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## MODERN MARYLAND CONFLICTS: BACKING INTO THE TWENTIETH CENTURY ONE HAUCH AT A TIME

Richard W. Bourne†

Despite a Conflicts revolution that has swept through a majority of American courts since the 1950s, Maryland has clung steadfastly to choice-of-law principles dating back to the early nineteenth century. In some ways, Maryland state courts' refusal to adopt the new approaches to the choice-of-law process, signaled by the development of interest analysis<sup>1</sup> and the *Restatement (Second) of Conflict of Laws*,<sup>2</sup> may seem to simplify the research tasks of Maryland lawyers,

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† Professor, University of Baltimore School of Law. For comments and criticisms the author is deeply indebted to many friends, particularly Professor William L. Reynolds of the University of Maryland Law School and Professor Emeritus Eugene J. Davidson of the University of Baltimore Law School, and Claudia A. Diamond, a student assistant without whose talent and help this paper would be much weaker. These people deserve credit for much of what is good in the piece and of course bear no responsibility for the rest.

1. "Interest analysis" is a method of approaching the choice-of-law process usually associated with the writings of the late Brainerd Currie. See BRAINERD CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* (1963). The chief early judicial apostle of interest analysis was Chief Justice Roger Traynor of the California Supreme Court who wrote a series of influential opinions that ushered California away from the traditional formalist mode of analysis toward interest analysis in cases such as *Reich v. Purcell*, 432 P.2d 727 (Cal. 1967); *Bernkrant v. Fowler*, 360 P.2d 906 (Cal. 1961); and *People v. One 1953 Ford Victoria*, 311 P.2d 480 (Cal. 1957). At the other end of the country, Judge Fuld led the Court of Appeals of New York into interest analysis in *Babcock v. Jackson*, 191 N.E.2d 279 (N.Y. 1963).
2. *RESTATEMENT (SECOND) OF CONFLICTS OF LAWS* (1971) [hereinafter *SECOND RESTATEMENT*]. The *Restatement (First) of Conflict of Laws* was published in 1934 and was largely the work of Professor Joseph Beale, who also put out a multivolume treatise, *Conflict of Laws*, the following year. See *RESTATEMENT OF CONFLICT OF LAWS* (1934) [hereinafter *FIRST RESTATEMENT*]; JOSEPH H. BEALE, *CONFLICT OF LAWS* (1935). A number of writers, including Walter Wheeler Cook, David Cavers, and Ernest Lorenzen, savaged the traditional system espoused by Beale. See WALTER W. COOK, *THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS* (1942); ERNEST G. LORENZEN, *SELECTED ARTICLES ON THE CONFLICT OF LAWS* (1947); David F. Cavers, *A Critique of the Choice of Law Problem*, 47 HARV. L. REV. 173 (1933). Their early attack led the American Law Institute to convene a new study to promulgate a *Second Restatement* in 1953. Other writers jumped into the fray, including Currie, see *supra* note 1, Albert Ehrenzweig, see ALBERT A. EHRENZWEIG, *TREATISE ON THE CONFLICT OF LAWS* (1962), Robert Leflar, see ROBERT A. LEFLAR, *AMERICAN CONFLICTS LAW* (1968), Arthur von Mehren and Donald Trautman, see ARTHUR T. VON MEHREN & DONALD T. TRAUTMAN, *THE LAW OF MULTISTATE PROBLEMS*

because in many instances cases that were good law in the early 1900s remain good today. Indeed, in the leading case of *White v. King*,<sup>3</sup> the Court of Appeals of Maryland grounded its refusal to join the developing trend on the belief that adherence to the traditional system simplified the choice-of-law process, and that adopting the new innovations would produce costly and unnecessary litigation and breed uncertainty in the law.<sup>4</sup>

Despite *White*, the lawyer's task in working through a case with multistate contacts remains complex in Maryland. The attorney needs a "feel" for conflicts doctrine simply to realize that a multistate case might implicate foreign law; recognition of this possibility can frequently enable the lawyer to invoke the application of that law.<sup>5</sup>

(1965), and later still others. Those working on the American Law Institute's effort to replace the *First Restatement* went through many drafts before the able leadership of Willis Reese finally led to promulgation of an acceptable *Second Restatement* in 1971.

3. 244 Md. 348, 223 A.2d 763 (1966).

4. *White* concerned a personal injury claim by Maryland plaintiffs against a Maryland defendant arising from an auto accident in Michigan. Because the complaint sounded in simple negligence, the plaintiffs could not prevail if the Michigan guest statute applied. The court recognized that the plaintiffs would win if it followed *Babcock v. Jackson*, 191 N.E.2d 279 (N.Y. 1963), or the then-current draft of the *Second Restatement*, but refused to depart from traditional choice-of-law doctrine on grounds of stare decisis and the virtues of certainty. See *infra* notes 200-04 and accompanying text.

More recently, in *Hauch v. Connor*, 295 Md. 120, 125, 453 A.2d 1207, 1210 (1983), the court of appeals reiterated its adherence to the traditional system of *lex loci delicti* on the basis that it promotes certainty and predictability. While the language in *Hauch* certainly reaffirms the position the court took in *White*, there was evidence in *Hauch* that the court's devotion to the traditional position stood on shakier ground. See *infra* notes 60-69, 205-09 and accompanying text.

5. Under § 4 of the Maryland Uniform Judicial Notice of Foreign Law Act, Md. CODE ANN., CTS. & JUD. PROC. § 10-504 (1989), a party wishing the court to enforce foreign law is required to give adverse parties "reasonable notice . . . either in the pleadings or by other written notice." *Id.* As a general matter, in the absence of such notice, foreign law is presumed to be the same as the law of the forum. See, e.g., *Heiserman v. Baltimore & A.R.R.*, 15 Md. App. 657, 664 n.2, 292 A.2d 140, 143 n.2 (1972). In a number of cases, the court of appeals has upheld trial judges' refusals to apply foreign law because of the failure of the parties to give notice under the statute. See, e.g., *Gebhard v. Gebhard*, 253 Md. 125, 128, 252 A.2d 171, 173 (1969); *Parkside Terrace Apts., Inc. v. Linder*, 252 Md. 271, 273-74, 249 A.2d 717, 718 (1969); *Hogan v. Q.T. Corp.*, 230 Md. 69, 73-74, 185 A.2d 491, 494 (1962). While the trial judge has considerable latitude to allow the issue to be raised belatedly, *cf.*, *Morris v. Peace*, 14 Md. App. 681, 685-86, 288 A.2d 600, 603 (1972) (upholding trial judge's discretionary decision to apply Virginia law when notice of intent to rely was made one day prior to trial upheld in light of offer to grant continuance), and a decision applying foreign law will be upheld if the trial judge and all parties assumed its applicability despite failure of anyone formally

Further, an understanding of Maryland conflicts law is not likely to suffice. This is true for several reasons. The breakdown in the national consensus as to which choice-of-law principles should govern cases with multistate elements<sup>6</sup> and the increasing isolation of Maryland among the ranks of "traditional" jurisdictions adhering to the *First Restatement*,<sup>7</sup> creates the real possibility of forum shopping to a state whose choice-of-law rules would favor one's client. The rapid expansion of courts with judicial jurisdiction in the aftermath of *International Shoe Co. v. Washington*<sup>8</sup> and its progeny only enlarges the opportunities for forum shopping. In order to be a smart shopper the attorney needs to become adept at working through the conflicts

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to give notice of intention to rely on foreign law, see *Joffe v. Canada Dry Ginger Ale*, 222 Md. 1, 5, 158 A.2d 631, 633 (1960), most trial judges rigidly enforce the notice statute, and when they do, their decisions are upheld.

