breaking of a tie. This Article has attempted to point out that one simply cannot know whether, as the Scoles treatise assumes, the Neumeier court thought about the vagueness in Rule 3's reference to the place of the tort, realized that solutions (1) and (2) each were consistent with the language of Rule 3, and concluded that solution (2) would be utilized in the future.
\textsuperscript{60} See Cunningham v. Williams, 814 N.Y.S.2d 467, 469 (App. Div. 2006). A Colorado plaintiff sued the defendants, including one domiciled in New York, based on an injury suffered in Ontario, where the law substantially limits the recovery of noneconomic damages. Id. at 468-69. The court recognized New York had no such damage cap but did not discuss Colorado law. See id. at 469. If Colorado law was identical to New York's, the court failed to realize it was dealing with a false conflict. See supra note 4 and accompanying text. If Colorado law on damages was not as favorable as New York's to the plaintiff, but not as
would be different if solution (2) to the Neumeier Rule 3 interpretation problem were adopted based on pre-Cooney precedent or if solution (1) were chosen based on the “tie break” dictum in Cooney. Squarely presenting the issue was a 2001 New York Appellate Division case, Bodea v. Trans Nat Express, Inc.\(^61\) The plaintiff in this automobile accident suit was from Ontario and the defendant from Quebec.\(^62\) The place of the misconduct and injury was New York.\(^63\) Quebec’s no-fault statute precluded the plaintiff from recovering noneconomic (pain and suffering) damages; Ontario’s allowed such recovery subject to a damage cap, while New York’s statute imposed no damage cap if injuries were serious.\(^64\)

Looking at the law of the domiciliary provinces, a court should see that this was a true conflict. Quebec law relieved the defendant from liability; Ontario law gave its domiciliary some recovery.\(^65\) But this was a true conflict not covered by the inartfully drafted Neumeier Rule 2 because the place of the tort was not one of the domicile provinces. Rule 3 thus applied.\(^66\) The Bodea court applied New York law, i.e., it used solution (2) to interpret Rule 3’s reference to the place of the tort.\(^67\) The court recognized that both Quebec and Ontario had an interest in application of the law of the province to aid a domiciliary of the jurisdiction.\(^68\) The court also quoted the tie-breaker passage from Cooney.\(^69\) Obviously ignorant of its import, the court held New York law applied rather than holding New York’s pro-plaintiff rule required breaking the tie between Ontario and Quebec in favor of the more pro-plaintiff law of these provinces, that of Ontario.\(^70\) Whether the appellate division in Bodea misinterpreted the “tie-breaker” dictum of Cooney will not be known until the New York Court of Appeals tells

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\(^61\) 731 N.Y.S.2d at 116-18.
\(^62\) Id. at 113.
\(^63\) Id.
\(^64\) Id. at 115.
\(^65\) Id.
\(^66\) Id. at 118. Neumeier Rule 3 begins by stating it is the catch-all rule, as it applies “[i]n other situations,” thus including split-domicile cases not covered by Rule 2. Neumeier v. Keuhner, 286 N.E.2d 454, 458 (N.Y. 1972) (internal quotation marks omitted).
\(^67\) 731 N.Y.S.2d at 118.
\(^68\) Id.
\(^69\) Id.
\(^70\) Id.
us whether solution (1) or (2) is to be applied in interpreting Neumeier Rule 3.\footnote{1}

At least one reported case—referred to here as Roselawn—has recognized that applying a third state’s law that is totally different from that of two other states contending for application of their laws under interest analysis in a nonfalse conflict does not involve breaking a tie;\footnote{2} it may shed some light on what the court meant in Cooney when it stated that the law of the place of injury is to be used as a tie-breaker device. After an airline crash in Indiana, survivors of the deceased passengers sought—among many other claims made—punitive damages from two defendants with their principal place of business in

\footnote{1} The issue possibly is lurking in California as well. As I explained elsewhere, William A. Reppy, Jr., Eclecticism in Choice of Law: Hybrid Method or Mishmash?, 34 Mercer L. Rev. 645, 672-76 (1983), the proper reading of California’s leading decision to explain the choice-of-law method used there in tort cases, Offshore Rental Co. v. Continental Oil Co., 583 P.2d 721, 723 (Cal. 1978), is that nonfalse conflicts are to be broken, if possible, by the comparative pertinence analysis should be tried to see whether that theory can break the conflict. But the Offshore court seems to have recognized that there will be cases where the laws of each domicile state are equally in the mainstream of law and equally important to the jurisdiction creating the law, requiring yet a third tie-breaker device. The court’s statement near the end of the opinion that “the situs of the injury remains a relevant consideration” should be seen as identifying the ultimate tiebreaker rule in California. \textit{Id.}

\footnote{2} In Castro v. Budget Rent-A-Car System, Inc., 65 Cal. Rptr. 3d 430, 432 (Ct. App. 2007), a California plaintiff sued Budget based on an accident in Alabama caused by a lessee of Budget’s truck under a lease made in Alabama. The court never located Budget in a state. Its principal place of business at the time of the tort in July 2002 was either in Illinois or New Jersey. See Milestone Events: The History of Budget Rent A Car, Inc., http://www.budget.com/budgetWeb/html/en/aboutus/companyinfo/milestone.html (last visited May 15, 2008) (noting that the company headquarters moved from Lisle, Illinois, to Parsippany, New Jersey, in 2002—a precise date is not given). Alabama law was applied. Castro, 65 Cal. Rptr. 3d at 441. This was a proper tie-breaking use of the place of injury if defendant Budget were to be located for interest analysis purposes not at its principal place of business but at the Alabama branch office through which it got into the litigation presenting the choice-of-law problem. Plaintiff Continental Oil in the Offshore case was similarly located in its Louisiana branch office, not at its New York headquarters, although the court there located defendant Offshore Rental for interest analysis purposes at its principal place of business in California, and not at its Texas office through which it got involved in the case. See Offshore, 583 P.2d at 723. Compare the Offshore case to Denham v. Farmers Insurance Co., 262 Cal. Rptr. 146, 147, 149 (Ct. App. 1989), where the defendant corporation, although headquartered in California, see About Farmers Insurance Group, http://farmers.insurance-website.com (last visited May 15, 2008), was located for interest analysis purposes in Nevada, because the policy at issue had been sold out of one of its Nevada offices. If Budget were to be located in Castro in its principal place of business, then retreat to the lex loci (of Alabama) is an example of unprincipled second-look eclecticism.

\footnote{1} In re Air Crash Disaster Near Roselawn, Ind. on October 31, 1994, No. 95 C 4593, MDL 1070, 1997 WL 572897 (N.D. Ill. Sept. 9, 1997) (mem.), aff’d 96 F.3d 932 (7th Cir. 1996).
Virginia, who had committed tortious conduct in Texas.\textsuperscript{73} The United States District Court for the Northern District of Illinois, following the United States Court of Appeals for the Seventh Circuit’s choice-of-law analysis in a case involving a Chicago air crash,\textsuperscript{74} determined it was presented with a conflict between Virginia law, under which punitive damages could be awarded up to $300,000, and Texas law, which did not cap punitive damages.\textsuperscript{75} The court held:

\[\text{[T]hus, there is a “tie” between the interests of Virginia and Texas here. Nor is Air Crash Chicago’s “tiebreaker” rule applicable here: that rule held that the law of the place of injury may in some instances be applied when the interests of other jurisdictions are equal and opposed. Applying that rule here, however, would result in the application of Indiana law on punitive damages. As Indiana does not permit the award of punitive damages at all, while both of the other jurisdictions do, the application of Indiana law would frustrate the policy determinations of both of the more interested states . . . . We will not apply Indiana law to upset the interests of two other states . . . .}\textsuperscript{76}

The judge in Roselawn understood that denying all punitive damages under Indiana law would not break the impasse between Virginia, which would award $300,000, and Texas, which would award even more.\textsuperscript{77} By way of analogy, if the Chicago Cubs and Saint Louis Cardinals finish the regular season tied for first place in the Central Division of the National League, it could not be said that this tie would be broken if the Commissioner of Baseball declared Cincinnati, which had finished third, three games behind the Cubs and Cardinals, the division winner with the right to proceed to the playoffs. Chicago and Saint Louis would still be tied.

\textsuperscript{73} Id. at *1-2.

\textsuperscript{74} In re Air Crash Disaster Near Chi., Ill. on May 25, 1979, 644 F.2d 594, 604 (7th Cir. 1981). New York would have held the punitive damages issue to be conduct regulating and would have looked solely to the law of the place of misconduct, Texas. But the trial court in Roselawn viewed Chicago Air Crash as requiring it to consider the domicile state of the defendant as having an interest in determining whether the defendant should be punished by a punitive damages award in addition to the interest of Texas, the state of misconduct, in imposing a punitive damages award. Roselawn, 1997 WL 572897, at *2. Thus, Roselawn dealt with a real (or actual, if you prefer) conflict, a “tie” that needed to be broken.

\textsuperscript{75} Id. at *1.

\textsuperscript{76} Id. at *5. The court chose to break the conflict by weighing interests, concluding that the state where the defendant acted had a greater interest in supplying the applicable law of punitive damages than the state of domicile of the defendant. Id. As a result, the unlimited damages law of Texas applied. Id. Using an analogy to solution (1) to the Neumeier enigma in New York, however, the incident’s territorial contact to the very pro-defendant law of Indiana would have broken the tie in favor of the somewhat pro-defendant law of the interested domicile state of Virginia with its cap on punitive damages.

\textsuperscript{77} Id. at *1.
C. The European Union's Mixing of Personal-Law and Territorial Theories in Tort Cases Under Rome II

While the highest court of New York remains free to follow Roselawn by interpreting Neumeier Rule 3 as not reverting from interest analysis to the lex loci method, but instead consulting the law of the place of the tort as part of the process of choosing between the two interested states, the European Union (EU) seems committed to the senseless second-look eclecticism applied in New York's Bodea case. The EU rule for choice of law in cases involving noncontractual obligations, found in a regulation known as Rome II, is like New York's approach in tort cases, a mix of lex loci and false conflict theory.78 Unlike New York, where Neumeier Rule 1 has the court determine whether there is a false conflict based on common domicile, Rome II's first look is to the "law of the country in which the damage occurs."79 The second look under Rome II is based on a personal-law theory of sovereignty rather than territorialism: "However, where the person claimed to be liable and the person sustaining damage both have their habitual residence in the same country at the time when the damage occurs, the law of that country shall apply."80

These articles are incapable of the construction that the place of injury functions as a tie-break device when there is a nonfalse conflict between the laws of the two domicile states. Rather, these articles will be viewed as requiring application of the lex loci's no-recovery rule of country A, the place of the tort, although the plaintiff habitually resides in country B and the defendant in country C, with B and C having identical prorocession laws.81 As a result, the Rome II mixing of lex loci with false conflict theory is an example of the very most indefensible use of second-look eclecticism.

79. Id. art. 4(1).
80. Id. art. 4(2).
81. Rome II's escape clause, article 4(3), seems incapable of being used to get to the law of either B or C in this situation. It provides:

Where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply. A manifestly closer connection with another country might be based in particular on a preexisting relationship between the parties, such as a contract, that is closely connected with the tort/delict in question.

Id. art. 4(3).
D. Second- and Third-Look Eclecticism Under the Second Restatement

The torts and contracts chapters of the Second Restatement have a similar structure. For various specific types of contracts and torts, a section of the Restatement lays out, almost always based on a territorial reference only, a presumption as to which state's law applies. Elements include: for a personal injury tort, the law of the place where the injury occurred; for damage to chattels, the law of the place where the damage occurred; for defamation, the law of the place of publication; for invasion of privacy, the law of the place where the invasion occurred; for interference with a marriage relationship, the law of the place where the conduct complained of principally occurred; for a contract to transfer interest in chattel, the law of the place designated for delivery of the chattel; for a contract of casualty insurance, the law of the place of principal location of the insured risk; and for a contract to render services, the law of the place where a major part of the services are to be performed.

But each section provides that the presumption of application of law based on the territorial connection can be overcome if a different state emerges by applying the various principles found in section 6 of the Second Restatement. This second-look eclecticism is mandated even to reverse the presumptively applicable law of the situs of land in the case of a contract to transfer ownership of the land.

If a court employing the Second Restatement's method for choice of law does not find that one of the sections dealing with specific types of torts or contracts applies in the case, it will usually begin its analysis with the sections dealing generally with torts or contracts, sections 145 and 188, respectively. A center of gravity is found by weighing the

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82. See infra notes 83-92 and accompanying text.
83. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 146 (1971).
84. Id. § 147.
85. Id. § 149.
86. Id. § 152.
87. Id. § 154.
88. Id. § 191.
89. Id. § 193.
90. Id. § 196.
91. See, e.g., id. §§ 147, 149, 152, 154, 191, 193, 196.
92. Id. § 189.
several pertinent contacts listed in sections 145 and 188, but the law of this jurisdiction only presumptively applies. Sections 145 and 188 also direct that the court move on to section 6 for a second look, using the quite different lists of pertinent factors found in section 6.94

What is not precisely clear in the Second Restatement is the following: if the court begins with a section dealing with a particular type of tort or contract and it finds a presumptively applicable law, should it then apply section 145 or 188 to see whether center-of-gravity analysis under one of these sections leads to a different state than that whose law was presumptively applicable under the first look? To do so would be to depart from the literal wording of the specific section to move on directly to section 6. If such a departure is made, the court will be sent to section 6 by the terms of sections 145 and 188. Such a reference to section 6 constitutes a third and not second look.95

Suppose in a personal injury case the court begins its analysis with section 146, presumptively directing it to the law of the place of injury and then does not proceed directly to section 6, but next consults section 145. The initial language of section 145 would suggest that its sole function is to provide a list of contacts that should be collected en route to section 6,96 and used in doing a section 6 analysis. Under this

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94. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 145, 188 (1971). Sections 6, 145, and 188 are each examples, standing alone, of big-mix eclecticism. But because the "mix" in section 6 is more complex than that in sections 145 and 188, a court's switch from sections 145 or 188 to section 6 to determine the applicable law does constitute a shift in the theory for allocating sovereignty through choice-of-law methodologies and is properly viewed as constituting second-look eclecticism.

95. The first look employs only territorial theory; the second look (to section 145 or 188) involves a big mix with the domicile of each party (personal-law theory) listed as a pertinent contact as well as territorial contacts; and in probably most states, the third look (to section 6) shifts to pure personal-law theory. The third look makes this shift by recognizing that if there is a false conflict, the state law chosen under that theory displaces that chosen on the first look or the second look (where a section 145 or 188 analysis had displaced the presumptive reference of a section dealing with a specific kind of tort or contract). This view of the role of section 6 is not what its drafters intended but has wide acceptance in the courts. See infra notes 114-116 and accompanying text.