6. In *The Choice-of-Law Revolution: An Empirical Study*, Patrick Borchers suggested that "until the early 1960s, the *First Restatement* had a nearly monolithic following in the United States," Patrick Borchers, *The Choice-of-Law Revolution: An Empirical Study*, 49 WASH. & LEE L. REV. 357, 359 (1992), but that today only 15 states subscribe to its tenets, while 24 follow the *Second Restatement*, four apply "interest analysis," and five employ Professor Robert Leflar's "choice influencing considerations," *id.* at 371-73. Since the publication of Professor Borchers's article, at least two states, South Dakota and Tennessee, have shifted from following the *First Restatement* to following the *Second*. See *Selle v. Pierce*, 494 N.W.2d 634 (S.D. 1993); *Hataway v. McKinley*, 830 S.W.2d 53 (Tenn. 1992). Clearly the monolith is a thing of the past.
  7. The number of states credited with adhering to the principles of the *First Restatement* varies among courts and commentators, but is without much doubt low and in a steady state of decline. In discussing the traditional doctrine that *lex loci delicti* applies in torts cases, Judge Rosalyn B. Bell, speaking for the Court of Special Appeals of Maryland, recently noted that only twelve American jurisdictions adhere to the doctrine, and among these, in the past 10 years, it had been reaffirmed by a court of last resort in only seven. *Black v. Leatherwood Motor Coach Corp.*, 92 Md. App. 27, 38-39 n.6, 606 A.2d 295, 300-01 n.6, *cert. denied*, 327 Md. 626, 612 A.2d 257 (1992). In his empirical study, Professor Borchers acknowledges that different commentators have come up with different counts in recent years, ranging from a high of 22 states in 1983 to a low of 14 in later years. See Borchers, *supra* note 6, at 367-68 n.87. The downward trend continues: of the 15 states Borchers listed, at least two, South Dakota and Tennessee, have since left the fold. See *supra* note 6.
- The court of special appeals recently indicated that, in its view, the *First Restatement* continues to command majority support in contract actions, although it conceded that the *Second Restatement* and other policy-oriented approaches are gaining support, and that support for the *First Restatement* is "shrinking." *Commercial Union Ins. Co. v. Porter Hayden Co.*, 97 Md. App. 442, 455, 630 A.2d 261, 268, *cert. granted*, 333 Md. 201, 634 A.2d 62 (1993). A close reading of the authority cited in *Commercial Union*, see *id.* at 455-56, 630 A.2d at 268; *cf.* EUGENE F. SCOLES & PETER HAY, *CONFLICT OF LAWS* § 18.21 (2d ed. 1992), fails to support the "majority" characterization, though it amply justifies the "shrinking" language.
8. 326 U.S. 310 (1945).

doctrines of many states, not just Maryland. Working through this conflicts thicket can be a daunting task.<sup>9</sup>

This Article argues that Maryland should abandon its adherence to the *First Restatement* and adopt in its stead a more policy-oriented approach to choice-of-law problems. The first stage of the argument is to demonstrate that Maryland case law itself belies the notion that stated adherence to the principles of the traditional system guarantees predictability and consistency, and thus, simplification of the task of bar and bench in working out conflicts problems within the Maryland courts. Second, the Article argues that a number of recent decisions in Maryland suggest possible abandonment of the principles of the *First Restatement* in favor of a more modern policy-oriented approach. Finally, the Article demonstrates that following these decisions to their logical conclusion would result in a more just and rational approach to the choice-of-law process.

## I. THE TRADITIONAL APPROACH TO CONFLICTS PROBLEMS

The traditional approach to conflict of laws problems in this country reflected formalist and positivist methodologies and values. Each state viewed itself as a semi-autonomous sovereign with broad authority to create and develop its courts and to adopt substantive rules for allocating wealth and power and regulating conduct among its people. The earliest influential writers on conflicts, including Justice Story,<sup>10</sup> analogized the American states to sovereign nations in Europe and believed that they were largely independent to develop substantive rights and obligations, as well as procedures for enforcement of these rights and obligations. As Story put it, every state

possesses an exclusive sovereignty and jurisdiction within its own territory. The direct consequence of this rule is, that the laws of every state affect, and bind directly all property, whether real or personal, within its territory; and all persons, who are resident within it, whether natural born subjects, or aliens; and also all contracts made, and acts done within it . . . . [A corollary rule] is, that no state . . . can, by its laws, directly affect, or bind property out of its own territory, or bind persons not resident therein, whether they are

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9. "The realm of the conflict of laws is a dismal swamp, filled with quaking quagmires, and inhabited by learned but eccentric professors who theorize about mysterious matters in a strange and incomprehensible jargon. The ordinary court, or a lawyer, is quite lost when engulfed and entangled in it." William L. Prosser, *Interstate Publication*, 51 MICH. L. REV. 959, 971 (1953).

10. JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS (1834), was undoubtedly the most important nineteenth century American source.

natural born subjects, or others. . . . From these two maxims . . . there flows a third, and that is, that whatever force and obligation the laws of one country have in another, depends solely upon the laws, and municipal regulations of the latter, that is to say, upon its own proper jurisprudence and polity, and upon its own express or tacit consent . . . . [Comity of nations] . . . is the most appropriate phrase to express the true foundation and extent of the obligation of the laws of one . . . within the territories of another.<sup>11</sup>

The leading American writer on conflict of laws in the early twentieth century was Joseph Beale. Beale adhered to Story's territorialist bent, but attempted to rationalize a court's application of foreign law, not on the basis of discretionary "comity," but because, on principle, there was a duty to recognize rights that had been "vested" in the state of their creation. According to Beale, "[a] right having been created by the appropriate law, the recognition of its existence should follow everywhere. Thus an act valid where done cannot be called into question anywhere."<sup>12</sup>

American courts at the turn of the century alternated between the comity and vested rights theories,<sup>13</sup> but remained consistently wedded to a territorialist system for selecting the normally applicable law over a broad range of cases. In most instances, the methodology was beguilingly simple. First, the forum's own rules would govern all questions of procedure.<sup>14</sup> Second, with respect to nearly every category of cases, there was an easy-to-administer rule that pointed to a single sovereign as the state whose local law should provide the substantive rule of decision. In torts, the rule was *lex loci delicti*,

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11. *Id.* §§ 18, 20, 23, 38 (2d ed. 1841).

12. 3 BEALE, *supra* note 2, § 73, at 1969.

13. *See, e.g.*, Slater v. Mexican Nat'l R.R., 194 U.S. 120, 126 (1904) (vested rights); Alabama Great S.R.R. v. Carroll, 11 So. 803 (1892) (comity).

14. FIRST RESTATEMENT, *supra* note 2, § 585. The introduction to chapter twelve of the *First Restatement*, which deals with questions of procedure, justified the automatic *lex fori* reference for procedural questions on grounds of administrability. The introduction recognized that the rule might occasionally undermine achievement of the same result in the forum as in the courts of the state whose substantive rules governed the case. Professor Beale believed that the effect of applying forum procedures would, in most cases, be negligible, and in any case was far outweighed by the convenience to the court of being able to apply its own rules. *See* 3 BEALE, *supra* note 2, § 584.2, at 1601.

The truth of Beale's belief is questionable. The *First Restatement* characterized a broad range of issues as "procedural." *See, e.g.*, FIRST RESTATEMENT, *supra* note 2, § 592 (matters of pleading and proceedings in court); *id.* § 594 (judge or jury trial); *id.* §§ 595-97 (rules of evidence, including sufficiency, presumptions, and admissibility); *id.* §§ 603-04 (limitations); *id.* § 606 (limitations on damages).

the law of the place of the wrong, and that place was usually defined as the state in which the right to recovery accrued.<sup>15</sup> In contract cases, Beale's rule was *lex loci contractus*, the law of the place of contracting, and this was usually defined as the state in which the obligation first became binding.<sup>16</sup> In cases involving *inter vivos* transfer<sup>17</sup> or succession to real property,<sup>18</sup> *lex loci rei sitae* provided the rule of decision. The situs state's law also governed the validity of *inter vivos* transfers of tangible personalty.<sup>19</sup> Generally, succession to personal property was governed by *lex domicilii*,<sup>20</sup> which also tended to control cases involving the personal status of the parties.<sup>21</sup>

By and large, Maryland conflicts doctrine fits neatly into this traditional mold. Even when Maryland applies some other state's substantive rule, it applies its own procedures.<sup>22</sup> On the substantive

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15. FIRST RESTATEMENT, *supra* note 2, § 377; 2 BEALE, *supra* note 2, §§ 377.2-378.4.
  16. 2 BEALE, *supra* note 2, § 311.1, at 1045; FIRST RESTATEMENT, *supra* note 2, §§ 311 cmt. d, 332. Justice Story had earlier favored the law of the place of performance. See JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS §§ 242, 280 (8th ed. 1883). Beale acknowledged that the cases speaking of the place of the contract often confused the place of making (or *lex loci celebrationis*) with the place of performance (or *lex loci solutionis*), 2 BEALE, *supra* note 2, § 311.1, at 1044-45, and that there was a split of authority as to which rule to follow, *id.* § 332.57, at 1171-74, but was clear that the performance rule was inferior because it "enable[s] one state to dictate to another what acts done in that other's borders shall and what shall not result in a legal obligation," *id.* § 332.3, at 1172-73.
  17. FIRST RESTATEMENT, *supra* note 2, § 215.
  18. *Id.* §§ 245 (intestacy), 249 (will).
  19. *Id.* § 257.
  20. *Id.* §§ 303 (intestacy), 306 (will).
  21. The *First Restatement* used a domiciliary reference to control jurisdiction to grant a divorce, see FIRST RESTATEMENT, *supra* note 2, §§ 110-11, 135, or decide custody, see *id.* § 117, and to provide the governing law regarding legitimacy, see *id.* § 137, adoption, see *id.* § 142, custody, see *id.* § 144, or guardianship, see *id.* § 149. The *Restatement* initially suggested that the validity of a marriage turned on the law of the state of celebration, see *id.* § 121, but indicated that the domiciliary state's law could invalidate any marriage contracted elsewhere if it violated the domiciliary state's strong public policies against incest, polygamy, or other unions statutorily declared null and void, see *id.* § 132.
  22. See, e.g., *Johnson v. G.D. Searle & Co.*, 314 Md. 521, 552 A.2d 29 (1989) (Maryland applies own statute of limitations to permit time-barred claims arising in Illinois between Illinois plaintiffs and Illinois defendant despite the fact that the claim was time-barred in state where injury inflicted and discovered); *Vernon v. Aubinoe*, 259 Md. 159, 269 A.2d 620 (1970) (forum law controls as to inferences to be drawn from the evidence, the sufficiency of the evidence, the inferences from it to go to the jury, as well as other procedural matters); *Joffre v. Canada Dry Ginger Ale, Inc.*, 222 Md. 1, 158 A.2d 631 (1960) (though law of District of Columbia may govern substantive liability, Maryland law governs issues like applicability of doctrine of *res ipsa loquitur*);

side, in tort cases, Maryland applies *lex loci delicti*,<sup>23</sup> which it construes as meaning the law of the place where the last event giving rise to a right to recovery occurred.<sup>24</sup> In contract actions, the place of the making of the contract supplies the applicable law.<sup>25</sup> *Situs law* governs the *inter vivos* transfer or succession to real property<sup>26</sup> as

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- Turner v. Yamaha Motor Corp., U.S.A., 88 Md. App. 1, 591 A.2d 886 (1991) (tort claim arising in Virginia, though time-barred there, not barred by Maryland statute of limitations, which is procedural).
23. Hauch v. Connor, 295 Md. 120, 123-24, 453 A.2d 1207, 1209 (1983); Harford Mut. Ins. Co. v. Bruchey, 248 Md. 669, 673-74, 238 A.2d 115, 117 (1968); White v. King, 244 Md. 348, 354-55, 223 A.2d 763, 767 (1966).
24. See Volkswagen of America, Inc. v. Young, 272 Md. 201, 321 A.2d 737 (1974) (in products liability action, law of state of injury, not of design or manufacture, applies); Johnson v. Oroweat Foods, Inc., 785 F.2d 503, 511 (4th Cir. 1986) (under Maryland law, tortious breach of franchising law governed by law of state where injury suffered, not law of state where wrongful act occurred); *In re Sabin Oral Polio Vaccine Prods. Liab. Litig.*, 774 F. Supp. 952, 954 (D. Md. 1991) (law of Maryland, where polio was contracted, governs, rather than law of state of manufacture or sale of vaccine); see also *infra* notes 79-86 and accompanying text.
25. See Kramer v. Bally's Park Place, Inc., 311 Md. 387, 535 A.2d 466 (1988) (gambling contract enforceable in Maryland because made in state that validates such contracts, even though gambling contracts illegal in Maryland); Traylor v. Grafton, 273 Md. 649, 332 A.2d 651 (1975) (law of place of making governs validity of liquidated damages clause); Cooper v. Atlantic Fed. Sav. & Loan Ass'n, 249 Md. 228, 239 A.2d 89 (1968) (law of place of making of contract governs whether foreclosure on mortgage extinguishes right to separate suit for deficiency). Under Maryland law, the contract is considered "made" in the place where the last act necessary to complete the contract was performed. Grain Dealers Mut. Ins. Co. v. Van Buskirk, 241 Md. 58, 65-66, 215 A.2d 467, 471 (1965); Mallinckrodt, Inc. v. Whittaker M.A. Bioproducts, Inc., 81 Md. App. 96, 103, 566 A.2d 1113, 1116 (1989). In insurance cases, typically the place of making is the state in which the policy is delivered and the premiums are paid. Mutual Life Ins. Co. v. Mullen, 107 Md. 457, 69 A. 385 (1908); Commercial Union Ins. Co. v. Porter Hayden Co., 97 Md. App. 442, 630 A.2d 261, cert. granted, 333 Md. 201, 634 A.2d 62 (1993). In Union Trust Co. v. Knabe, 122 Md. 584, 89 A. 1106 (1914), a Maryland married woman's guaranty of her husband's obligation only became binding upon the making of the loan to him, which transpired in New Jersey; therefore, New Jersey law applied and rendered unenforceable the obligation she purportedly undertook in Maryland. *Id.* at 606-07, 89 A. at 1114.
26. Harrison v. Prentice, 183 Md. 474, 38 A.2d 101 (1944) (Maryland statute of descent governs intestate succession to the Maryland land of a woman who died domiciled in England and permits her estranged British husband to inherit share he would not recover under English law or Maryland statute of distribution); Roach v. Jurchak, 182 Md. 646, 649, 35 A.2d 817, 819 (1944) ("It is a universal principle of the common law that the formalities necessary for transfer of real estate, whether *inter vivos* or testamentary, are governed by the *lex loci rei sitae*, irrespective of the *lex domicilii*."); see also Wright v. Nugent, 23 Md. App. 337, 328 A.2d 362 (1974), *aff'd*, 275 Md. 290, 338 A.2d 898 (1975) (per curiam) (construing statute validating will disposing of Maryland property if it conforms to the formality requirements of Maryland, the state of domicile of the decedent, or of the state of execution).



well as the inter vivos transfer of tangible personal property,<sup>27</sup> while a domiciliary reference controls succession to a decedent's personal property<sup>28</sup> as well as determination of a person's status.<sup>29</sup>

*A. Difficulties in Administering the Traditional System: The Fuzzy Line Separating Procedure and Substance*

The traditional system espoused by the *First Restatement of Conflict of Laws* and Maryland's courts appears at first glance to be reasonably easy to administer. It is not. Part of the problem arises from the difficulties that necessarily accompany characterization of legal issues and cases. One example involves the dichotomy between procedure, for which the Maryland conflicts rule mandates a reference to Maryland law, and substance, for which the conflicts rule may point to the law of some other sovereign. An issue repeatedly litigated has been whether the measure of damages should be labeled "procedural" or "substantive," and despite the traditional view that the issue is essentially remedial, Maryland cases have tended to characterize damages as presenting a substantive question.<sup>30</sup> Another