96. Subsection (1) of section 145—as well as subsection (1) of section 188, directed to contract cases—declares that the governing law on an issue in tort (or contract) is that "of the state which . . . has the most significant relationship to the [occurrence or transaction] and the parties under the principles stated in § 6." RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 145(1), 188(1). Subsections (2) of sections 145 and 188 begin by stating that the subsection provides a list of "[c]ontacts to be taken into account in applying the principles of
approach, section 6, not section 145, provides the first and only opportunity for displacement of the section 146 presumption.

On the other hand, the final subsection of section 188, the contract law counterpart of section 145 in the Second Restatement, includes black letter language indicating that the function of the section 188(2) list of contacts is not simply to facilitate a section 6 analysis: “If the place of negotiating the contract and the place of performance are in the same state, the local law of this state will usually be applied . . .” 97 That is, the section 188(2) factors are to be used to determine what state is the center of gravity in a contract conflicts case and the law of that state displaces the presumption provided by one of the sections dealing with specific types of contracts, such as that favoring the law of the place of the employee’s rendition of services in a contract for employment.

Moreover, reference in section 187 to section 188 indicates that the Second Restatement assumes a center-of-gravity analysis will always be made in every contract case. Section 187 lays out tests for the validity of a law selection clause in a contract, one part of which requires the court to determine whether

application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state . . . which, under the rule of § 188, would be the state of the applicable law in the absence of an effective choice of law by the parties. 98

97. Id. § 188. The deleted words are: “except as otherwise provided in §§ 189-199 and 203,” dealing with specific types of contracts. This language is a reminder that the existence of a center of gravity found after a section 188 analysis in a state other than the state whose law presumptively applies under the specific-contract sections does not necessarily mean that such a presumption will be displaced. Id.

98. Id. § 187(2)(b) (emphasis added). This is surely an erroneous statement. What the italicized language should have said is that the chosen law is to be compared to the different law that would apply were there no choice-of-law clause, which sometimes would be found under a section 188 center-of-gravity analysis but sometimes under one of the specific-contract sections such as section 193 (the law of the place of the insured risk presumptively applies in a casualty insurance contract case) and sometimes under section 6.

The first paragraph of comment g to section 187 repeats the erroneous assumption that it will be only under section 188 that the law to be displaced by the law-selection clause is to be determined, but a passage of comment g’s second paragraph gets it right: “No detailed statement can be made of the situations where a ‘fundamental’ policy of the state of the otherwise applicable law will be found to exist.” Id. § 187 cmt. g (emphasis added). This
Furthermore, comments e to both sections 145 and 188 discuss at length the relative importance—not in the context of section 6 but in that of a center-of-gravity analysis based on the section 145 and 188 lists of pertinent contacts—of the several contacts in various situations. Both comments seem to assume that a court visiting section 145 or 188 en route to section 6 not only will collect the list of pertinent contacts, but also will determine their relative weight in assessing where the center of gravity is for the tort or contract issue in question. The next logical step is to determine whether the existence of such a center of gravity in a state other than the state whose law is presumptively applicable under one of the specific-tort or specific-contract sections provides a reason to displace the presumptively applicable law found during the “first look” in favor of a presumption that can be overcome by a section 6 analysis that the law of the center-of-gravity state governs, a second presumption that can in turn be displaced by a section 6 analysis.

Illustration 1 to section 145 confirms the conclusion that in a tort case, a court, before doing a section 6 analysis, is to determine if a section 145 analysis will displace the section 146 presumption in a personal injury tort case that the law of the place of the injury governs. In Illustration 1 in “state Y, . . . B negligently drives [an] automobile off the road and A is injured.” A was B’s guest passenger, and state Y has a guest statute immunizing B from liability. Obviously, section 146 is the starting place for this tort case involving a personal injury, and illustration 1 acknowledges this, at least indirectly, by stating that a section 145 analysis might be able to establish that state “Y’s interests were not sufficiently involved to require application of the Y rule.”

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99. Restatement (Second) of Conflict of Laws § 145 cmt. e.
100. Id § 188 cmt. e.
101. Id § 145 illus. 1. Bryant v. Silverman, 703 P2d 1190, 1192 (Ariz. 1985), was a wrongful death case decided under the Restatement in which the court first cited the applicable tort-specific sections, 175 (on wrongful death in general) and 178 (on damages recoverable in a wrongful death suit), to pick up the presumption that the law of the place of injury governed. Id. at 1195. It then engaged in a lengthy center-of-gravity analysis under section 145, which ended up displacing the initial presumption. Id. at 1193, 1197.
102. Restatement (Second) of Conflict of Laws § 145 illus. 1.
103. Id.
104. Id.
The illustration makes state X the domicile of both A and B, triggering subsection 145(2)(c) (domicile of parties is a relevant contact) and also has A and B forming the host-guest relationship in state X, triggering subsection 145(2)(d). Illustration 1 thus concludes that a good case can be made that X law, making B liable, should apply, rather than the law of the place of injury. Section 6 is not alluded to in any way in illustration 1.

Accordingly, the ultimate section 6 analysis will often involve a "third look," in which yet a third method of choice of law is applied after territorialism (e.g., place of injury), the basis of the "first look," and center of gravity—its self an example of big-mix eclecticism because both domicile and territorial factors get considered—the basis of the "second look."

Just what choice-of-law method section 6 tells courts to use in making the second or third look to find the governing law is not at all clear from the face of its black letter text. A true grab bag of potential considerations is presented. As stated in comment c to the section, "[a]t least some of the factors mentioned in this Subsection [6(2)] will point in different directions in all but the simplest case." I have noted above that one readily can find amongst the listed principles use of all three theories for allocating sovereign control of a litigated dispute via the choice-of-law process—territorialism, personal-law theory, and doing justice. If one looks at how the courts interpret section 6, however, it turns out that subsections (2)(b) and (c), which stress recognition of "relevant policies" of "interested" states, are viewed as the most important, or even the only important, factors in section 6.

105. Id. § 145(2)(d).
106. Id. § 145 illus. 1.
107. The section reads:

[T]he factors relevant to the choice of the applicable rule of law include

(a) the needs of the interstate and international systems,
(b) the relevant policies of the forum,
(c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
(d) the protection of justified expectations,
(e) the basic policies underlying the particular field of law,
(f) certainty, predictability and uniformity of result, and
(g) ease in the determination and application of the law to be applied.

Id. § 6(2).

108. Id. § 6 cmt. c.
109. See supra notes 1-6 and accompanying text.
110. See, e.g., Nelson v. Hix, 522 N.E.2d 1214, 1217-18 (Ill. 1988) (stating that the domicile of the parties and the place where their marital relationship was centered were more important than where the accident and injury occurred).
To simplify what the courts that rely on subsection (2)(b) and (c) are doing under section 6, they treat the section as calling for displacing the tentative territorial-based presumption of the applicable law found under sections 145 and 188 or action-specific sections such as 146 and 193 only if the case presents a false conflict on the issue at hand under Currie-style interest analysis.  

Curiously, several of the section 6 factors seem to be telling the court that it should not displace the pending presumption of applicable law, such as a presumption for the law of the place of injury arising under section 146 and not negated by a section 145 center-of-gravity analysis conducted before the court consults section 6. The majority of decisions ignore or downplay these factors, apparently because of the courts' belief that subsections (2)(b) and (c) are the heart and soul of section 6, so that, if a false conflict is found, other section 6 factors

111. More than a score of Second Restatement-based decisions that view section 6 as either by itself calling for application of the law of the domicile of the parties where it is the same, or for bolstering the case for recognition of a false conflict initially suggested by such sections as 145(2)(c), have been collected by Dean Symeonides and his coauthors. See Scoles, Hay, Borchers & Symeonides, supra note 1, at 761-67; Symeonides, Purdue & Von Mehren, supra note 98, at 175-78. Examples of such cases are O'Connor v. O'Connor, 519 A.2d 13, 13 (Conn. 1988); Nelson v. Hix, 522 N.E.2d 1214, 1216-18 (Ill. 1988); Collins v. Trius, Inc., 663 A.2d 570, 572-73 (Me. 1995); and Miller v. White, 702 A.2d 392, 397 (Vt. 1997).

112. The “needs of the interstate... system[]” surely are not harmed by applying the law chosen under either section 146 or 145 in a tort case or 188 or some contract-specific section in a contract case. Restatement (Second) of Conflict of Laws § 6(2)(a). If that were not so, the entire Second Restatement’s presentation of choice-of-law methodology, except for section 6, should be discarded as contrary to good policy. The “protection of justified expectations,” id. § 6(2)(d), is not impaired if a court using the Second Restatement, the most popular choice-of-law method in the United States, reaches a result that is clearly contemplated either by section 146 or 145 in a tort case or section 188 or one of the contract-specific sections in a contract case, especially where the section states on its face that it raises a presumption of its applicability. Based on similar reasoning, “certainty, predictability, and uniformity of result,” id. § 6(2)(f), is best achieved by not displacing the presumptions arising from analysis made under the basic sections of the Second Restatement dealing with torts and contracts issues. If the court has found a presumptively applicable choice of law using one of the territorially based sections, even though the conflict is actually “false,” apparently there has not been a problem of “ease in the determination” of out of state law. Id. § 6(2)(g).

Thus, four of the seven section 6 factors seem to counsel in favor of not letting that section change the choice-of-law result in the case reached prior to the section 6 analysis, although the drafters of section 6 did not intend its factors to all be weighted equally so that there would be 4-3, 5-2, or 6-1 “scores” identifying the section 6 outcome. It is reasonable to treat these four as of little significance in some cases. On the other hand, if the pre-section 6 presumptively applicable law favors recovery in a tort case, hence spreading the risk, or upholds the validity of a contract, while the law chosen under false conflict analysis (§ 6(2)(b) and (c)) denies a tort recovery or invalidates a contract, the section 6(2)(e) factor, which favors making a choice of law that will implement the “basic policies” of tort and contract law, provides a basis for not overturning the pre-section 6 presumptively applicable law that cannot be dismissed on the ground that the factor is not significant.
cannot prevent the "heart's" directive to apply the law of the domicile of the parties.

Obviously, section 146 indicates that the writers of the drafts of the Second Restatement, before section 6 was added near the end of the process, were of the view that the state of injury in a tort case, although not a domicile state, was an "interested state." It does not necessarily follow, however, that section 6, because it was introduced to offer a new method of choice of law for the purposes of taking a second or third look at the governing law issue, uses the term interested state in the same way. Nothing in the black letter of section 6 is inconsistent with Professor Currie's notions that only a domicile state generally has any interest in applying its law to a tort or contract issue and that such a domicile state is interested only if its law favored its domiciliary litigant.

However, the comments to section 6 make it abundantly clear that "interested states" in the black letter of the section does not incorporate Professor Currie's views. Comment f to section 6 states in part:

In general, it is fitting that the state whose interests are most deeply affected should have its local law applied. Which is the state of dominant interest may depend upon the issue involved. So if a husband injures his wife in a state other than that of their domicil, it may be that the state of conduct and injury has the dominant interest in determining whether the husband's conduct was tortious or whether the wife was guilty of contributory negligence.

Whether the defendant owed the plaintiff a duty of care cannot possibly be classified as a conduct-regulating issue, so Currie would completely disagree that on the facts in the comment the state of injury was "interested" in having its tort law applied. Nevertheless, enough courts have weighed in on the import of section 6 that it should be recognized that the prevailing rule is that the section engrafts false-conflict theory on the basically territorially structured balance of the Second Restatement.

113. Id. § 6(2)(c).
114. Id.
115. See id. § 6.
116. Id. § 6 cmt. f. The comment goes on to say that the state of the spouses' domicile would have the dominant interest on the issue of whether spousal immunity in tort was a defense.
E. Escape Provisions Do Not Involve Eclecticism

The addition of an escape provision to a choice-of-law method usually does not change the theoretical basis of the method. Rather, the escape provision recognizes that unusual facts can be presented by a conflicts case that make application of the normal rule inappropriate and call instead for making an alternative choice of law within the theoretical framework of the choice-of-law method. 117

Perhaps the first escape clauses annexed to a modern choice-of-law method appear in New York's Neumeier Rules, originally designed for deciding guest statute issues in tort cases but later extended to apply by analogy to all loss-allocation issues in torts conflicts. 118 Rule 2 states that where the plaintiff guest is injured in his domicile state—it is assumed the defendant host driver committed misconduct there—the proration law of that domicile state, rather than the guest statute in effect in the state of domicile of the driver, will apply "in the absence of special circumstances." 119 An escape clause should be very broadly worded like this one is, as one cannot predict in advance what unexpected situation will suggest an escape is appropriate.

In teaching Neumeier in my conflicts classes, I give my students the following hypothetical to illustrate what such "special circumstances" might be, using a conflict of laws that a contemporary court might face because guest statutes have disappeared. D lives in state X, which has enacted a statute imposing a $250,000 damage cap for pain and suffering recovery in a negligence suit. P lives in contiguous state Y, which has no such damages cap. D proposes that P drive to D's home in X and that they then take D's Jeep on a camping trip at a state park in X, not far from the X-Y border. The

117. Dean Symeonides has usefully defended recognition of escape provisions in the creation of choice-of-law methodologies:

As Aristotle recognized many centuries ago, any pre-formulated rule, no matter how carefully or wisely drafted, may, "due to its generality," or because of its specificity, produce results that are contrary to the purpose for which it was designed. This "is a natural consequence of the difference between law making and law application."


118. See supra note 37 and accompanying text.

119. Neumeier v. Kuehner, 286 N.E.2d 454, 457-58 (N.Y. 1972). Bizarrely, Rule 2 is written in such a way that only the defendant gets the benefit of the escape clause. If the plaintiff from the proration state is injured by the driver defendant in the latter's domicile state, its guest statute applies despite the existence of "special circumstances." Id. Surely this is an error of sentence construction that will be corrected by New York courts when failure to do so would result in unfairness in a case. The issue has yet to arise in a reported decision.
plan is to come back to D's home, never having entered state Y in the Jeep. While D is driving, an escaped convict leaps into the back seat of the Jeep and at gunpoint orders D to drive to the town located five miles into state Y where the convict's girlfriend lives. Soon after entering state Y, with the gun pointed at his head, D negligently crashes the Jeep, severely injuring P.