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27. *Cf. United Rental Equip. Co. v. Potts & Callahan Contracting Co.*, 231 Md. 552, 191 A.2d 570 (1963) (law of situs of property at time of transfer gives bailor superior title to bailee's judgment creditors who subsequently removed the property to a second state); *John Hancock Mut. Life Ins. Co. v. Fidelity-Baltimore Nat'l Bank & Trust Co.*, 212 Md. 506, 129 A.2d 815 (1957) (situs of check at time of delivery, not making, governs interest of receiver against maker).
28. *Persson v. Dukes*, 280 Md. 194, 199, 372 A.2d 240, 243 (1977); *Smith v. Mercantile Trust Co.*, 199 Md. 264, 86 A.2d 504 (1952).
29. *See, e.g., Milton v. Escue*, 201 Md. 190, 93 A.2d 258 (1952) (law of Virginia, the domicile of father and child, determines child's legitimacy, and hence his ability to inherit Maryland land through intestate succession). Domicile is also the basis for subject matter jurisdiction in divorce cases. *Adams v. Adams*, 101 Md. 506, 508-09, 61 A. 628, 629 (1905); *Fletcher v. Fletcher*, 95 Md. App. 114, 619 A.2d 561 (1993). As the *Fletcher* opinion makes clear, once the court decides to take divorce jurisdiction, it automatically applies forum law, so the domiciliary reference simultaneously controls jurisdiction and choice-of-law issues.
30. *See, e.g., Traylor v. Grafton*, 273 Md. 649, 332 A.2d 651 (1975) (state of making of contract governs validity and enforcement of liquidated damages clause in contract); *Black v. Leatherwood Motor Coach Corp.*, 92 Md. App. 27, 606 A.2d 295 (Maryland cap on damages in tort actions unenforceable in suit arising from New Jersey accident, where New Jersey law imposes no such limitation), *cert. denied*, 327 Md. 626, 612 A.2d 257 (1992); *Polglase v. Greyhound Lines, Inc.*, 401 F. Supp. 335 (D. Md. 1975) (court upholds application of New Jersey rule regarding award of prejudgment interest in death actions on basis of substantive characterization of issue). The *First Restatement* and Professor Beale both suggested questions like this were essentially ones of construction of the law of the forum as to whether damages issues were procedural or not. *See* FIRST RESTATEMENT, *supra* note 2, § 606; 3

area of difficulty has involved whether presumptions, inferences, and doctrines like *res ipsa loquitur* should be classified as substantive or procedural.<sup>31</sup> Fertile field for disagreement has also involved the propriety of characterizing statutes of limitations as procedural or substantive.<sup>32</sup>

Part of the difficulty is that many rules serve substantive and procedural purposes *simultaneously*, and hence any singular characterization risks being arbitrary. For example, the cases dealing with statutes of limitations illustrate how fuzzy the line drawing is and in the end suggest that no coherent policy is served by enforcing the rigid dichotomy. The courts have divided on the question of whether a particular Maryland statute of limitations is substantive or procedural.<sup>33</sup> In *Feldman v. Granger*,<sup>34</sup> a case in which the Court of

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BEALE, *supra* note 2, § 606.1, at 1629-30. The *Polglase* court purported to apply Maryland law, but discussed at length the *Second Restatement's* characterization of the issue before the court as substantive. See *Polglase*, 401 F. Supp. at 336 (discussing SECOND RESTATEMENT, *supra* note 2, § 171 cmt. c). *Polglase* noted that, under the *Second Restatement's* analysis, the issue would be deemed substantive if the rule were perceived to be related to proper assessment of the basic damages ensuing from the tort, but procedural, and hence subject to forum law, if perceived as a remedy for a second wrong, *i.e.*, wrongful delay in payment. *Id.* at 336.

31. See, *e.g.*, *Joffre v. Canada Dry Ginger Ale, Inc.*, 222 Md. 1, 158 A.2d 631 (1960) (applying "procedural" label to applicability of *res ipsa* doctrine).
32. The general view in Maryland is that most statutes of limitations are procedural, and thus require only a reference to forum law. See, *e.g.*, *Doughty v. Prettyman*, 219 Md. 83, 88, 148 A.2d 438, 440 (1959) (citing FIRST RESTATEMENT, *supra* note 2, § 604); *Turner v. Yamaha Motor Corp.*, 88 Md. App. 1, 3, 591 A.2d 886, 887 (1991). However, if compliance with the statute is seen as a condition precedent to the right of action, the statute will receive a substantive characterization. See *Slate v. Zitomer*, 275 Md. 534, 542, 341 A.2d 789, 794 (1975) (Maryland statute of limitations in death actions goes to right, not remedy, and hence statutory extension cannot be applied retroactively to death antedating extension), *cert. denied*, 423 U.S. 1076 (1976); *Turner*, 88 Md. App. at 3, 591 A.2d at 887. Moreover, if the limitations period is viewed as a grant of immunity from suit it will be classified as substantive. See *Pottratz v. Davis*, 588 F. Supp. 949, 952-53 (D. Md. 1984) (Oregon limitations on products liability claims to injuries sustained within eight years after product purchased held substantive); *President of Georgetown College v. Madden*, 505 F. Supp. 557, 571-73 (D. Md. 1980), *aff'd in part, dismissed in part*, 660 F.2d 91 (4th Cir. 1981) (limitation on right to sue architects, engineers and contractors more than ten years after substantial completion of structure held substantive), *aff'd in part, dismissed in part*, 660 F.2d 91 (4th Cir. 1981).
33. Compare *Bertonazzi v. Hillman*, 241 Md. 361, 368, 216 A.2d 723, 726-27 (1966) (Maryland's six-month statute of limitations on suits against representatives of estates serves substantive ends of foreclosing claims so stale as to be unjust and of encouraging prompt settlement of estates) with *Martel v. Stafford*, 992 F.2d 1244, 1248 n.10 (1st Cir. 1993) (same statute characterized as procedural).
34. 255 Md. 288, 257 A.2d 421 (1969).

Appeals of Maryland decided to extend the discovery rule to all professional malpractice actions, the court quoted a law review article pointing out that

[t]he primary consideration underlying [statutes of limitations] is undoubtedly one of fairness to the defendant. There comes a time when he ought to be secure in his reasonable expectation that the slate has been wiped clean of ancient obligations, and he ought not to be called on to resist a claim when 'evidence has been lost, memories have faded, and witnesses have disappeared.'<sup>35</sup>

The protection of a defendant from "stale claims," to the extent it serves the interest of repose, is properly characterized as a *substantive* purpose of the law. Yet, as *Feldman* illustrates, its "fairness" can be counterbalanced by the desire to afford the plaintiff who exercises "reasonable diligence the full benefit of the statutory period,"<sup>36</sup> a desire that seems both procedural and substantive.

The tests Maryland developed to distinguish between procedural and substantive statutes of limitations do not seem related to any discernable policy or purpose. The rule seems to be that statutes of limitations are presumptively procedural unless the statute is construed to be a condition precedent to the right of action or to create an immunity to suit.<sup>37</sup> But the Maryland cases are not clear even as to whose law should be applied to determine the purpose of the statute.<sup>38</sup>

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35. *Id.* at 297, 257 A.2d at 426 (quoting *Developments in the Law—Statutes of Limitations*, 63 HARV. L. REV. 1177, 1185 (1950)).

36. *Feldman*, 255 Md. at 297, 257 A.2d at 426. In *Pottratz*, the court characterized Oregon's requirement that injury occur within eight years of the sale of the putatively defective product in product liability actions as substantive because it was designed to serve the purpose of repose; but its explanation of why this was so seemed to mix arguably procedural concerns about access to reliable proof after a lapse of time with substantive concerns regarding the ability of people to "plan their affairs with certainty, free from the disruptive burden of protracted and unknown potential liability." *Pottratz*, 588 F. Supp. at 952.

37. See cases cited *supra* note 32.

38. A federal case, *Rockstroh v. A.H. Robins Co.*, 602 F. Supp. 1259 (D. Md. 1985), suggests that the Maryland view is that the characterization the foreign state gives its own statute of limitations should not be dispositive. Not cited by *Rockstroh* is an opinion by Judge Harvey that takes a directly opposing view. See *Leonard v. Wharton*, 268 F. Supp. 715, 718-19 (D. Md. 1967) ("Whether or not a statute of limitations merely bars the remedy or actually extinguishes the right of action depends upon the statute's construction by the courts of the enacting jurisdiction."), *cert. denied*, 393 U.S. 1028 (1969). *Rockstroh* cites no authority for its position except two other federal diversity cases applying Maryland conflicts doctrine. See *Rockstroh*, 602 F. Supp. at 1263 (citing *Pottratz*, 588 F. Supp. at 952; *President of Georgetown College*

Indeed, Maryland's courts have failed to come up with a rational test for analyzing cases on the borderline between substance and procedure. In *Jacobs v. Adams*,<sup>39</sup> the court of special appeals tried. It was faced with the question of whether to enforce the law of the District of Columbia, which barred negligence suits covered by that jurisdiction's no-fault law, or Maryland's rule, which permitted the plaintiff to pursue traditional remedies even though optional recovery under the state's no-fault legislation was available. The accident occurred in the District, and the court characterized the issue as substantive and hence declined to enforce Maryland's rule. The court refused to characterize the issue as procedural, stating that "[t]here is no reason to classify an issue as procedural, and hence controlled by the law of the forum, unless it affects the manner in which the forum administers justice."<sup>40</sup> With all respect to the *Jacobs* court,

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*v. Madden*, 505 F. Supp. 557, 571 (D. Md. 1980), *aff'd in part, dismissed in part*, 660 F.2d 91 (4th Cir. 1981). The *Pottratz* and *Georgetown College* cases are discussed *supra* note 32. Neither *Pottratz* nor *Georgetown College* stands for the view *Rockstroh* attributes to them. Each noted that Maryland had construed its statute of limitations on the particular issue at hand to create a substantive immunity, but then went on to expressly rely upon the judicial construction that the courts of the foreign states in question gave their own limitations statutes. See *Pottratz*, 588 F. Supp. at 952-53; *Georgetown College*, 505 F. Supp. at 571-73.

In upholding the power of a state to apply its own statute of limitations to a foreign claim to which it could not apply its substantive law under *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), the Supreme Court was careful to limit its holding to those cases where the statutes of limitation of the states whose substantive law applied were admittedly *procedural* under their own definitions. See *Sun Oil Co. v. Wortman*, 486 U.S. 717, 729-30 n.3 (1988) (O'Connor, J., concurring in part and dissenting in part). Of course, the foreign characterization may not have been made for conflicts of law purposes. Still, *Sun Oil's* limitation may mean that there is some outer limit to the power of a state to characterize the statute of limitations issue as procedural and then apply *lex fori*.

39. 66 Md. App. 779, 505 A.2d 930, *cert. denied*, 306 Md. 513, 510 A.2d 260 (1986).

40. *Id.* at 791, 505 A.2d at 936. The quoted language is the court's paraphrase of a suggestion by Professors William Richman and William Reynolds that interest analysis should influence the characterization of issues as procedural or substantive. The suggestion is made in the writers' book, *Understanding Conflict of Laws*, that "if neither the forum's interest nor judicial convenience is involved, no reason exists to treat the problem as 'procedural.'" WILLIAM M. RICHMAN & WILLIAM L. REYNOLDS, *UNDERSTANDING CONFLICT OF LAWS* § 46, at 116 (1984). This statement is also quoted in *Jacobs*. See *Jacobs*, 66 Md. App. at 791, 505 A.2d at 936 (1986).

Maryland's cases certainly do not reflect the kind of interest analysis suggested by Richman and Reynolds. There is substantial authority that Maryland would toll the running of its statute of limitations because of the absence of the defendant from the state despite the fact that the defendant and the

its own test is no test at all: Cases involving issues such as the measure of damages or the statute of limitations invariably "affect the manner in which the forum administers justice," yet only some of them end up being classified as procedural.

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plaintiff had been nonresidents of the state and the cause of action was foreign. See, e.g., *Osborn v. Swetnam*, 221 Md. 216, 156 A.2d 654 (1959); *Miles v. McGrath*, 4 F. Supp. 603, 604 (D. Md. 1933); *Mason v. Union Mills*, 81 Md. 446, 32 A. 311 (1895). In *Rockstroh v. A.H. Robins Co.*, 602 F. Supp. 1259 (D. Md. 1985), the court, applying what it viewed to be modern Maryland conflicts doctrine, allowed plaintiff to proceed on a Florida action against a foreign defendant, despite the fact that the claim would have been time-barred under Florida law without any explanation as to why it served Maryland's interest to do so. It is possible, of course, that plaintiff was a Marylander, and hence an intended beneficiary of the longer Maryland statute, but the case report does not reflect any inquiry at all into her status or Maryland's interest.

Nor, under the Maryland cases, should it have. In *Johnson v. G.D. Searle & Co.*, 314 Md. 521, 552 A.2d 29 (1989), two Illinois women brought products liability claims in Maryland against an Illinois pharmaceutical company for injuries sustained in Illinois through insertion of intrauterine devices there. The reason the women sued in Maryland was because their claim was time-barred by Illinois law, and they wished to take advantage of Maryland's longer statute of limitations. The court had no difficulty with Maryland's entertaining the suit, and refused defendant's request for a forum non conveniens dismissal because the Illinois courts were closed. In the court's view, the fact that the plaintiffs had two years after discovery of their injuries to sue in Illinois was beside the point. *Johnson* deals directly with the forum non conveniens issue, not the choice-of-law issue, but it is implicit authority for rejecting the view taken by Professors Richman and Reynolds. Even though hearing the case advanced no Maryland interest, rewarded the plaintiffs' forum shopping, and contributed to the cluttering of Maryland's courts, the court felt bound to allow the case to go forward under Maryland's "procedural" statute of limitations.

There is language in *Hauch v. Connor*, 295 Md. 120, 133 n.10, 453 A.2d 1207, 1214 n.10 (1983), suggesting that Maryland tends to apply *lex fori* in all statute of limitations cases, not so much because the issue is procedural as because it implicates important public policies of the forum. The case quotes Professor Leflar as permitting a state to bar foreign claims on the same basis as it bars domestic ones; *i.e.*, that doing so advances "certain social policies" of the forum. See *id.* (quoting ROBERT A. LEFLAR, *AMERICAN CONFLICTS LAW* § 127, at 253 (3d ed. 1977)). Neither *Hauch* nor Leflar explain precisely what these policies are, why they deserve to be applied to foreign claims, or why they are strong. Unless tails are truly meant to wag dogs, it would be bizarre for *Hauch* to imply that *all* rules that determine whether relief can be granted are procedural and hence require a *lex fori* reference. Whatever the court meant, it was certainly not speaking the same language as Professors Richman and Reynolds. See discussion *supra*. (In fairness, it is hard to attach great significance to the *Hauch* suggestion that the procedural characterization be abandoned or that Maryland limitations rules represent strong public policies of the state regarding foreclosing stale claims, because subsequent Maryland cases have not repeated it or even referred to it.)