When P sues D in New York, a court likely will invoke the escape clause of Rule 2 so that D can get the benefit of X's damages cap statute, because use of a place-of-injury reference to break this particular true conflict is not appropriate due to the unusual facts. The law of D's domicile is applied, but this is not based on a second look approach that shifts to a different choice-of-law method. It is New York's standard method, with an adjustment having been made.

Rome II's escape clause\textsuperscript{120} is also usefully written in broad terms:

Where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with a country other than that indicated in paragraphs 1 [lex loci] or 2 [common domicile], the law of that other country shall apply. A manifestly closer connection with another country might be based in particular on a preexisting relationship between the parties, such as a contract, that is closely connected with the tort/delict in question.\textsuperscript{121}

It is true that when escape is made under this provision from article 4(2), it cannot be to a domicile state\textsuperscript{122} so that the personal-law theory underlying article 4(2)\textsuperscript{123} will be inconsistent with the basis for the decision. But Rome II's escape article, 4(3), even with the example given based on a contract existing between the parties litigating a tort suit, does not even hint at a methodological basis for finding the country with the manifestly closer connection to the action than the common domicile. If it turns out, after article 4(3) is applied numerous times, that a center-of-gravity theory can explain every holding that there was a country with a manifestly closer relationship to the action than that of the place of injury or of the common domicile of the parties, then article 4(3) could properly be called, under the terminology of this Article, a second-look type of eclecticism, rather

\textsuperscript{120} Rome II's recital 18 provides, "Article 4(3) should be understood as an 'escape clause' from Article 4(1) and (2), where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with another country." Rome II, supra note 78, recital 18.

\textsuperscript{121} Id. art. 4(3); see supra notes 79-80 and accompanying text.

\textsuperscript{122} I am using the word as shorthand for "habitual residence," the actual terminology of article 4(2).

\textsuperscript{123} Id.
than an escape clause that does not involve the embrace of a different theoretical basis for decision than that underlying the Rome II article escaped from. That seems unlikely to happen.

The other escape provision I wish to examine is not well written at all; indeed, it is judicial gibberish. It is the escape clause of Neumeier Rule 3, providing that the state of injury is consulted to break nonfalse conflicts that fall into Rule 3, "but not if it can be shown that displacing that normally applicable rule will advance the relevant substantive law purposes without impairing the smooth working of the multistate system or producing great uncertainty for litigants."

The Neumeier opinion says that if it were to apply the escape rule in that case, doing so would both "‘impair[] the smooth working of the multi-state system [and] produc[e] great uncertainty for litigants,’” because to apply New York law would be “sanctioning forum shopping and thereby allowing a party to select a forum which could give him a larger recovery than the court of his own domicile” would provide.

Note that a literal precondition of escape under the Rule 3 proviso is that the law escaped to does a better job of “advanc[ing] the relevant . . . purposes” of tort law compared to the law escaped from. Does this mean there can be an escape only from nonrecovery law to law allowing an award to the tort victim, because spreading the risk via insurance (or in the case of products liability cases, the manufacturer’s making a small increase in price) is a primary purpose of modern tort law? There are several reasons why this prorecovery bias cannot be what the quoted passage intends.

First, we have seen that the escape clause in Rule 2 on its face only applies to allow the defendant to escape tort liability on the basis of a guest statute, a defense that cannot possibly be viewed as

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125. Id. I think that by use of the words “court of his own domicile” a mistake was made here by the Neumeier court. What it intends to refer to is an escape in which a plaintiff gets a larger recovery than the law of his own domicile would give him rather than what a court in his domicile state would give him. As written, the reference to larger recovery involves a renvoi, as the court referred to might not apply its own tort law. Imagine in Neumeier that the accident victim was a Minnesota domiciliary tortiously killed in Minnesota by the New York defendant and that Minnesota had a guest statute while New York did not. A Minnesota court would, employing the “better law” method of choice of law, apply New York law to grant the Minnesota heirs a recovery.
126. Id.
advancing the substantive purposes of tort law as a field.\textsuperscript{127} Secondly, the \textit{Neumeier} opinion seems to say that, at least in some circumstances, an escape that will grant a "larger recovery," more spreading of the risk, is often forbidden.\textsuperscript{128} Thirdly, in the only case where the New York Court of Appeals made a Rule 3 escape, \textit{Schultz v. Boy Scouts of America, Inc.},\textsuperscript{129} the escape was from a law that allowed recovery based on a young teenager's being driven to suicide by repeated sexual molestations by his scoutmaster/priest to a law that denied recovery by applying a defense not at all favored in the area of tort law, charitable immunity. Accordingly, I can make no sense of Rule 3's apparent requirement that the escape only be used to advance the "purpose" of tort law.

How might an escape "impair . . . the smooth working of the multi-state system"?\textsuperscript{130} I am guessing this is a warning to courts never to escape to a jurisdiction that has very little connection to the issue at hand compared to the jurisdiction whose law is displaced by the escape. One could read \textit{Neumeier} as establishing that this is what occurs when the connection of the jurisdiction to be escaped to is merely that of the domicile of one party, while the connection of the jurisdiction escaped from is domicile of the other party and place of misconduct plus place of injury.

What of the admonition that the Rule 3 escape must not "produce[e] great uncertainty for litigants"?\textsuperscript{131} Until there is a lot of escape case law, litigants will be uncertain as to how this escape clause operates. If the possibility of an escape based on considerations that cannot be anticipated constitutes "great" uncertainty, there never could be an escape. Obviously, Rule 3 anticipates that occasions for escape will arise, and the highest court of New York did make a Rule 3 escape in \textit{Schultz}.\textsuperscript{132} Maybe the reference to litigant uncertainty is just a warning to lower court judges that there must be a good reason for escaping or else they will get reversed. But, for now, the "uncertainty" reference is meaningless.

Also problematic in \textit{Neumeier}'s Rule 3 escape analysis is the gloss from the opinion on the Rule 3 escape language that granting an

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\textsuperscript{127} See, e.g., Brown v. Merlo, 506 P.2d 212, 215 (Cal. 1973) (holding that a guest statute is so irrational as to be a denial of equal protection of the law to the tort victim denied recovery and, hence, unconstitutional).
\textsuperscript{128} \textit{Neumeier}, 286 N.E.2d at 458.
\textsuperscript{129} 480 N.E.2d 679, 685-87 (N.Y. 1985).
\textsuperscript{130} \textit{Neumeier}, 286 N.E.2d at 458.
\textsuperscript{131} Id.
\textsuperscript{132} \textit{Schultz}, 480 N.E.2d at 687.
\end{flushleft}
escape must not "sanction[] forum shopping."\textsuperscript{133} Unless and until every U.S. jurisdiction adopts the same choice-of-law method and applies it in exactly the same way, which will never happen, the existence of a conflict of laws in a case will always invite counsel for the party planning to file suit to check out which jurisdiction will apply the law most favorable to the would-be plaintiff. Shopping forums to get a good choice of law will always occur. A jurisdiction that uses the "better law" method of choice of law is always going to be chosen by some plaintiffs. If New York wanted to make courts in that state that were potential forums for conflicts litigation less likely to entice plaintiffs to sue there in order to get favorable law, would it not eliminate entirely the flexibility added to New York's choice-of-law methodology by recognition of escape opportunities? Especially an escape that may have a built-in pro-plaintiff bias because the escape may have to be to a law that "advance[s] the ... substantive law purpose" of the field of tort law?\textsuperscript{134} It is impossible to give any logical meaning to the "forum shopping" reference in Neumeier's discussion of Rule 3 escapes.

In sum, almost all of Rule 3's escape language, as well as the gloss on it, is inescrutable. The Court of Appeals' Rule 3 escape in \textit{Schultz} that benefited the defendant Franciscan Brothers was accompanied by a quotation of the escape clause's mumbo jumbo, together with the assertion that the declared escape from New York's prorecovery law to New Jersey law precluding recovery "will enhance 'the smooth working of the multi-state system' by actually reducing the incentive for forum shopping and ... will provide certainty for the litigants."\textsuperscript{135} The only explanation offered for these remarkable conclusions was that the parties had only "isolated and infrequent contacts" with New York, the state of injury, while New Jersey was "where plaintiffs are domiciled and defendant sends its teachers."\textsuperscript{136} I read this to say that New Jersey was the center of gravity.

If \textit{Schultz} can be read to firmly establish that the \textit{only} basis for escape from the law of a state whose sole connection to the tort is its being the place of injury is that the center of gravity is elsewhere, it may well be that such a huge contraction of the potential scope of the Rule 3 escape clause would somewhat reduce forum shopping and add some certainty to the choice-of-law process for litigants. But it cannot

\textsuperscript{133} Neumeier, 286 N.E.2d at 458.
\textsuperscript{134} Id.
\textsuperscript{135} Schultz, 480 N.E.2d at 687.
\textsuperscript{136} Id.
be said with any confidence that this is what the Schultze court intended. Moreover, it continues to be necessary to use the Rule 3 escape clause to get the correct result—apply domicile law, not the law of the place of injury—for false conflicts cases in which the plaintiff and defendant are domiciled in different states with the same laws that fall into Rule 3 because of the poor drafting of Rule 1.

New York's basic choice-of-law method under Neumeier uses personal-law theory (reference to the law of the states of the litigants' domiciles) mixed with reference to the place of injury (territorial theory) to break nonfalse conflicts. Schultze, using a center-of-gravity consideration (territorialism) to end up in the domicile state of the plaintiffs (personal-law theory), did not change the mix. It remains uncertain whether future escapes in New York tort cases will involve use of a different theory of choice of law to turn to what is a third look made in the choice-of-law process. The Schultze escape was not an example of eclecticism.

III. DÉPEÇAGE ECLECTICISM: PRIMARILY THE ABUSE OF THE CONCEPT OF CONDUCT-REGULATING RULES OF TORT LAW

A. The New York Experience

Professor Brainerd Currie, primary creator of the personal-law based choice-of-law method of interest analysis, memorably commented that "a contract to dance naked in the streets of Rome can hardly be considered without reference to Roman Law." Currie thus recognized that in some contract choice-of-law cases a dépeçage would be required, so that on issues relating to regulation of conduct, the law of the place of performance would govern, although on all other issues the law of one of the litigants' domicile would govern (i.e., the personal law theory of allocating sovereign control was dominant).

Quite obviously, the same is true of tort cases. It would be absurd in the instance of two New Yorkers involved in a head-on collision of automobiles on the roads of England to declare there was a false conflict on the issue as to whether one should be driving on the right or

137. This is due to its introductory language: "In other situations." Neumeier, 286 N.E.2d at 458.
138. See supra note 38 and accompanying text.
139. Recall that the first look is to see whether there is a false conflict using the personal-law theory; the second look—if solution (Z) continues to be employed—is to the place of injury under territorial theory.
left hand side of the road. A territorial reference to English law on this issue is imperative.

Babcock v. Jackson, 141 New York's seminal interest analysis case in the area of tort choice of law, recognized that making interest analysis the primary method of choice of law in tort cases could not eliminate the need for a territorial reference on some issues. Babcock variously described the category of issues subject to a territorial reference to the place of the misconduct: rules concerning the "exercise of due care"; rules "regulating conduct"; "rule[s] of the road"; and "standard[s] of conduct." 142 Particularly, the latter term is ambiguous. It could refer to the broad categories of negligence, gross negligence, or strict liability. Or, it could refer to more specific descriptions of required or banned conduct. 143 Inclusion of the concept of "rule of the road" in the list of terms describing the category subject to territorial reference in choice of law suggests the latter, narrower interpretation of "standard of conduct." The holding that the negligence law of the domicile state of New York applied in Babcock, although any negligence involved occurred in Ontario, 144 also supported the notion that the "standard of conduct" laws to be selected by a territorial reference were narrow standards. But, as we have seen in Babcock, Ontario tort law offered no standard of conduct at all, in the broad sense, that could have been applied where an automobile guest sued his host for damages. 145 Thus Babcock left an important question unresolved: whether, if the law of the place of misconduct imposed a negligence standard or a gross negligence standard, that broad standard would be applied by the New York court by a territorial reference as opposed to application of interest analysis.

A good example of a narrow standard of care that Babcock could reasonably have wanted to be subject to territorial reference under a dépecage type of eclecticism in New York choice-of-law methodology was one of the important exceptions to application of the lex loci delicti under the First Restatement of 1934. 146

142. Id.
144. 191 N.E. 2d at 284.
145. See discussion supra note 35.
146. This dépecage involved use of two different territorial-based references and, hence, was not the eclectic type of dépecage being analyzed in this Article.
Where by the law of the place of wrong [lex loci], the liability-creating character of the actor's conduct depends upon the application of a standard of care, and such standard has been defined in particular situations by statute or judicial decision of the law of the place of the actor's conduct, such application of the standard will be made by the forum.147

For example, if plaintiff is injured in state A by a defective product manufactured in state B, the lex loci of A will decide whether the plaintiff can recover on a strict liability theory or must prove negligence. If the latter, and if state B has a statute (not preempted by federal law) requiring certain testing on the type of product at issue before it is marketed, the violation of which has been held by B courts to constitute negligence per se, the B statute and judicial holding are made applicable by the above-quoted exception to application of the lex loci.

A decision six years after Babcock, Tooker v. Lopez,148 appeared to have removed any doubt whether this kind of narrower possible meaning of "standard of conduct" was what the Babcock court intended in carving out an exception to the application of interest analysis in tort cases. Tooker involved a New York driver defendant and a New York passenger decedent in an auto accident in Michigan.149 If Michigan's guest statute were to be applied, recovery for the plaintiff's heirs required proof of the defendant's "willful misconduct or gross negligence."150 If an interest analysis were properly employed, New York law would apply due to the presence of a false conflict, and recovery would be granted on proof of ordinary negligence.151 After noting that Babcock had carved out an exception, such that interest analysis did not apply to laws relating to "the manner in which the defendant had been driving [her] car," because these were laws "regulating conduct," the Tooker court applied interest analysis to make New York's simple negligence rule the applicable standard for assessing the fault of the defendant.152 That is, whether negligence or gross negligence had to be proved was a matter of loss allocation, not regulation of conduct.

Unfortunately, uncertainty about the scope of "standard of conduct" as describing laws chosen not by interest analysis but by

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147. Restatement of Conflict of Laws § 380(2) (1934).
149. Id. at 395.
150. Id.
151. Id. at 396.
152. Id.
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territorial reference was revived by the highest court of New York in 1994 in Padula v. Lilarn Properties Corp.\footnote{Id. at 1002.} A New York plaintiff sued a New York defendant for injuries suffered at a construction site in Massachusetts.\footnote{Id. at 1002-03.} Under interest analysis, this was a false conflict, and New York supplied all the governing law except for laws that were conduct regulating. The plaintiff relied on a New York statute imposing strict liability if the responsible defendant failed to follow certain guidelines addressing the safety of scaffolding.\footnote{Id. at 1003.} Because the strict liability rule was annexed to a New York regulatory scheme that was conduct regulating, Padula held that this regulatory “package” did not apply in the case because New York was not the place where the misconduct occurred.\footnote{Id. at 1002 (quoting Schultz v. Boy Scouts of Am. Inc., 480 N.E.2d 679, 685 (N.Y. 1985)).} In reaching this conclusion, the Padula court quoted from a 1985 precedent that explained that the conduct-regulating exception to the applicability of interest analysis applied the law of the place of the tort “‘because [of] the locus jurisdiction’s interests in protecting the reasonable expectations of the parties who relied on it to govern their primary conduct.’”\footnote{Id. at 1002.} Such reliance would not be placed by an actor on the fact that the jurisdiction where he was would hold him liable for his negligence in the situation at hand and would not require proof of gross negligence or impose strict liability. If Massachusetts had had specific rules for erecting scaffolding at construction sites in that commonwealth, that is the kind of law that would elicit reliance by a builder.

Having held that New York’s strict liability law did not apply, Padula concluded, astonishingly, that “Massachusetts law was properly applied.”\footnote{Id. at 1003.} But Massachusetts’ simple negligence standard could apply only if it were classified as a conduct-regulating rule of tort law.\footnote{Id. at 811.} The statements that Massachusetts law applied can be viewed as
dictum that lower courts can disregard, the actual holding of Padula being only that the plaintiff could not benefit from a law of strict liability but had to prove negligence, with no party having noted any difference between the negligence law of New York (applicable under interest analysis) and of Massachusetts.

The Padula dictum needs to be repudiated by New York's high court in order to restore the conduct-regulating exception to interest analysis so that it operates as a sensible, narrow application of dépeçage eclecticism. If the basic standard of negligence in tort is a conduct-regulating law, then almost any aspect of tort law that imposes liability is as well. The exception would swallow up the rule, which is not what New York intended in Babcock.

B. Application of Conduct-Regulating Law Under Rome II

The language of Rome II describing what in New York would be called a conduct-regulating rule of law seems sufficiently narrow to eliminate any possibility that it could be the source of determining whether the plaintiff, in order to recover, had to prove negligence, gross negligence, or willful misconduct. The heading for article 17 of Rome II is "Rules of safety and conduct," and the text provides:

In assessing the conduct of the person claimed to be liable, account shall be taken, as a matter of fact and in so far as is appropriate, of the rules of safety and conduct which were in force at the place and time of the event giving rise to the liability.

It is bizarre that a statute in the place of acting, mandating certain conduct to assure safety, must be treated as a question of fact. Apparently, evidence concerning enactment of the statute must be presented, and, moreover, in some jurisdictions, the trial court's finding of fact concerning the existence of conduct-regulating law would be harder to get reversed on appeal than if the matter were one of law.

It seems clear that the matter of applicability of conduct-regulating law is treated as a question of fact rather than one of law in

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161. Rome II, supra note 78, art. 17.
162. Id.
163. See id.
order to assure that there not be a scintilla of dépeçage in the choice-of-law method Rome II prescribes for tort cases. Numerous articles of Rome II employ language to indicate that all legal issues in the tort cause of action are to be decided by the law of one country.\textsuperscript{164} Dean Symeonides has tracked efforts of some drafters to interject dépeçage into Rome II only to be rebuffed by the EU Council.\textsuperscript{165}

And what of the limitation in article 17 that the conduct-regulating laws are incorporated into the litigation as applicable facts only “in so far as is appropriate”?\textsuperscript{166} Is this also a question of fact not to be reviewed de novo on appeal in some jurisdictions? And what circumstances can be imagined to make it inappropriate to find as a fact that the defendant acting in state $A$ failed to abide by a safety regulation of state $A$ that indisputably was in effect at the pertinent time if it is clear there was such a failure?

As long as a “not appropriate” restriction is used in only the most compelling circumstances, Rome II’s incorporation of the theory that some laws are conduct regulating is sound. Article 17 creates what is in effect an eclectic dépeçage\textsuperscript{167} if the otherwise applicable law is that of the common domicile of the litigants (a mix of personal-law theory with territorial theory), but a noneclectic dépeçage if the lex loci otherwise applies, as both applicable laws—one set disguised as fact—are chosen by territorial references.\textsuperscript{168}

C. \textit{In California, Disarray on the Conduct-Regulating Issue in the State’s Methodology for Torts Conflicts Cases}

The 1974 California Supreme Court case of \textit{Hurtado v. Superior Court} involved plaintiffs from the state of Zacatecas in Mexico suing a California defendant for the wrongful death in California of a Zacatecan victim of an automobile accident.\textsuperscript{169} Zacatecan law severely

\textsuperscript{164} Article 4(1) applies the lex loci to the “non-contractual obligation,” which would seem to cover all issues raised by litigation in that area of law. \textit{See, e.g., id.} art. 5(1) (applying lex loci rules to a product liability cause of action); \textit{id.} art. 6(1) (applying lex loci rules to unfair competition cause of action); \textit{id.} art. 7 (applying article 4(1) lex loci rules to an environmental damage cause of action); \textit{see also id.} art. 4(3) (applying the chosen law to “the tort/delict”).

\textsuperscript{165} Symeonides, \textit{supra} note 117, at 185. Symeonides thinks dépeçage may nevertheless emerge in the application of a handful of articles of Rome II. \textit{Id.} at 185-86. That seems unlikely to me.

\textsuperscript{166} Rome II, \textit{supra} note 78, art. 17.

\textsuperscript{167} It is not “pure” dépeçage because the conduct-regulating law is treated as a matter of fact.

\textsuperscript{168} Rome II, \textit{supra} note 78, art. 17.

\textsuperscript{169} 522 P.2d 666, 668 (Cal. 1974).
capped recoverable damages. California law would provide no limit on the recoverable damages. Unless a conduct-regulating issue were involved, this was a classic zero-interest case, in which the law of each litigant’s domicile was unfavorable to him. The California court was two years away from announcing that courts should try to break nonfalse conflicts with comparative impairment analysis, and four years from inventing the alternative comparative impairment approach to breaking nonfalse conflicts.

The Hurtado court correctly held that Zacatecas had no interest in having its damage cap law applied because, under interest analysis theory, that law was intended to benefit only Zacatecan defendants. The initial holding was that this meant forum law had to apply. At this point, the reader assumes the court viewed the case as presenting a zero-interest conflict, with forum law used to break it. But, the court asserted in its alternative holding, California did have an interest in applying its law of unlimited damages. A “primary purpose[ ]” of a statute creating a wrongful death action “is to deter the kind of conduct within its borders which wrongfully takes life,” and it was “abundantly clear” that providing for unlimited damages “strengthens the deterrent aspect.” That is, California had an interest on the facts of Hurtado “in deterring conduct.” Inherent in the alternative holding is that California’s conduct-regulating law applied because California was the place where the misconduct occurred.

170. Id. The court calculated that under this law the maximum recovery was $1946.72. Id.
171. Id. at 669.
173. See Offshore Rental Co. v. Cont’l Oil Co., 583 P.2d 721, 728 (Cal. 1978). Because California and Zacatecas each had zero interests in the lawsuit under interest analysis, comparative impairment of state interests was not available as a break device. Use of Offshore Rental’s comparative pertinence analysis, treating the damages issue in Hurtado as subject to interest analysis (rather than a conduct-regulating issue subject to a territorial reference for choice-of-law purposes) would have provided an obvious solution for breaking the zero-interest conflict: the Zacatecan law was out of the mainstream, while California’s unlimited damage was modern and widely followed. Under Offshore, in determining which of two contending laws in conflict is to be chosen because it is more “comparatively pertinent,” a California court looks to see which law is more “prevalent and progressive,” which is more in the “main stream” of law. 583 P.2d at 726-28 (internal quotation marks omitted).
175. Id. at 670-71.
176. Id. at 672.
177. Id.
178. Id. However, if the law really did deter dangerous driving on California highways, it should apply to all drivers there, not, as stated by the court, only to drivers who were California residents. Id.
I have noted elsewhere that it seems preposterous to imagine that fear of the application of a law imposing higher damages than might be awarded under another law in contention for application would have any effect on a driver’s conduct affecting highway safety.\textsuperscript{179} Nevertheless, it seems that \textit{Hurtado} does create in California recognition of a class of tort laws that are conduct regulating, so that the law of the place of misconduct applies. If California is serious about unlimited damages being a conduct-regulating law, in a case where a decedent of California, survived by California heirs, is killed on the highways of Zacatecas by a California defendant, California’s law of unlimited damages does not apply. This law of unlimited damages is conduct regulating and thus not part of the applicable loss-allocating tort law (of California) chosen by labeling the case a false conflict under interest analysis. Zacatecan law on the measure of damages would seem to have to apply by default, even though it would not be conduct-regulating under the theory of \textit{Hurtado}. Indeed, does not the logic of \textit{Hurtado} make all aspects of California law that can be invoked to impose liability on a negligent defendant conduct-regulating law?\textsuperscript{180} Should such a case arise, one can predict the prompt overruling of \textit{Hurtado} insofar as it held an unlimited damages law to be conduct regulating, with the court explaining that actually the case presented a zero-interest conflict under interest analysis, broken in the manner proposed by Brainerd Currie by application of forum law—a break device abandoned in California in the cases to be decided two and four years after \textit{Hurtado}.\textsuperscript{181}

Until such a repudiation of the language of \textit{Hurtado} by the California Supreme Court, lower state courts and federal courts

\textsuperscript{179} See Reppy, supra note 71, at 668-69 n.117.

\textsuperscript{180} See Denham v. Farmers Ins. Co., 262 Cal. Rptr. 146, 148 (Ct. App. 1989). This case looked like a true conflict between California law that favored the California plaintiff tort victim by allowing him to sue the tortfeasor’s insurer for the distinct tort of bad faith refusal to settle the case. Nevada law, favorable to the insurance company located in Nevada for interest analysis purposes, did not recognize such a cause of action. Much of the opinion applies interest analysis, with comparative impairment used to break the true conflict in favor of Nevada law. Id. But one passage of the decision treats the California law imposing liability on the insurance company as conduct regulating:

\textit{California had an interest... in affording redress to California residents damaged by unfair insurer practices. In this case, California’s interest in regulating insurers within California is irrelevant because Farmers’ refusal to settle occurred in Nevada. “California has no legitimate interest in the possible deterrent effect of its third party cause of action on conduct in [Nevada].”}

\textit{Id.}

\textsuperscript{181} See supra notes 172-173 and accompanying text.
applying California conflicts methodology in diversity cases must struggle with what it means. Some seem unaware that Hurtado recognizes the category of conduct-regulating rules of tort law. In a 1996 federal case, the issue was whether a stairway at the defendant's resort in the Mexican state of Jalisco was negligently constructed because it lacked a handrail as required by California law, although it was constructed in conformance with the Jalisco building code, which did not require a handrail. Surely, both the Californian and Jalisco construction requirements were conduct-regulating laws—and the law of the place of misconduct (Jalisco) would apply—if such a category of tort law is recognized in California. But the court applied interest analysis, assumed there was a true conflict, and broke it under the comparative impairment approach to breaking nonfalse conflicts.

In Hernandez v. Burger, a lower state court did recognize that under Hurtado some tort laws should be classified as conduct regulating. A plaintiff of the Mexican State of Baja California Norte sued a California defendant for injuries suffered in an automobile accident in Baja. The Baja law limited recoverable damages “to the amount of the injured party’s medical and rehabilitative expenses and lost wages at the minimum wage rate.” California law provided no such limits on damages. An alternative holding was that “it cannot be said that Mexico’s law limiting the amount of damages recoverable is entirely unrelated to her interest in affecting conduct in Mexico.”

184. Id. at *1-2.
185. Id. at *4. “Because Mexico’s interest would be most impaired if its building and construction regulations were subordinated, this court finds that Mexico law should govern the issue of defective premises liability.” Id. The defendant in the case was described as a Delaware corporation but clearly was located in Jalisco for interest analysis purposes because it got involved in the litigation through its branch facility located there. Id. at *1. Similarly, Continental Oil Company, which had its principal place of business in New York in the Offshore Rental case, was located for interest analysis in Louisiana, where it had a branch office through which it got involved in the tort suit. Offshore Rental Co. v. Cont’l Oil Co., 583 P2d 721, 723 (Cal. 1978).
186. See 162 Cal. Rptr. 564, 567 (Ct. App. 1980) (attributing a deterrent purpose to the California rule permitting full recovery of damages).
187. Id. at 565.
188. Id. at 566.
189. Id.
190. Id. at 569. The alternative basis for decision was that the conflict was not, as it seems on first analysis, a zero-interest conflict because Baja had a general economic interest in attracting American tourists to the state “and the application of Mexico’s limited damages law to nonresident motorists might well advance that interest.” Id. at 568.
Until the California Supreme Court reexamines and narrows its concept of what constitutes a conduct-regulating law, chosen by territorial reference and not interest analysis (personal-law theory), *Hurtado* must be classified as a decision that grossly abuses the concept of dépeçage-type eclecticism in its choice-of-law methodology for tort cases.

D. *A Senseless and Needless Eclectic Dépeçage in California Choice of Law for Contract Cases*

According to one intermediate appellate court in California, the state also employs an eclectic dépeçage, mixing personal law and territorial theories of allocating sovereign power through choice of law, in contract conflicts cases.\(^{191}\) The California Supreme Court, in 2001, declared that an interest analysis applied generally in contract cases as well as tort conflicts cases.\(^{192}\) Despite the Supreme Court’s assertion,

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\(^{191}\) Frontier Oil Corp. v. RLI Ins. Co., 63 Cal. Rptr. 3d 816, 826-27 (Ct. App. 2007).