*B. Further Difficulties: Fitting Cases into Substantive Categories*

The courts have also had difficulty giving proper substantive characterization to claims so as to determine the applicable law. Sometimes a decision simply adopts one characterization rather than another without any principled explanation why the characterization is correct. One example is *Satellite Financial Planning v. First National Bank*,<sup>41</sup> a federal action against satellite sellers brought by Maryland plaintiffs who wished to set up a business to help Maryland purchasers of satellite dishes finance their purchases. Some of the claims were federal, but a number arose under state law, including breach of contract, breach of fiduciary duty, tortious interference with business relations, trade defamation, and common law fraud. The contract contained an "operating agreement" indicating it was to be "construed under Delaware law." The court indicated that all tort claims would be governed by Maryland law because that was where all of the wrongdoing had occurred; but the court found, without explanation, the fiduciary duty claims presumptively contractual.<sup>42</sup>

Another example is *Milton v. Escue*,<sup>43</sup> where a thirty-year-old woman from Virginia laid claim to being the legitimate daughter of a Virginia decedent and hence entitled to his estate to the exclusion of his four surviving siblings. Though seeking only a declaratory judgment in Maryland's courts, the case report makes it obvious that the woman was attempting to lay the groundwork for claiming title to land situated in Maryland.<sup>44</sup> In upholding her position that the case involved status, governed by the law of her domicile, and not succession to land, governed by Maryland law, the court focused on language in Beale's treatise<sup>45</sup> that relies heavily upon an earlier

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41. 633 F. Supp. 386 (D. Del. 1986).

42. *Id.* at 393; *cf.* *President of Georgetown College v. Madden*, 505 F. Supp. 557 (D. Md. 1980), *aff'd in part, dismissed in part*, 660 F.2d 91 (4th Cir. 1981), where Georgetown sought to avoid a statutory limitation on its right to sue architects in tort for negligent design of one of its buildings by attempting to get the court to characterize the claim "as one for negligent breach of contract and thus 'based on a contract' and outside the scope" of the statute. *Id.* at 577 n.37. The court quite sensibly rejected the argument. Quoting from *Mumford v. Staton, Whaley & Price*, 254 Md. 697, 255 A.2d 359 (1969), the court said that professional malpractice actions, whether sounding in tort or contract, "share the common gravamen of negligence," and hence should receive the same treatment in terms of statutes of limitations. *Georgetown College*, 505 F. Supp. at 577 (quoting *Mumford*, 254 Md. at 714, 255 A.2d at 367).

43. 201 Md. 190, 93 A.2d 258 (1952).

44. *See id.* at 204, 93 A.2d at 265.

45. 2 BEALE, *supra* note 2, § 140.2, at 712.

Maryland case,<sup>46</sup> which the *Milton* court conceded was misstated by Beale.<sup>47</sup>

*Milton* should be compared to *Harford Mutual Insurance Co. v. Bruchey*,<sup>48</sup> an action involving a claim for loss of consortium filed by a Maryland husband against a Virginia driver and the Maryland lessor of the driver's automobile. The accident arose from a head-on collision in Virginia between the plaintiffs' vehicle and that of the defendants. Under Virginia law, unlike Maryland law, relief for loss of consortium was unavailable to the husband. The trial judge characterized the issue as involving "conjugal rights and duties . . . which should be governed by the law of the marital domicile."<sup>49</sup> The Court of Appeals of Maryland reversed, treating the issue as a simple matter of tort not implicating any strong Maryland public policies and simply warranting enforcement of *lex loci delicti*.<sup>50</sup>

The distinction between transactions affecting land, which receive a situs reference, and those affecting contracts or succession to personalty has also caused difficulty. The court of appeals has hinted that contracts affecting land would be regulated by the law of the state where the contract is made, not by the law of the state where the land is situated, but the court has not finally determined the matter.<sup>51</sup> Doctrines promoting party autonomy have been employed in such a way as to blur the distinction.<sup>52</sup>

New legal claims and theories create problems of characterization that have required judicial intervention and narrow line drawing that have given litigants, and sometimes courts, difficulty. The cases teach that statutory rules fixing no-fault liability deserve a tort character-

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46. *Holloway v. Safe Deposit & Trust Co.*, 151 Md. 321, 134 A. 497 (1926).

47. The *Milton* court noted that Beale cited *Holloway* for the position that legitimacy should be decided according to a domiciliary and not situs reference, despite the fact that the court itself found *Holloway* "not entirely clear" on the question. See *Milton*, 201 Md. at 204, 93 A.2d at 265.

48. 248 Md. 669, 238 A.2d 115 (1968).

49. *Id.* at 672-73, 238 A.2d at 117.

50. *Id.* at 673-74, 238 A.2d at 117-18; accord *Rhee v. Combined Enters., Inc.*, 74 Md. App. 214, 536 A.2d 1197, cert. dismissed, 314 Md. 123, 549 A.2d 385 (1988).

51. See *Traylor v. Grafton*, 273 Md. 649, 660-61, 332 A.2d 651, 659-60 (1975) (noting the problem and applying both forum (place of making) law and foreign (situs) law validating liquidated damages clause in contract for sale of realty); cf. *Kronovet v. Lipchin*, 288 Md. 30, 415 A.2d 1096 (1980) (in foreclosure action on Maryland realty by New York creditor claiming defendant dishonored New York debt, Maryland law validating contract held applicable against usury defense on basis of party autonomy evidenced by choice-of-law provision in contract).

52. See, e.g., *Harrison v. Prentice*, 183 Md. 474, 38 A.2d 101 (1944) (applying doctrine of equitable conversion to render will of Maryland land subject to English statute of distribution because English testatrix directed sale of land and distribution of proceeds); cf. *Kronovet*, 288 Md. 30, 415 A.2d 1096 (upholding real estate mortgage against usury defense and allowing foreclosure because of choice-of-law provision in contract).

ization,<sup>53</sup> but that the benefits victims receive from suits for enforcement of uninsured motorist coverage and personal injury protection (PIP) benefit clauses in insurance contracts warrant contract treatment.<sup>54</sup>

Proper characterization of products liability claims has proven particularly vexing. It appears that the theory of a plaintiff's pleading determines what substantive rule will be applied; thus, a plaintiff unschooled in the law of products liability is well advised to plead as many theories as she has and hope at least one of them provides her with a favorable choice-of-law. This was not always true. After reading leading texts and early Maryland cases suggesting recognition that implied warranty claims for tortious injury more closely fit into tort than contract law, Judge Miller, sitting in diversity, predicted that Maryland would characterize those claims as torts for choice-of-law purposes, and hence applied *lex loci delicti* rather than the law of the place of sale or delivery of the offending product.<sup>55</sup> The Court of Appeals of Maryland subsequently rejected Judge Miller's view, holding that in products liability actions, negligence counts warrant a tort "place-of-the-wrong" reference, but that warranty counts should receive a contractual "place-of-making" reference.<sup>56</sup>

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53. *Jacobs v. Adams*, 66 Md. App. 779, 505 A.2d 930, *cert. denied*, 306 Md. 513, 510 A.2d 259 (1986).

54. *See Ward v. Nationwide Mut. Auto. Ins. Co.*, 328 Md. 240, 614 A.2d 85 (1992) (PIP); *Nationwide Mut. Ins. Co. v. Wendler*, 796 F. Supp. 201 (D. Md. 1992) (uninsured motorist coverage).

55. *See Uppegren v. Executive Aviation Servs., Inc.*, 326 F. Supp. 709, 714-16 (D. Md. 1971), and authorities cited therein. Judge Miller was so sure of himself that he disregarded the position of counsel for *both* parties that he should apply contract conflict rules. *Id.* at 714.

56. *See Frericks v. General Motors Corp.*, 278 Md. 304, 363 A.2d 460 (1976) (applying Maryland law imposing secondary impact liability for design defect because car sold in Maryland, even though accident occurred in North Carolina); *Volkswagen of America, Inc. v. Young*, 272 Md. 201, 321 A.2d 737 (1974) (applying Maryland tort law creating secondary impact liability for design defect because accident occurred in Maryland, even though law of place of sale, Alabama, created no such liability).