\(^{192}\) Wash. Mut. Bank v. Superior Court, 15 P.3d 1071, 1078 (Cal. 2001). Some lower courts seem not to realize that this adoption of interest analysis by the Supreme Court precludes application of the contract choice of law rules of the Second Restatement because the Second Restatement method is quite different from interest analysis. In *Stonewall Surplus Lines Insurance Co. v. Johnson Controls, Inc.*, 17 Cal. Rptr. 2d 713, 715 (Ct. App. 1993), the issue was validity of an insurance contract that could be construed to require the insurer to indemnify the insured for punitive damages owed by the insured. The court said, “California now follows a methodology characterized as the “governmental interest” approach to choice of law problems.” *Id.* at 718. It then quoted section 188 of the Second Restatement and applied section 193. *Id.; see also ABF Capital Corp. v. Berglass*, 30 Cal. Rptr. 3d 588, 596 (Ct. App. 2005) (declaring that when a contract does not have an effective choice-of-law clause, section 188 of the Second Restatement is consulted to find the governing law); Application Group, Inc. v. Hunter Group, Inc., 72 Cal. Rptr. 2d 73, 87 (Ct. App. 1998) (quoting section 188 as quoted in Dixon Mobile Homes, Inc. v. Walters, 122 Cal. Rptr. 202, 208 n.4 (Ct. App. 1975), *overruling recognized by Segura v. McBride*, 7 Cal. Rptr. 2d 436 (Ct. App. 1992)). But the California Supreme Court can be blamed for these particular (erroneous) applications of section 188 of the Second Restatement. In *Nedloyd Lines B.V. v. Superior Court*, 834 P.2d 1148, 1151 (Cal. 1992), the court adopted the approach taken by section 187 of the Second Restatement for determining the validity of a choice-of-law clause in a contract. It quoted that part of section 187 calling for a determination of whether the chosen law would violate a fundamental policy of the state whose law would otherwise apply “under the rule of § 188.” *Id.* The same error appears in the paraphrasing of section 187. *Id.* at 1152 n.5. The court should have modified the terms of section 187 so that the state whose fundamental policy was to be consulted was chosen under interest analysis. Nothing about *Nedloyd*, other than the two sloppy references to section 188, indicates an intent to abandon interest analysis as the basic methodology of California in contract cases, a position restated in 2001 in *Washington Mutual*. 15 P.3d at 1077-82.

Some California contract conflicts cases jump directly into the Second Restatement without even acknowledging that the California Supreme Court has declared interest analysis to be at least the primary choice-of-law method to apply. See Kashani v. Tsann Kuen China
Frontier Oil Corp. v. RLI Insurance Co.\textsuperscript{193} in 2007 held that when the issue is contract interpretation, the law of the place of performance governs, and if there is no place of performance, the law of the place of making of the contract is applied on interpretation issues. Frontier Oil held that section 1646 of the California Civil Code required such a departure from interest analysis.\textsuperscript{194}

It makes sense in a contract conflicts case to apply the truly conduct-regulating law of the place of performance, as suggested by Brainerd Currie’s comment about a contract to dance naked in the streets of Rome.\textsuperscript{195} The First Restatement\textsuperscript{196} offers a useful test—the “minute details” test—for determining when interpretation of the scope of a promise made by a party to a contract should be determined not by use of the primary choice-of-law methodology (interest analysis in California) but by the law of the place of performance.

But, California Civil Code section 1646 goes much too far in consigning interpretation of all of a contract to the place of performance. There is no logic in applying the law of the place of performance on issues relating to interpretation of a contract such as the amount of money to be paid as consideration. Moreover, section 1646 calls for use of the lex loci contractus to interpret all terms of a contract when, as is often the case, no place of performance has been

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\textsuperscript{193} 63 Cal. Rptr. 3d at 837.
\textsuperscript{194} CAL. CIV. CODE § 1646 (Deering 1998) (originally enacted in 1872) (“A contract is to be interpreted according to the law and usage of the place where it is to be performed; or, if it does not indicate a place of performance, according to the law and usage of the place where it is made.”).
\textsuperscript{195} Currie, supra note 140, at 103.
\textsuperscript{196} RESTATEMENT OF CONFLICT OF LAWS § 358 (1934).

When the application of law of the place of contracting would extend to the determination of minute details of the manner, method, time, and sufficiency of performance so that it would be an unreasonable regulation of acts in the place of performance, the law of the place of contracting will cease to control and the law of the place of performance will be applied.

\textit{Id.} § 358 cmt. b.

For comment b’s application in California, change the language “law of the place of contracting” to “law determined under interest analysis.” In some situations, it will be obvious that details of performance that cannot be labeled “minute” must also be governed by the law of the place of performance. For example, a plaintiff and defendant of California contract that the defendant will build a summer cottage for the plaintiff on land in Nevada. An implied promise by the defendant would be to adhere to the building code of Nevada. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 206 (1971) (stating that details concerning performance are controlled by the law of the place of performance).
agreed on.\textsuperscript{197} A modern court never has reason to apply the contract law of the place of making of a contract made by two Californians,\textsuperscript{198} yet Frontier Oil's embracing of section 1646 would require California courts to frequently apply the lex loci contractus in that situation.

The Frontier Oil court admitted that the statute it relied on was part of California's Field Code of 1872.\textsuperscript{199} Although the court declared in a footnote that only the California legislature could repeal section 1646,\textsuperscript{200} it knew that was not so. Frontier Oil quoted the present writer as saying that "the California Supreme Court's adoption of interest analysis had worked a judicial repeal of the . . . choice of law rule in section 1646."\textsuperscript{201} However, in the original text, that observation is preceded by my sentence, "The California Supreme Court can abrogate these [1872 Field Code] statutes at will."\textsuperscript{202} Section 1646 is a prime candidate for such judicial abrogation.

Consider this hypothetical case. Father and Son, both California domiciliaries, were seated together on a plane flying across the country, and, while in the airspace over state $X$, signed a short contract stating that Father would pay Son $1 million if he married a Jewish woman within two years. A month later, Son married a Jewish woman who belonged to a Reformed congregation. In Son's suit for breach of contract against his late father's estate in California, the defense is that "Jewish woman" was intended to mean Orthodox Jew. Should evidence supporting this defense be excluded under the traditional substantive parol evidence rule in effect in state $X,$\textsuperscript{203} which bars extrinsic evidence if a contract's terms are unambiguous on their face (which "Jewish woman" could be), or should evidence be received that Son was well aware that when Father spoke of "Jewish," he meant

\begin{itemize}
  \item \textsuperscript{197} Cal. Civ. Code § 1646.
  \item \textsuperscript{198} Even the Second Restatement is of this view: "Standing alone, the place of contracting is a relatively insignificant contact." Restatement (Second) of Conflict of Laws § 188 cmt. e.
  \item \textsuperscript{199} Frontier Oil Corp. v. RLI Ins. Co., 63 Cal. Rptr. 3d 816, 825 (Ct. App. 2007) (citing David D. Field, The Code of Civil Procedure § 811 (1865), reprinted in Comm'r's on Practice and Pleadings, New York Field Codes 1850-1865, at 249 (1998)).
  \item \textsuperscript{200} Id. at 835 n.15.
  \item \textsuperscript{201} Id. at 835 (quoting William A. Reppy, Jr., Choice of Law Problems Arising When Unmarried Cohabitants Change Domicile, 55 SMU L. Rev. 273, 292 n.90 (2002)).
  \item \textsuperscript{202} Reppy, supra note 201, at 292 n.90 (citing Li v. Yellow Cab Co., 532 P.2d 1226, 1233 (Cal. 1975)).
  \item \textsuperscript{203} The hypothetical contract has no place of performance, so under section 1646, the law concerning interpretation of the contract would be the law of the place of making. The parol evidence rule is substantive, not procedural, for choice-of-law purposes. Hutchinson v. Hutchinson, 119 P.2d 214, 217 (Cal. Ct. App. 1942); accord Henderson v. Superior Court, 142 Cal. Rptr. 478, 484 (Ct. App. 1978).
\end{itemize}
Orthodox like him under California's version of the parol evidence rule that requires the court to consider extensive evidence in deciding whether there is an ambiguity in the writing.\textsuperscript{204} If anyone believes the California Supreme Court would not, citing \textit{Li v. Yellow Cab,}\textsuperscript{205} reject section 1646 and instead apply the California parol evidence rule through interest analysis, I would like to discuss selling to him or her some oceanfront property in Iowa.

Whether or not the California Supreme Court repudiates \textit{Frontier Oil}, issues involving validity of a contract and most matters of defense to a breach of contract suit will be decided in California courts using interest analysis as the choice-of-law method. Presumably, these courts will borrow from interest analysis tort cases the preferred approaches to breaking nonfalse conflicts: comparative pertinence for zero-interest cases and comparative impairment for true conflicts, with the court reverting to comparative pertinence when, as will almost always be the case, a decision not to apply the law of either domicile state will impair the interest of that state to the same degree the other state's interest would be impaired by nonapplication of its law. There will be cases where the laws of the two domicile states are equally in the mainstream and equally important in the legal scheme of things within the jurisdiction (e.g., each has recently enacted a statute defining, but in different terms, when a contract is void due to adhesion). In \textit{Offshore Rental}, the California Supreme Court indicated that the ultimate break device for nonfalse torts conflicts is to apply the law of the domicile state in which the tortious injury occurred.\textsuperscript{206} That is, the lex loci delicti is consulted, as under the traditional rule for tort conflicts. One might expect the analogous ultimate reference in most contract cases to be choice of a domicile state that was also the place of making, i.e., use of the lex loci contractus, the traditional approach for contract conflicts. But, as the Second Restatement's comments to section 188 point out, the place of the last signature (or oral approval)

\textsuperscript{204} See Pac. Gas & Elec. Co. v. G.W. Thomas Drayage & Rigging Co., 442 P.2d 641, 646 (Cal. 1968). The California approach has become the majority version of the parol evidence rule in the United States, with the traditional on-its-face version of the rule falling to minority rule status. See 29A AM. JUR. 2D Evidence § 1135 (2d ed. 1994) ("The majority of jurisdictions ... permit the admission of parol evidence to explain an ambiguity whether latent or patent.").

\textsuperscript{205} That decision abrogated section 1714 of the Civil Code, dating from California's 1872 Field Code, which laid out the tort defense of contributory negligence, in order to enable the California Supreme Court to create a common law doctrine of comparative negligence. See \textit{Li}, 532 P.2d at 1231-32.

\textsuperscript{206} \textit{Offshore Rental Co. v. Cont'l Oil Co.}, 583 P.2d 721, 728 (Cal. 1978) ("[T]he situs of the injury remains a relevant consideration.").
to make a contract effective can readily be fortuitous. My prediction
is that if, following Offshore Rental by analogy, the California
Supreme Court opts for a territorial reference as the ultimate approach
to breaking nonfalse conflicts in the contract arena, it will direct that
courts apply the law of the domicile state having the most significant
territorial connections to the contract, after looking at various
connecting factors such as place of negotiation, place of performance,
and place where the relationship was formed. In other words, the
ultimate break device will be a structured center of gravity. We will
have, then, another example of sensible second-look eclecticism.

E. New York’s Eclectic Dépeçage for Contract Conflicts

With In Re Allstate Insurance Co. (Stolarz), the highest court of
New York held that the center-of-gravity method of choice of law
would be employed to find the applicable law for most issues in a
contract conflicts case, but interest analysis would apply “where the
policies underlying conflicting laws in a contract dispute are readily
identifiable and reflect strong governmental interests.” It is yet to be
decided whether interest analysis applicable in contract cases will draw
by analogy on the use of territorialism to break nonfalse conflicts in
the tort cases of Neumeier and Schultz, which is very similar to the
unresolved issue concerning territorialism as a break device under
interest analysis applied to contract conflicts in California. For the
reasons stated above, lex loci contractus is an unsuitable form of
territorialism in this context. In a contract case involving two
domiciliary states with conflicting laws on an issue, New York should
determine under Stolarz which state has the most significant territorial
connections as a basis for breaking nonfalse conflicts.

207. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188 cmt. e (1971).
208. 613 N.E.2d 936, 939 (N.Y. 1993). It identified as issues subject to interest
analysis under this exception a statute of frauds applicable to a finder’s fee contract and the
durability of a foreign-issued letter of credit. Id. But see Spink & Son, Ltd. v. Gen. Atl.
Corp., 637 N.Y.S.2d 921, 924 (Sup. Ct. 1996) (stating that the statute of frauds applicable to a
sale of goods does not raise an issue of governmental interest). One would think that the
classic contract issue involving governmental interests would involve protection of the “little
guy” from contracts of adhesion and from unconscionable contract provisions.
IV. BIG-MIX ECLECTICISM AND THE COURTS' INABILITY TO EXPLAIN SQUARELY WHAT CONTACTS GO INTO THE MIX AND HOW TO WEIGH THOSE THAT DO

A. The Use of Domicile or Nationality of a Party in a Center-of-Gravity Approach to Choice of Law Incorporates Personal-Law Theory

If section 6 of the Second Restatement is viewed, as a majority of reported cases appear to do, as asking no more than whether a conflicts case is a false conflict under interest analysis,209 it is based solely on the personal-law theory of allocating sovereignty, although the language of section 6 is susceptible of an interpretation that its factors variously rest on the territorial theory and the doing-justice theory.210 Part IV of this Article accepts the judgment of the majority of the courts concerning how section 6 operates, which leaves center of gravity211—a choice-of-law method used in New York and in sections 145 and 188 of the Second Restatement—plus a strange combination of interest analysis and Second Restatement, which is employed in the District of Columbia, New Jersey and Pennsylvania, as the types of big-mix ecleticism subject to analysis in this Part of the Article.212

One could formulate a center-of-gravity method that would exclude domicile of a party as a contact while focusing on a multiplicity of territorial factors.213 It would differ from the lex loci method that homes in on one territorial connection. It would be based solely on the territorial theory for allocating sovereign control in conflicts cases. I also think it could fairly be labeled 100% territorial if “residence” of a party to the litigation were one of the factors employed in the analysis, as residence is a matter of a person’s being

209. See sources cited supra note 111.
210. See supra note 24 and accompanying text.
212. If New York reverses course and adopts solution (1) to the problem of what reference to the place of the tort in Neumeier Rule 3 means, another method of choice of law will employ big-mix eclecticism, with personal-law theory used to restrict the states whose law applies to loss-allocation issues in tort cases, and territorial theory used to choose between the two domicile states when the conflict is not false.
213. For example, for contracts cases with conflict-of-law issues, the pertinent factors could be place of negotiation, place of execution, place of performance, and place of breach, each based on the occurrence, either actual or anticipated (e.g., an act of performance never done), of some act within a specified governmental territory.
regularly in a place where he or she eats, sleeps, socializes, etc.\textsuperscript{214} That is, the focus is solely on physical acts occurring in a geographic territory.

On the other hand, if the connecting factor is domicile, the state of mind of the party is as much a controlling fact as is his or her being physically in the jurisdiction. A domiciliary of New York can reside in Michigan to attend college for many years and not have been present in New York at any pertinent time when facts creating a tort or contract cause of action arose,\textsuperscript{215} yet be assigned New York law in a choice-of-law case if domicile and not residence were used as the test to connect a person to a state.

Apparently, one can be a national of a country without ever having been there. For example, suppose the French ambassador to the United States and his or her spouse have a child while residing at the embassy in Washington, D.C. Before they can take the infant to France, they are killed, and the child goes to live with his maternal grandparents in New York, where the child is still domiciled (or resides) when he gets into litigation involving a choice-of-law issue. Only some legal connection not resting on territorialism can explain why a court would treat this litigant as a national of France.

Both sections 145 and 188 of the Second Restatement list domicile\textsuperscript{216} and nationality of a party as factors to use in making a center-of-gravity analysis; they also list a number of territorial factors, and, hence, each section is an example of big-mix eclecticism that rests not only on the territorial theory but also the personal-law theory.\textsuperscript{217}

As noted above, New York uses the center-of-gravity method to decide most contract conflicts issues, but the cases are inconsistent whether the test for locating a party in a state is domicile or residence. The first major such case, \textit{Auten v. Auten}, used domicile, holding that New York's only contact was that the contract at issue was made there and in part to be performed there, although noting that the alien husband resided in New York under a temporary visa (i.e., he would lack the intent to make New York his permanent home).\textsuperscript{218} The \textit{Auten


\textsuperscript{216} Spelled "domicill" in both sections, which is out of the mainstream of usage and will not be employed in this Article.

\textsuperscript{217} \textsc{Restatement (Second) of Conflict of Laws} §§ 145(2)(c), 188(2)(e) (1971). Each list also includes "residence."

\textsuperscript{218} 124 N.E.2d 99, 102 (N.Y. 1954).
court also noted that the litigant wife had alleged that she was "domiciled in" England, whose law was ultimately applied.\(^{219}\)

However, in the highest court of New York's next center-of-gravity contract conflicts case, *Haag v. Barnes*, decided seven years later, domicile was never mentioned, and the court described the plaintiff as "a resident of this State" (New York) and the defendant as "a resident of Illinois."\(^{220}\) More recently, however, the New York court of Appeals reverted to use of "domicile" as the connecting factor for center-of-gravity analysis in contract cases,\(^{221}\) and recent lower court decisions also use "domicile."\(^{222}\) Thus, New York employs big-mix eclecticism in deciding most contract conflicts issues.


New York's two early center-of-gravity cases can be criticized for listing as pertinent contacts in determining the center-of-gravity matters that were either irrelevant or effectively already taken into account indirectly by reference to a major contact that was relevant. In *Auten*, for example, one of the listed contacts was that the litigating spouses had been married in England, but surely this was merely derivative of the fact, already noted in the opinion, that they resided there (apparently as domiciliaries).\(^ {223}\) The same sort of improper double-counting appears in the court's reference to the fact that the couple "had children" in England.\(^ {224}\) No surprise there, as that is where the pair lived. In *Haag*, where the issue was validity of an agreement limiting a father's child support obligation, surely it was irrelevant that the father's "place of business is and always has been in Illinois" and that his attorney was an Illinois resident.\(^ {225}\) Moreover, both such facts seem to follow naturally from the significant contact, already mentioned in the opinion, that the father resided in Illinois.\(^ {226}\) That is, the father's residence was counted at least three times.

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219. *Id.* at 100.
220. 175 N.E.2d 441, 442 (N.Y. 1961).
223. 124 N.E.2d at 102.
224. *Id.*
225. 175 N.E.2d at 444.
226. *Id.* at 444.
Whether lower courts and federal courts will understand that this kind of foolishness rampant in *Auten* and *Haag* has been disapproved by the New York Court of Appeals is unclear. In 1993, *Stolarz*, the decision that revived use of center of gravity for deciding most contract conflicts issues after a post-*Haag* embrace for a few years of interest analysis, the high court of New York said it was “the significant contacts [that] are considered.” The court promptly continued, “The Restatement, for example, enumerates five generally significant contacts in a contract case: the place of contracting, negotiation and performance; the location of the subject matter of the contract; and the domicile of the contracting parties.”

This is certainly not an adoption of section 188 as a choice-of-law method in New York, and *Stolarz* cites both *Auten* and *Haag* as examples of application of the center-of-gravity method without any criticism. A much clearer repudiation of both *Auten* and *Haag* for double counting and for referring to insignificant contacts is needed.

A second uncertainty about use of center of gravity to decide contract conflicts in New York relates to the weight to be given to the domicile contact and whether that is affected by the content of the law of the party’s domicile. In *Auten*, the wife was domiciled in England and could obtain spousal and child support from the husband under English law (or so it was assumed). Much of the choice-of-law analysis in the opinion assumed that the wife would not prevail if New York law applied. Announcing why the center-of-gravity theory required application of English law, the *Auten* court stated, “There is no question that England has the greatest concern in prescribing and governing those [support] obligations, and in securing to the wife and children essential support and maintenance.”

Suppose the laws were reversed so that the wife would lose under English law but win under New York law. It could not now be said that England would have the “greatest concern” in the case, for its law would not “secure” support for the wife and children domiciled there. They could be thrown into the English welfare system. To

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228. 613 N.E.2d 936, 940 (N.Y. 1993).
229. *Id.* (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188(2) (1971)).
230. *Id.* at 939.
231. *Auten*, 124 N.E.2d at 100-01.
232. *Id.* at 100.
233. *Id.* (emphasis added).
234. See *id.*
give legal effect to the quoted passage, one can infer the intent to be that, with the laws reversed, the wife’s English domicile is still a contact to be considered, but the weight to be given to that contact is quite small compared to the weight due it when English law does benefit its domiciliary. This would not be illogical. We are assuming that—by treating domicile as a significant contract—the center-of-gravity big-mix method of choice of law has incorporated some of the personal-law theory that Brainerd Currie used in devising the interest analysis method. Currie would hold that England has no interest at all if its laws denied recovery to its domiciliary.

In some fact-law patterns, the issue is moot. If the husband in *Auten* had been domiciled in New York, that state would have had as great a concern in applying its law to protect its litigant from a liability considered to be unfair as England’s concern for having its law chosen to benefit its domiciliary, the wife. The extra weight to be given the domicile contact based on the content of the jurisdiction’s law would be offset, with neither state getting any sort of boost that would help the party prevail in the center-of-gravity analysis.

Consider, however, this version of *Auten*: Wife is domiciled in England, Husband in New Jersey, where the law is the same as that of England. The pair negotiates and executes the contract in New York, and it is to be performed there, calling for a New York bank that holds funds of Husband to make the contractually agreed on payments for Wife by periodically forwarding funds to her bank in New York for deposit in her account there. Giving an extra boost to England as a domicile state because its laws protect the wife is probably essential to her argument that she prevails under a center-of-gravity analysis.

*Stolarz* declared that the territorial method used in New York to resolve most contract conflicts “does not consider State interests.”

This seems specific enough to repudiate implicitly the passage of *Auten* to the effect that, because English law protected the English wife, England had the “greatest concern” in that case. On the other hand, recall that in *Stolarz*, New York’s high court listed domicile as a significant contact for center-of-gravity analysis because it was significant under section 188 of the Second Restatement.

Illustration 2 to section 188 concerns a married woman domiciled in state X who

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235. 613 N.E.2d at 940. In this sentence, the court refers to the method as “grouping of contacts,” but, as has been noted, see discussion supra note 211, elsewhere in *Stolarz* it is called “center of gravity.” *Id.* at 939. There is no doubt that the assertion that state interests are not to be considered is directed at the center-of-gravity method.

236. *Id.* at 940; see supra text accompanying note 230.
has the capacity to contract under $X$ law and who makes a contract in $Y$, under whose law she lacks such capacity. The illustration's analysis states that "[i]t is questionable in this case whether the interests of either $X$ or $Y$ would be furthered by application of their respective rules [of law]." That is, the domicile contact to $X$ is of little weight because its domiciliary gets no benefit from $X$ law when she defends a suit against her for breach of the contract. Also, recall that Stolarz cites Auten as an example of a center-of-gravity decision without any criticism of Auten. Once again, it is obvious that clarification is needed from the New York Court of Appeals as to how, if at all, the content of the law of a state that has a connection to an issue under center-of-gravity theory bears on the ultimate choice-of-law decision.

The third uncertainty about how center of gravity functions as a method when used to resolve most contracts conflicts in New York courts concerns the time of contract issue. In Haag, the plaintiff-mother, whose eventual contract barred her from seeking additional child support, had sex with the defendant-father in New York, and conceived their child there. She then moved to California, where she resided for more than two years.

Long after the contract was made, she moved back to New York, under whose law her contractual attempt to waive future child support was invalid. The waiver was enforceable under the law of Illinois, where the contract was made and the father resided. The court found Illinois to be the center of gravity due to numerous contacts, and then stated, "Contrasted with these Illinois contacts, the New York contacts are of far less weight and significance. Chief among these is the fact that child and mother presently live in New York and that part of the 'liaison' took place in New York."

It may be that as a matter of constitutional law the precontract involvement of New York (especially the conception) related to the contract permitted the Haag court to consider a postcontract event to

237. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188 illus. 2 (1971).
238. Id.
239. Stolarz, 613 N.E.2d at 938.
241. Id. at 443. I am assuming the references to California are correct and that the statement in the opinion that the plaintiff had resided in New York from 1947 until the time of trial is in error. See id.
242. Id.
243. Id.
244. Id. at 444 (emphasis added).
increase the total weight of contacts that state had to the contract. But is doing so a proper application of center-of-gravity theory? Do the contacts not have to exist at the time the contract is executed so that the parties can consult counsel thereafter and get an opinion as to its validity?

In a post-Haag tort case where the choice-of-law method used was interest analysis, *Schultz v. Boy Scouts of America, Inc.*, the New York Court of Appeals held that a corporate defendant's relocating its principal place of business after the tort cause of action arose from New Jersey, whose law provided it a defense, to Texas, whose law would impose liability, had to be disregarded. The same policy considerations relating to certainty as to applicable-law and facilitating-law shopping by the creation of after-the-fact contacts to a state should apply just as much, it would seem, to policing the center-of-gravity choice-of-law method as they did in *Schultz*, where the method was interest analysis. Clarification by the New York Court of Appeals would be helpful, however.

The fourth uncertainty as to how New York's center-of-gravity method operates concerns whether "lumping" is recognized. It will be recalled that comment i to section 145 of the Second Restatement provides that in doing a center-of-gravity analysis in a tort case involving more than two states with significant contacts, the weight of the contacts of two states having the same law should be combined, giving a major boost for finding the "combined law" to be that which the center-of-gravity method selects. There is no similar comment to section 188 of the Second Restatement, but surely the courts will hold that the fact it deals with contracts, not torts, is no basis for limiting lumping to section 145. We can predict lumping is authorized when section 188 is applied, and we recall that in *Solorz* the court favorably...


246. Imagine counsel telling Dorothy Haag, "Well, I think the contract is valid, but if both you and Mr. Barnes were to move to New York, it probably would cease to be valid."

247. 480 N.E.2d 679, 682 (N.Y. 1985). However, maybe the ludicrous exception in *Schultz* to the rule that contacts and interests must be frozen as of the time the parties need to know the governing law would apply in *Haag*, because the mother in *Haag* moved to New York. 175 N.E.2d at 443. *Schultz* stated in dictum, "Our decision recognizing a postaccident change in domicile in *Miller v. Miller* . . . is distinguishable because in that case the defendant's domicile was changed to New York, which was the forum and also the plaintiff's domicile." 480 N.E. 2d at 682 (citing Miller v. Miller, 237 N.E.2d 877, 882 (N.Y. 1968)). Our hypothetical case has Mr. Barnes moving from Illinois to New York, the forum, and plaintiff's home state at the time of the move.

248. See supra note 51 and accompanying text.
cited section 188 as providing guidance in New York as to how to make a center-of-gravity analysis. 240

It may well be, then, that the Haag court erred in not considering the law of the third state, California, that had a significant contact to the child support contract. Because the mother in Haag bargained for a provision in the contract permitting her to return to California with her baby after signing the contract in Illinois, she seems to have had a state of mind at the time of contract that California was her home base, which would make California her domicile; and she had been living in California when she came to Illinois to negotiate the contract. If California law was like New York's in declaring void the mother's attempted waiver of child support, a case could have been made for holding the combined New York-California law to be the law made applicable by a center-of-gravity analysis. The highest court of New York needs to address the "lumping" issue.

C. Uncertainty in the Big-Mix Sections (145 and 188) of the Second Restatement

Sections 145 and 188 employ the center-of-gravity method of choice of law in tort and contract cases respectively, with both territorial and personal-law contacts (such as domicile) listed as being significant. Because both of these sections lay out specifically which contacts are to be examined, the reference to silly contacts such as the domicile of a party's attorney in Haag and the double counting in Haag (and to a lesser extent in Auten) will not occur. Comment e to each section usefully discusses the weight to accord each of the contacts listed in the black letter text, and section 188 deals with the weighing issue in its black letter text. 250

But, major uncertainty is introduced into sections 145 and 188 by the subsections (c) and (e) respectively, which both list the contacts made relevant by personal law as opposed to territorial theory. 251 These subsections state that among the contacts "to be taken into account" are "the domicil[e], residence, nationality, place of incorporation and


250. RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 145 cmt. e, 188 cmt. e (1971). "If the place of negotiating the contract and the place of performance are in the same state, the local law of this state will usually be applied . . . ." Id. § 188(3). Section 146 is a gloss on section 145, reminding courts that the place of injury is usually the weightiest contact in tort cases.

251. Id. § 145 cmt. e. Use of the word "and" rather than "or" especially suggests that all three contacts in the quoted sentence get counted, with the law of each consulted.
place of business of the parties.” What happens if a party in a conflicts case is domiciled in state A, resides in state B temporarily at the time of the tort or when the contract at issue was made, got involved in the litigation through business he or she conducted in state C, and is a national of country D? Are all four jurisdictions to be treated as significant contacts so that the law of each is eligible for selection under the center-of-gravity analysis, or is the court to pick just one of the four?

The comments shed little light on how the American Law Institute intends to answer this question. Comment e to both sections 145 and 188 says that the locales in the subsection listing personal-law connections “are all places of enduring relationship to the parties.” Comment e to section 145 has a statement hinting that the answer to the question is that a party can be entitled to multiple locales for center-of-gravity analysis: “When the interest affected is a personal one such as a person’s interest in his reputation, or in his right of privacy or in the affections of his wife, domicile[e], residence and nationality are of greater importance” than, for example, place of business. On the other hand, the two illustrations to section 145 and the two illustrations to section 188 mention only “domicile[s]” of the parties. And, comment e to section 188 states that “when a person has capacity to bind himself to the particular contract under the local law . . . of his domicile[e],” that law will probably apply, suggesting that it would be inappropriate to check to see whether the law of his residence or nationality denied the actor capacity to contract.