*Frericks* and *Volkswagen* have the salutary effect of enhancing the chances of a claimant's victory in products liability actions, but the court's failure to articulate any principled justification for the bifurcated treatment of implied warranty and tort theories has left the Maryland courts free to continue the debate in other contexts. *See, e.g., Loh v. Safeway Stores, Inc.*, 47 Md. App. 110, 120-21, 422 A.2d 16, 23 (1980) (despite *Frericks* and *Volkswagen*, Judge Miller was correct in concluding that "warranty is a matter of tort as well as contract," and hence, "[f]or the purposes of the Uniform Contribution Among Tortfeasors Act, we conclude that appellant's suit for breach of implied warranty can be a 'claim in tort' which allows appellant to claim the role of an injured person under the Act," possibly escaping the effect of the common-law rule that release of one tortfeasor releases all).



Most of the substantive classification of cases for choice-of-law purposes have involved nearly intuitive judgments unsupported by any clear reasoning. Without such reasoning, they often appear arbitrary. For example, each of the cases set out in this section had at least two substantive category faces, and many could as easily have been identified with one category as with the other. Only occasionally do the cases acknowledge the arbitrary nature of their decisions.<sup>57</sup> In *Johnson v. Oroweat Foods, Inc.*,<sup>58</sup> the Fourth Circuit entertained a diversity claim by a Maryland plaintiff against a Connecticut bakery for breach of contract and violation of the Connecticut Franchise Act. The plaintiff had contracted for an exclusive distributorship for Prince George's County and the District of Columbia and claimed that his rights were violated by the defendant. The question arose whether the Connecticut Franchise Act could be applied to his case. The court was troubled by the problem:

It is not obvious . . . that the Connecticut Act does not apply . . . . The Maryland rule for torts would seem to be applicable here, because what is alleged—a violation of a statute—is essentially a matter of tort and not of contract. Under that rule, the law of the place of injury applies. The place of injury is the place where the injury was suffered, not where the wrongful act took place. Because the injury

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57. Indeed, sometimes courts simply glide over the problem. For example, in *Jiffy Lube Int'l, Inc. v. Morgan*, No. 92-1249, 1993 WL 366330 (4th Cir. Sept. 21, 1993) (unpublished) (disposition noted at 7 F.3d 224 (4th Cir. 1993)), the Fourth Circuit considered a diversity action by Jiffy Lube against multiple defendants who had purchased the right to develop Jiffy Lube franchises in several South Pacific countries. When the defendants defaulted on their note, the plaintiff sued. The defendants challenged the validity of the contract on several grounds, including usury and fraud in the inducement, and counter-claimed in tort for misrepresentation. *Id.* at \*2. Applying Maryland conflicts doctrine, the court held that California law, not Maryland law, should be applied because the contract, though negotiated both in Maryland and California, was finally executed and rendered enforceable in the latter state. *Id.* at \*3. The court ignored the fact that one of the defendants signed the note in Hawaii and concentrated on the fact that the other two signed in California. *Id.* at \*1, \*3. Finding that the interest on the note violated California's usury statute, the court ordered the case remanded for recalculation of the interest at a legally enforceable rate. *Id.* at \*3-\*4. The court found that the fraud defense failed because under California law the plaintiff had at most been guilty of "'dealer['] puff," and in any event there was insufficient evidence of reasonable reliance. *Id.* at \*4. In this regard, the court never seemed to consider whether the issue of fraud should be decided as a contract problem and hence under *lex loci contractus*, warranted consideration as a tort under *lex loci delicti*, or should be characterized as contractual when considered as a defense and as a tort when considered as a claim.

58. 785 F.2d 503 (4th Cir. 1986).

here was suffered in Maryland, it appears possible . . . that the Connecticut Act may not apply to Johnson's termination. On the other hand, Johnson urges that the statutory violation is ancillary to the contract claim, and that, because Connecticut law governs question of liability for breach of contract, the termination of his wholesale dealership is also subject to the Connecticut statute.<sup>59</sup>

The difficulty of the problem is compounded by the fact that the result of a categorization one way or the other can lead to untoward results. The products liability cases described above—characterizing negligence, and presumably strict liability, claims as torts, but products liability claims as contracts—have the singular virtue of assuring the plaintiff the opportunity to get the court to apply at least one plaintiff-oriented rule whenever the substantive rules of the two jurisdictions differ and the place of contracting is different from the place of injury. But the cases' virtue may also be seen, at least by those who wish predictability and certainty for defendants, as a vice. Moreover, in those cases where the plaintiff is likely to pursue both theories—as she is likely to do if neither is overwhelmingly preferable to her—they also create the possibility of complex actions likely to confuse juries made up of the best and the brightest our system of justice can muster.

The Court of Appeals of Maryland, in *Hauch v. Connor*,<sup>60</sup> gave indirect recognition to the difficulties of the traditional methodology requirement that all claims be fitted into clear-cut categories. *Hauch* involved an auto accident in Delaware in which two Maryland employees of a Maryland employer were injured, allegedly through the negligence of the driver of their vehicle, a Maryland co-employee. When the two victims sued their co-employee in a Maryland court, the co-employee defended on the basis that the Delaware worker's compensation statute barred their claims and remitted them to statutory benefits. The plaintiffs contended that Maryland's worker's compensation statute applied, because all claims arose out of employment relationships grounded on Maryland employment contracts. Thus, the plaintiffs argued that Maryland's worker's compensation statute did not bar their claims against the co-employee. The Maryland circuit court treated the issue as one of tort law and applied Delaware law. The Court of Special Appeals of Maryland reversed on the ground that the Delaware rule could not be applied because it infringed upon the strong public policy of Maryland.

On appeal to the Court of Appeals of Maryland, the plaintiffs defended the court of special appeals' decision by arguing abandon-

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59. *Id.* at 510-11 (footnotes and citations omitted).

60. 295 Md. 120, 453 A.2d 1207 (1983).

ment of the traditional rule of *lex loci delicti* in favor of a more flexible law of the state of the most significant contacts test under the *Second Restatement*. The court rejected the invitation to jettison the *First Restatement* on *stare decisis* grounds, and because it felt the *First Restatement's* position promoted predictability and certainty.<sup>61</sup> The court noted that a conflict had arisen among American states as to whether to characterize worker's compensation claims as involving tort law or contract law principles, with the result that some courts had applied *lex loci delicti* while others applied *lex loci contractus* to such claims. The court noted that this conflict had largely been resolved by statutory directives regarding choice-of-law in the worker's compensation statutes themselves, but the statutory directives often did not cover worker's compensation statute bars against third-party tort actions.<sup>62</sup>

In *Hauch*, the Court of Appeals of Maryland declined to follow either the tort or contract characterization for the case before it.<sup>63</sup> Instead, the court treated the case as fitting within a new classification, "worker's compensation" cases. The new classification was not derived from the Maryland worker's compensation statute, which did not treat co-employee suits, but from the Delaware statute, which did so by barring them.<sup>64</sup> The court's disingenuous employment of foreign law to characterize the case before it was the result of the court's perception of Maryland's policy interests. As the court said, it wished to "recognize that workmen's compensation law conflict issues present distinct policy questions and should not be treated as tort or contract matters for choice of law purposes."<sup>65</sup> In actions against the employers themselves, *Hauch* indicated that all courts should apply the exclusive remedy rule of any state in which the employer may be held liable for worker's compensation benefits on the ground that to do otherwise would upset the system of predictable insurability the compensation system had attempted to create by simultaneously creating liability without fault and immunity from negligence damages.<sup>66</sup> But this rationale should not be applied to co-employee suits. Here the rule should be that *lex fori* governs, because Maryland has strong public policy concerns when the accident occurs within the state but the employment relationship arises elsewhere,<sup>67</sup> and the state's interests are stronger when the accident occurs outside

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61. *Id.* at 125, 453 A.2d at 1210.

62. *Id.* at 127, 453 A.2d at 1211.

63. *Id.*

64. *Id.* at 133-34, 453 A.2d at 1214.