In my view, the rule should be that a party should be located in only one jurisdiction for a section 145 or 188 analysis. I cannot imagine any fact-law pattern in which the law of the country of the person’s nationality should be the one chosen as opposed to the law of the party’s domicile, residence, or place of business. If the law of a party’s domicile differs from that of residence, I think the party should be located in his or her domicile for the reasons stated in Tooker v. Lopez, notwithstanding that it employed interest analysis and not center of gravity as the appropriate choice-of-law method.

252. Id. §§ 145(2)(c), 188(2)(e).
253. Id. §§ 145 cmt. e, 188 cmt. e.
254. Id. § 145 cmt. e (emphasis added).
255. Id. §§ 145 illus. 1-2, 188 illus. 1-2.
256. Id. § 188 cmt. e.
257. 249 N.E.2d 394, 401 (N.Y. 1969). In short, the litigant will be leaving his or her temporary residence and returning to his or her domicile, where he or she intends to remain indefinitely—that is the place where the benefits of litigation victory or the detriment of
Comment e to both sections 145 and 188 states, "At 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 or] state." If the conflict involves corporations law, the law of the place of incorporation will almost always be applied under sections 296-313 of the Second Restatement, and there is no need to locate the corporate party in that state to get that state's law eligible for consideration. This leads to the conclusion that nationality, residence, and place of incorporation should be stricken from the list of locales in which a party can be located for center-of-gravity analysis under sections 145 and 188.

That leaves domicile and "place of business" as locales where a party can be located under sections 145 and 188. Suppose John Jones is domiciled in state X and operates a solo-practice accounting business at his office in state Y, just across the nearby state border. If he gets involved in litigation through his business, should he be located in state Y? No guidance for the answer to this question is provided by the Second Restatement. The high court of each state that has adopted it to provide the choice-of-law method for the jurisdiction needs to clarify. I think the proper answer is to locate Jones in state Y, the location of his business, although it is true that if he has to pay a large money judgment as a losing defendant, he will feel the pain in his domicile in X, as well as in Y.

Suppose Acme Inc. has its principal place of business in state A and a branch office in state B, and it becomes involved in litigation through events occurring at the branch office. The black letter of sections 145 and 188 suggests a court should locate Acme in its "place of business," which could refer to either states A or B. Although comment e to section 188 states that the "principal place of business" will usually be a more significant contact than the place of incorporation, that passage does not consider the possibility that the corporate litigant got involved in the conflicts case via its branch office in a state other than where its principal place of business was located.

The issue whether to locate a litigant that is a business entity in its principal place of business or the state where it has an office or plant through which it got embroiled in the suit arises under the interest analysis method as well as center of gravity. I am not aware of a

litigation loss will primarily be felt. I am assuming here the party did not get involved in the litigation through his or her business.

258. RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 145 cmt. e, 188 cmt. e.
reported decision that discusses the considerations a court should weigh in deciding what the rule should be: principal place of business or branch office? Rather, the opinions simply announce, without explanation, where a litigant is being located. In New York, under interest analysis, the high court invariably locates a business entity litigant in its principal place of business. After the Stolarz directive to use center of gravity rather than interest analysis to decide most contracts conflicts, New York’s lower courts have continued to locate business-entity parties in their principal places of business.

We have already encountered in this Article two California cases that, without explanation, located a corporate litigant in the state of the branch office, through which it got involved in the litigation, rather than in its principal place of business, as well as a California case locating the corporate plaintiff in its principal place of business and the corporate defendant in its branch office, even though on the facts it seems the plaintiff as well as the defendant found itself in court due to events tied to a branch office. Decisions using interest analysis in other states have also, without explanation, located a corporate litigant in the state of its pertinent subsidiary operation rather than in the state that is the principal place of business.

Good arguments can be made for either solution to this problem. What is needed, though, is for the high court of each state using the Second Restatement (as well as those employing interest analysis as the primary method for choice of law) to face squarely the issue, to announce a solution, and to ensure it is thereafter adhered to.

The same issue—domicile as of what point in time—discussed above with respect to center of gravity and interests analysis in New York can arise under sections 145 and 188 of the Second Restatement. The issue is not alluded to in the black letter of sections 145 and 188, nor in the comments to each. The two illustrations to each section involve a domicile existing when a tort occurred or a contract was

261. See discussion supra note 60.
262. See, e.g., Eger v. E.I. Du Pont DeNemours Co., 539 A.2d 1213, 1214-16 (N.J. 1988) (locating Du Pont in South Carolina although its principal place of business was in Delaware). This was stated in Lony v. E.I. Du Pont de Nemours & Co., 886 F.2d 628, 630 (3d Cir. 1989)).
263. See supra note 217 and accompanying text.
made. The high court in each state following the Second Restatement should resolve the time of contact issue by freezing the domicile or principal place of business assigned to a litigant as it exists when it becomes necessary to know the governing law (usually the moment an alleged tort occurs or a contract has allegedly been entered into).

D. Chaotic Big Mixes: Tort and Contract Methodologies in the District of Columbia, New Jersey, and Pennsylvania

Three American jurisdictions have declared or otherwise indicated that the choice-of-law method each uses is a combination of interest analysis and Second Restatement, itself a big-mix method: the District of Columbia, New Jersey and Pennsylvania. We have seen that interest analysis has been combined with the Second Restatement by a number of courts that interpret section 6 of the Restatement as calling for a second or third look at the choice-of-law issue to see if there is a false conflict (i.e., interest analysis is used), and if so set aside the tentative choice of law made under a territorial reference (such as section 146) or a center-of-gravity analysis (such as section 145 in a tort case). But, that seems not to be what these three jurisdictions are doing. The precise nature of the mix is unclear in each jurisdiction.

1. The District of Columbia

Several significant choice-of-law decisions by the District of Columbia Court of Appeals contain no reference at all to the Second Restatement and employ a choice-of-law method that is 100% interest analysis, usually stating that nonfalse conflicts are to be broken by some sort of weighing of interests. An occasional decision applying


Of course, it is not possible to break a nonfalse conflict of the zero-interest type by interest weighing, as zero cannot outweigh zero.
the District’s choice-of-law method employs only the Second Restatement and does not supplement that approach with any kind of interest analysis. 266

But, the most recent explanation of the applicable choice-of-law method made by the District of Columbia Court of Appeals is this:

In determining which jurisdiction’s law to apply in a tort case, we use the “governmental interests” analysis, under which we evaluate the governmental policies underlying the applicable laws and determine which jurisdiction’s policy would be more advanced by the application of its law to the facts of the case under review. As part of this analysis, we also consider the four factors enumerated in the Restatement (Second) of Conflict of Laws § 145:

- (a) the place where the injury occurred;
- (b) the place where the conduct causing the injury occurred;
- (c) the domicile, residence, nationality, place of incorporation and place of business of the parties; and
- (d) the place where the relationship is centered.

The Restatement factors help to identify the jurisdiction with the “most significant relationship” to the dispute . . . . 267

The above quotation makes little sense. Under interest analysis, only the law of a domicile state can apply, and the place of injury or misconduct or relationship cannot be the most significant jurisdiction, unless that place is also a domicile state. An earlier decision had tried to explain how, in the District of Columbia, interest analysis and Second Restatement get mixed together this way: “The ‘governmental interest analysis’ and the ‘most significant relationship’ test [i.e., Second Restatement] have sometimes been treated as separate approaches to conflict of law questions. We have, however, applied a constructive blending of the two approaches.” 268 This, too, is of no help in understanding how to use the two methods in combination.

It is not surprising, then, to find some cases from the District citing as relevant a section of the Second Restatement, such as section 145, while proceeding to ignore it in making the choice of law, utilizing solely the interest analysis method at the analysis stage of the


opinion. Some courts first do an interest analysis to find the applicable law and then a Second Restatement analysis to show that the result is the same under that method. One court did this in the reverse order, following a Restatement Second analysis with the observation that the result would be the same under “general application” of choice-of-law principles. None of the decisions employing this kind of second-look approach suggests what is to be done if the second analysis leads to application of a different law from that reached by the initial analysis.

On the other hand, in some cases applying the choice-of-law method of the District of Columbia, a thorough analysis based on the Second Restatement seems to be the primary basis for the choice-of-law decision, although the court feels it has to declare that interest analysis is part of the method of choice of law employed by courts of the District of Columbia. An actual interest analysis is not done, however.

One case suggests that, in the tort arena, the District of Columbia brings section 145 of the Second Restatement into the choice-of-law analysis as a form of dépeçage eclecticism so that the category of conduct-regulating rules of law can be recognized. In this 1985 case, the plaintiff-children of Maryland complained of injuries suffered in Maryland due to what they characterized as an attractive nuisance maintained by the defendant, which had its principal place of business in the District of Columbia. The District of Columbia recognized the attractive nuisance theory of the suit and would have imposed liability. Under Maryland law, the plaintiffs lost. The defendant claimed that

269. See Burke, 917 A.2d at 1117-18 (mentioning section 145); Myers v. Gaither, 232 A.2d 577, 583 (D.C. 1967) (referring favorably to the tentative draft of what became section 145 but using only interest analysis in making the choice of law).

270. See e.g., Coleman, 667 A.2d at 818 (“An application of the four factors . . . from the Restatement [§ 145] leads to a similar conclusion.”).


272. Washkowiak, 900 A.2d at 180-83 (analyzing sections 145 and 148); Hercules, 566 A.2d at 40-43 (applying sections 145 to a negligence/breach of warranty count and 148 to a fraud count). Section 148 uses a center-of-gravity method based on contacts that are territorial and others drawn from the personal law theory. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 148 (1971).


That would be a sensible dépeçage.

274. Id. at 1360.

275. Id.
the Maryland law was conduct regulating in that it fostered free use of land. This is immediately followed in the court's opinion by a footnote stating that it was the defendant, arguing for recognition of a conduct-regulating category of tort law, that argued section 145 was pertinent. Right after this footnote, the opinion states, "The court finds this method of analysis compelling and persuasive."

Another possibility is that even though almost every conflicts opinion applying the District of Columbia's choice-of-law method states that some sort of interest weighing is used to break nonfalse conflicts, the courts of the District of Columbia are aware that this tie-breaking device will not always be useable, and in that situation, the choice-of-law method calls for breaking the nonfalse conflict by a center-of-gravity analysis under section 145 in tort cases and probably a center-of-gravity analysis under section 188 in contract cases. The

276. Id. at 1361. The superior argument was that the District of Columbia's law detailing what a landowner should not do that might entice young children to trespass was conduct regulating and hence did not apply, for without it the plaintiffs could not prevail. Id. at 1362-63.

277. Id.

278. Id. at 1361 n.4; see also Bisceo v. Arlington County, 738 F.2d 1352, 1361 (D.C. 1984) ("[A]s the site of most of the relevant conduct and all the injury, the District has a strong interest in deterring conduct of this kind [a high-speed police chase]"); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 146 cmt. d (1971) ("When conduct and injury occur in [the] same state[,] . . . [that] state will usually be the state of dominant interest . . . . The state where the defendant's conduct occurs has the dominant interest in regulating it and in determining whether it is tortious in character.").

In Bisceo, District of Columbia law was applied, but Bisceo is not a case where the use of a conduct-regulating dépecage annexed on to interest analysis resulted in application of the law of a jurisdiction that was disinterested under the personal-law theory. The plaintiff was located in the District for choice-of-law purposes and the court stated:

[T]his court has previously recognized the special and largely unique interest of the District in protecting persons who live in the surrounding suburbs and work in the District. . . . [W]hen a plaintiff such as Dr. Bisceo, who is a Maryland resident working in the District, is injured in the District, District of Columbia courts have recognized a strong local interest in protecting that plaintiff.

738 F.2d at 1361.

279. In a true conflict case, each domicile jurisdiction might have an interest of the same strength as that of the other jurisdiction, or the conflict might be a zero-interest conflict.

280. Inconsistent with this theory of how the Second Restatement might function in the District in combination with interest analysis are the cases relying not on the center-of-gravity sections of that Restatement but instead on a section creating a presumption of applicable law based solely on a territorial factor. See Nat'l Union Fire Ins. Co. of Pittsburgh v. Binkler, 665 F. Supp. 35, 40 (D.D.C. 1987) (citing section 193, which chooses the law of the place of the risk insured by liability insurance contract); Vaughn v. Nationwide Mut. Ins. Co., 702 A.2d 198, 201 (D.C. 1997) (same); Bisceo, 738 F.2d at 1361-62 (citing section 146, which applies the law of the place of tortious injury).

Sections 145 and 188 can be used to break nonfalse conflicts found via interest analysis even if one of the domicile states is not the center of gravity, as long as one of them is the
results in almost all the cases mentioning use of both interest analysis and section 145 of the Second Restatement are consistent with this theory, but there is at least one exception. In a 1989 case, a negligence claim presented a false conflict because the plaintiff and defendant were each District of Columbia entities, but the law of Virginia was chosen after a section 145 analysis found it to be the center of gravity.

The 1989 case can be considered an aberration. If the standard approach in the District is to use section 145 to break nonfalse conflicts, the method uses second-look eclecticism reminiscent of solution (2) to the Neumeier Rule 3 riddle. If under interest analysis no false conflict is found, the court reverts to center of gravity, using the factors listed in sections 145 and probably 188, to find a law that need not be that of a domicile state.

One thing is clear: judges in other courts and attorneys desperately need clarification from the District of Columbia Court of Appeals as to the details of the choice-of-law method adopted in that jurisdiction.

2. New Jersey

Upon abandoning the lex loci in 1967, New Jersey adopted the "governmental interest analysis approach." The opinion in the New Jersey Supreme Court's 1970 false conflict case of Pfau v. Trent Aluminur is pure interest analysis, and the court rejected each argument made on behalf of recognizing a basis for applying the law locale of a significant factor in addition to domicile. Consider a tort case in which the plaintiff is of state A, the defendant of state B, they form a relationship in state B, and state C is the place of the misconduct and injury. State C may be the center of gravity, but state B has more section 145 factors connected to it than state A, so a court can break the nonfalse conflict in favor of B law.

If in the hypothetical above the relationship had been formed in state C, states A and B each have only the one section 145 contact, domicile of a party, and to use section 145 to break the nonfalse conflict, the law of state C must be consulted. If it is more similar to (or identical to) the contending law of state A than that of state B, state A law is chosen.

281. Hercules & Co. v. Shama Rest. Corp., 566 A.2d 31, 33, 40 (D.C. 1989) (stating that the plaintiff was from Washington, D.C., and noting that it was contended the defendant was, too, which the court seems to accept as true). Certainly the defendant was recently located in the District. See Architects Directory, Darrel Downing Rippeteau Architects PC, http://www.architectureweek.com/directory/firms.cgi?4305 (last visited May 20, 2008).

282. Hercules & Co., 566 A.2d at 42.


284. Id. at 131-33. The court recognized that a conflict would be false even though the plaintiff and defendant were domiciled in different states if each domicile state's law provided for recovery and the law of the place of injury would deny recovery. Id. at 136-37.
of the place of injury to decide an issue that was not conduct regulating. Many subsequent decisions by the New Jersey Supreme Court largely use interest analysis as the choice-of-law method, without any mention of the Second Restatement. 285

Meanwhile, the same court was in other cases embracing a contact-counting approach and citing to and relying on the Second Restatement, as early as two years after Pfau. The New Jersey Supreme Court declared it had adopted a method "that applies the law of that jurisdiction having the most significant relationship and closest contacts with the occurrence and the parties." 286 This approach is far removed from interest analysis. In 1980, the New Jersey Supreme Court declared that the place of contracting was an "important contact[]" in a contract conflicts case and that Restatement Second sections such as 6, 188, and 193 should be considered as part of the choice-of-law process. 287 In 1993, the New Jersey Supreme Court decided a contract conflicts case on the basis of its interpretation of section 193 of the Second Restatement, while also discussing sections 188 and 6. 288

In 1999, in Fu v. Fu, the New Jersey Supreme Court apparently attempted to synthesize the two different lines of conflict-of-laws precedents or at least explain how Second Restatement sections fit into

285. See, e.g., Rowe v. Hoffman-La Roche, Inc., 917 A.2d 767, 771 (N.J. 2007) (stating that New Jersey courts apply "the more flexible governmental-interests analysis"). The court broke a zero-interest conflict case in favor of the nonrecovery law of the plaintiff's domicile apparently on the untenable theory that it had more interest in the matter than the state of the defendant's place of business. See id. at 775; see also Eger v. E.I. Du Pont DeNemours Co., 539 A.2d 1213, 1217 (N.J. 1988) (deciding a true conflict on the basis of "balancing . . . the [governmental] interests involved").

Purporting to use interest analysis as its choice-of-law method, New Jersey recognizes interests that most interest analysis adherents would consider nonexistent. See, e.g., Gantes v. Kason Corp., 679 A.2d 106, 109-11 (N.J. 1996) ("In this case, . . . the machine causing the fatal injury [in Georgia] was manufactured in, and placed into the stream of commerce from[ ] this State.") This gave it, according to the court, an interest in deterring distribution of unsafe products by applying New Jersey's two-year statute of limitation (considered substantive) rather than Georgia's ten-year statute of repose under which the Georgia heirs of the decedent would lose their case. See id. Statutes of limitation have no effect on safety, I believe. If there is any effect, a short statute of limitation for tort claims, such as two years, would encourage recklessness compared to the impact of a four- or five-year statute of limitations that might apply if the manufacturer were sued in a state other than New Jersey.


interest analysis."\textsuperscript{289} The court in \textit{Fu} stated that "Section 6 of the \textit{Restatement} identifies the general considerations germane to our governmental-interest analysis."\textsuperscript{290} Also, the court declared, "The relevant factors set forth in sections 6, 145 and 174 of the \textit{Restatement (Second) of Conflict of Laws} (1971) guide our evaluation of the governmental interests at stake."\textsuperscript{291} As a result of this blending of Second Restatement theory with interest analysis theory, the \textit{Fu} court stated, "[W]e now apply a more flexible 'governmental interest' test."\textsuperscript{292} Got it? I submit that all that "flexible" can mean here is that what the court will actually do is unpredictable.

Citing \textit{Fu}'s embracing of section 145, in a 2002 case, the New Jersey Supreme Court stated, "In personal injury cases, the place of the injury is important, and when both the conduct and the injury occur in the same place, that jurisdiction's law generally will apply."\textsuperscript{293} This is the antithesis of interest analysis and seems certain to generate great confusion.

The federal courts required to apply New Jersey's choice-of-law method when exercising diversity jurisdiction struggle in trying to figure out how they are to use both interest analysis and Second Restatement methodologies.\textsuperscript{294} The most recent attempt by the United States Court of Appeals for the Third Circuit first seems to do an interest analysis and then, in second-look eclectic fashion, does a center-of-gravity analysis under section 145.\textsuperscript{295} The court does not allude to what happens if the first and second looks each lead to differing and conflicting laws.

It is possible to combine Second Restatement sections 145 and 188 with interest analysis by providing that false conflicts are to be broken by applying the law of the domicile state that has more of the territorial factors list in section 145, if the case is in tort, or section

\begin{itemize}
\item \textsuperscript{289} 733 A.2d 1133, 1138-40 (N.J. 1999).
\item \textsuperscript{290} \textit{Id.} at 1140.
\item \textsuperscript{291} \textit{Id.} at 1139. \textit{Fu} was a torts conflict case involving a vicarious liability issue, with which section 174 of the Second Restatement deals (with a reference back to section 145). \textit{See} \textit{Restatement (Second) of Conflict of Laws} § 174 (1971); \textit{see also} Erny v. Estate of Merola, 792 A.2d 1208, 1217-18 (N.J. 2002) (focusing on section 145).
\item \textsuperscript{292} 733 A.2d at 1138. Later cases carry forward the qualifier that interest analysis in New Jersey is "flexible," whatever that means. \textit{See} Rowe v. Hoffman-L.A Roche, Inc., 917 A.2d 767, 771 (N.J. 2007); \textit{Erny}, 792 A.2d at 1212.
\item \textsuperscript{293} \textit{Erny}, 792 A.2d at 1217.
\item \textsuperscript{294} \textit{See}, e.g., Warriner v. Stanton, 475 F.3d 497, 501-05 (3d Cir. 2007).
\item \textsuperscript{295} \textit{See id.}\
\end{itemize}
188, if in contract. If that is the combination of interest analysis and Second Restatement that the New Jersey Supreme Court is trying to create, it should say so specifically. To me, no other combination is sensible. Maybe I would change my mind if the New Jersey Supreme Court were to describe such other mode of mixing with clarity and precision. As I asked in the title of a prior article on eclecticism in choice of law, is what have we here a "Hybrid Method or Mishmash?" Until we get clarification, New Jersey looks like a mishmash state to me.

3. Pennsylvania

In 1964, the Pennsylvania Supreme Court in *Griffith v. United Airlines, Inc.* abandoned the lex loci method for choice of law in tort cases "in favor of a more flexible rule which permits analysis of the policies and interests underlying the particular issue before the court." This description of the new method for Pennsylvania was immediately followed in *Griffith* by a quotation from New York's seminal interest analysis decision, *Babcock v. Jackson.* Previously, the opinion in *Griffith* had paraphrased the tentative draft of what would become section 145 of the Second Restatement and had quoted the tentative draft of what would become section 146. The *Griffith* defendant, United Airlines, was never located by the court in a jurisdiction, and, hence, the court could not do an interest analysis. The portion of the decision holding that the law of the domicile of the plaintiffs' decedent (Pennsylvania) would prevail over the law of the place of injury stressed that "[t]he relationship between decedent and United was entered into in Pennsylvania," which is consistent with center-of-gravity theory, but not interest analysis. In dictum, the court said that had the decedent not immediately died when the defendant's plane crashed, the state where the injury occurred would "have an interest in the compensation of those who render medical aid and other assistance to the injured party." The state of injury has no such

296. If the only connection of each domicile state is its domicile status, section 145 or 188 will point to a third state that is the territorial center of gravity. That state's law is then examined, and the court chooses the law of the domicile state which is most similar to that law.


299. *Id.* at 805 (quoting Babcock v. Jackson, 191 N.E.2d 279, 283 (N.Y. 1963)).

300. *Id.* at 802-03.

301. *Id.* at 807.

302. *Id.*
interest under interest analysis. If, as later opinions assert, *Griffith* created a choice-of-law method that is a combination of interest analysis and Second Restatement, one can find in the opinion no guidance as to how the new choice-of-law method for Pennsylvania torts conflicts would operate in a case where state *A* law would apply under interest analysis but state *B* law under a Second Restatement analysis or center of gravity.

The Pennsylvania Supreme Court’s next conflicts decision two years later did not clarify any of the uncertainties created by *Griffith.* The wife sued her husband, both of whom were Pennsylvania domiciliaries, for the wrongful death of their child in Colorado. Without using the term *false conflict,* the court held that Pennsylvania, the domicile state, had an interest in applying its spousal immunity defense, whereas Colorado’s law allowing the suit was intended to benefit Colorado spouses, none of whom were involved in the case, leaving Colorado disinterested. That smacks of interest analysis, but the tentative draft of the Second Restatement presuming the law of the marital domicile applies to the immunity issue was cited, and again the court said the place of injury would have an interest in applying its prorecovery law if the victim of the tort had been medically treated there before dying.

Four years later, in the Pennsylvania Supreme Court’s next conflicts opinion, the casebook favorite *Cipolla v. Shaposka,* the earlier spousal immunity case was referred to as presenting a “false conflict.” The Second Restatement was not cited, although the court did comment that “[t]he weight of a particular state’s contacts must be measured.” *Cipolla* involved an automobile accident and presented a true conflict under interest analysis. The court declared that “[t]he fact that the automobile involved in the accident is registered and housed in Delaware gives that state another contact” in addition to its being the defendant’s domicile. Thus, Delaware’s contacts were “qualitatively greater” than those of the state of Plaintiff’s domicile.

305. *Id.* at 681 n.14.
306. *Id.* at 683.
308. *Id.*
309. *Id.* at 855.
310. *Id.* at 856. That the injury occurred in Delaware would also seem to present an important contact to list along with the registration of the automobile, yet that was not done.
311. *Id.*
This looks like interest analysis with use of some sort of center of gravity to break nonfalse conflicts. As an apparent alternative basis for breaking the true conflict in *Cipolla*, the court said, "Also, it seems only fair to permit a defendant to rely on his home state law when he is acting within that state."312 This is similar to what later would become New York's *Neumeier* 's rule 2 and can be viewed as interest analysis using a single territorial reference to break nonfalse conflicts.

The Pennsylvania Supreme Court has cited *Cipolla* only twice, most recently twenty-four years ago.313 Its most recent description of the choice-of-law method used in torts conflicts is dictum from 1998 that refers only to the "flexible approach" of *Griffith*,314 which, we recall, looked a lot more like center of gravity based on Second Restatement theory rather than interest analysis.

Not unexpectedly, confusion reigns in the lower Pennsylvania state courts and federal courts exercising diversity jurisdiction that have to figure out what *Griffith* means. An intermediate appellate court in the state system has said that *Griffith* "adopted a methodology which is a combination of the 'government interest' analysis and the 'significant relationship' approach of Section 145 of the Restatement (Second) of Conflicts."315 Quite recent decisions of the United States Court of Appeals for the Third Circuit trying to explain Pennsylvania's modern choice-of-law method are all over the map. One from 2006 states that "Pennsylvania uses the 'significant relationship' test of the Restatement (Second) of Conflict of Laws."316 Earlier in 2006, a different Third Circuit panel declared that *Griffith* means that "a court applying Pennsylvania law should use the Second Restatement of

312. *Id.*

313. Myers v. Commercial Union Assurance Cos., 485 A.2d 1113, 1116 (Pa. 1984). This was a claim by an insurer of a Pennsylvania automobile driver for reimbursement from an insurance company insuring the workers compensation liabilities of an Illinois employer, apparently considered by the court to be an Illinois party. *Id.* at 1114-15. The holding was that Pennsylvania had "considerable interests" in applying its law favorable to the insurer seeking reimbursement when compared to Illinois' interests. *Id.* at 1117. This looks like interest analysis without combining in any Second Restatement-based considerations.


315. Troxel v. A.I. duPont Inst., 636 A.2d 1179, 1180 (Pa. Super. Ct. 1994). In 1978, the Third Circuit predicted that "*Griffith* and its progeny" would be applied by analogy in contract cases, which meant a method that was "a combination of 'interest analysis' and Restatement II's grouping of contacts, [so that] both these theories will be considered." Melville v. Am. Home Assurance Co., 584 F.2d 1306, 1313 (3d Cir. 1978). Each led to the same result, the court decided. *Id.* at 1315. Much reliance was placed on section 192 of the Second Restatement. *Id.* at 1314-15.

Conflict of Laws as a starting point, and then flesh out the issue using an interest analysis.”

Most recently, a 2007 Third Circuit panel sought to apply Griffith in a contract dispute. The court stated that Griffith’s method was a “combination” of interest analysis and the Restatement Second approach. It first checked to see whether there was a false conflict under interest analysis. There was not. Rather, “there is a true conflict between Pennsylvania and New York law, and we must determine which state has the most significant relationship to this dispute... We begin the analysis by assessing each state’s contacts under the Second Restatement of Conflicts of Laws.”

A lengthy analysis of the section 188 factors produced a choice of New York law. But, then, the court felt obliged to engage in interest weighing. For the court this interest weighing also led to a choice of New York law. “Lucky,” I say, for no hint is provided what would happen if Pennsylvania was found to have the stronger interest, while New York was the center of gravity based on section 188 contacts.

Calling all justices of the Pennsylvania Supreme Court. SOS! Help!

V. CONCLUSION

Eclecticism is essential to the interest analysis method in that some issues must be (narrowly) defined as conduct regulating, with the applicable law drawn from the place of misconduct, which may not be a domicile state. An eclectic use of one-shot territorialism (see solution (1) to the Neumeier Rule 3 enigma) or use of center of gravity (especially as confined by sections 145 and 188 of the Second Restatement) is acceptable. Big-mix eclecticism underlying sections 145 and 188 also makes sense. Second-look switching from interest analysis to lex loci as done in Schultz v. The Boy Scouts is indefensible, and most other instances of eclecticism are at least dubious.

319. Id. at 231.
320. Id. at 229-32.
321. Id. at 232.
322. Id. at 233-35.
323. Id. at 235 (“Finally, the Court must consider the ‘interests and policies that may be validly asserted by each jurisdiction.’ We conclude that New York has the greater policy interest.” (citation omitted)).