65. *Id.*

66. *Id.*

67. This had occurred in *Hutzell v. Boyer*, 252 Md. 227, 249 A.2d 449 (1969), a case strongly relied upon by the *Hauch* court.

it but involves an employment relationship created in Maryland and parties domiciled in Maryland.<sup>68</sup>

In the face of dysfunctional effects of the classification choices available under the traditional system, the *Hauch* court basically created a new classification, co-employee suits, for which it formulated a new rule, *lex fori*. This allowed it to keep intact the form of the traditional system, while escaping its results through the development of a new case category that could be used to advance the interests in promoting recovery policies that Maryland's laws of tort and worker's compensation were both designed to foster.<sup>69</sup>

### C. Further Difficulties: Locating the Proper Reference Point on a Map

The methodology of the *First Restatement* is supposed to be simple because characterizations are intuitively easy to make, and once made, involve rules that are clear and unambiguous. As indicated above, the characterizations are not easy to rationalize. But assuming one has properly classified the problem, there remains the question of whether the rule associated with it can easily be applied. The Maryland cases suggest the answer is often "No."

In complex commercial transactions, the place of the making of a contract is not always a simple matter. While courts in Maryland apply the law of the place where the last act making the contract binding occurred, that place is not always self-evident.<sup>70</sup>

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68. Comparing the *Hutzell* facts with those before it, the *Hauch* court found that "[i]n the instant case, although the injury did not occur in Maryland, there are greater Maryland interests." *Hauch*, 295 Md. at 133, 453 A.2d at 1214.

69. This new category has required subsequent development. See *Bishop v. Twiford*, 317 Md. 170, 562 A.2d 1238 (1989), discussed *infra* at notes 210-14.

70. See, e.g., *Commercial Union Ins. Co. v. Porter Hayden Co.*, 97 Md. App. 442, 630 A.2d 261 (insurance contracts are generally considered made where policy is delivered and premium is delivered; but when this occurs through a broker, place of making turns on whether broker is insured's agent, in which case delivery to the broker completes the contract, or is agent for the insurer to deliver the policy to the insured, in which case delivery only occurs when policy reaches insured), *cert. granted*, 333 Md. 201, 634 A.2d 261 (1993); see also *Johnson v. Oroweat Foods Co.*, 785 F.2d 503, 511 n.7 (4th Cir. 1986); *Union Trust Co. v. Knabe*, 122 Md. 584, 606-07, 89 A. 1106, 1114-15 (1914); *Mallinckdrodt v. Whittaker M.A. Bioproducts, Inc.*, 81 Md. App. 96, 103, 566 A.2d 1113, 1116 (1989). In *Jiffy Lube Int'l, Inc. v. Morgan*, No. 92-1249, 1993 WL 366330 (4th Cir. Sept. 21, 1993) (unpublished) (disposition noted at 7 F.3d 224 (4th Cir. 1993)), the Fourth Circuit, applying Maryland law, had particular difficulty figuring out where the note sued on became enforceable. The contract was originally negotiated over the telephone between a seller operating in Maryland and California purchasers. It is unclear from the opinion where the original contract was executed, but the deal was renegotiated with one additional purchaser and required the issuance of a new promissory note.

One might think the difficulty of finding the contact point would not appear in tort actions, where the courts apply the last event giving rise to the right of action test to determine the locus delicti. This is not the case. In the first place, some torts not involving palpable physical injury are difficult to localize. In *Rein v. Koons Ford, Inc.*,<sup>71</sup> for example, a Maryland purchaser sued a Virginia automobile dealer from whom he bought a car under the Virginia consumer protection statute.<sup>72</sup> Perusal of Judge Rodowsky's opinion fails to clarify whether the wrong occurred with the multistate publication of the defendant's false advertisement in the *Washington Post* newspaper,<sup>73</sup> or when the plaintiff purchased the car in Virginia, or when the plaintiff was attracted to come to Virginia by reading the advertisement.<sup>74</sup> It is difficult to understand upon what principle Judge Rodowsky would discern whether injury was inflicted upon arrival in Virginia rather than upon departure from Maryland, where the plaintiff may have read the offending advertisement.<sup>75</sup>

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The seller drafted and mailed the note to the purchasers; one of them signed it in Hawaii and the others signed it in California, whence it was mailed back to the seller's Maryland headquarters. *Id.* at \*1. The seller argued that Maryland was the place of execution because the new note did not become enforceable until the seller accepted it in Maryland by canceling the old note there. *Id.* at \*3. The purchasers argued that California law applied because the acceptance was complete when the contract was executed there and posted back toward Maryland. *Id.*

71. 318 Md. 130, 567 A.2d 101 (1989).

72. *Id.* at 131, 567 A.2d at 102.

73. *See id.* at 146, 567 A.2d at 108 (noting that the advertisement was circulated throughout the Washington metropolitan area, including suburban communities in Maryland and Virginia).

74. The complaint in the action failed to state where Rein read the allegedly false advertisement. *Id.* at 134, 567 A.2d at 102. The court seems at one moment to view the wrong as occurring when Rein purchased the car in Virginia:

In the contract formed there, Koons included the document preparation charge in that section of the written contract dealing with taxes and tags. It is Rein's position that the . . . fee, in relation to the advertisement, is an increase in the cash price. By . . . purchasing automobiles under contracts which included the document preparation charge, Rein . . . suffered harm which the statute . . . intended to prevent.

*Id.* at 145, 567 A.2d at 108. Yet, in the same breath, the court also spoke of the advertisements that drew Rein to the Virginia showroom:

By going to Falls Church in response to the ads and there purchasing automobiles . . . Rein and others have suffered harm . . . the statute . . . intended to prevent. To the extent that the "loss" provision in the statute requires a monetary detriment, that requirement is satisfied by the unquantified expense of traveling to Falls Church in response to the . . . deceptive ad.

*Id.*

75. *See also* Korotki v. Goughan, 597 F. Supp. 1365 (D. Md. 1984). In *Korotki*,

In wrongful death cases Maryland follows the rule that the state of injury, not the state of death, supplies the rule of decision.<sup>76</sup> The state of injury is not always easy to ascertain, however, even in personal injury cases. Especially difficult are those cases where the state of the wrongful conduct is known, but injury could have been inflicted in two or more jurisdictions. This occurred in *Bledsoe v. Crowley*,<sup>77</sup> a District of Columbia Circuit diversity case in which the plaintiff suffered permanent injury as a result of the development of a brain tumor that proper diagnosis and treatment would have discovered and prevented. The court was concerned about where the plaintiff had suffered his injuries. The plaintiff's treatment was in Maryland, but the court understood that this was not conclusive regarding where he had been harmed; with regard to that question, the court said his injury may as well have occurred in Maryland, where he had worked, as in the District of Columbia, where he resided during most of the period of his treatment.<sup>78</sup>

*Sacra v. Sacra*,<sup>79</sup> a Court of Special Appeals of Maryland case, is equally ambiguous regarding where injury was inflicted, though the ambiguity is restricted to a much narrower range of space and time. In *Sacra*, a passenger was killed when the camper vehicle in which he was riding exploded after being struck by another vehicle because the camper's driver had failed to obey a stop sign.<sup>80</sup> The camper driver's negligence and the initial impact with the second vehicle occurred in Delaware, but the crash caused the camper to be pushed across the Maryland-Delaware state line into Maryland, where it ran into a utility pole, overturned, and exploded into flames.<sup>81</sup> Whether the plaintiff's decedent suffered any injury in Delaware is unclear from the report; there is no question that his most serious injuries, and his death, occurred in Maryland.

In the view of the *Sacra* court, *White v. King*<sup>82</sup> required an application of the law of the state where the tort occurred, regardless

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the district court considered a federal suit against Delaware officials who allegedly wrongfully pursued a Maryland resident from Delaware into Maryland, arrested him, coerced him to return to Delaware, and caused suspension of his driver's license, thus depriving him of his civil rights in violation of both federal and state law. The federal court noted Maryland's adherence to *lex loci delicti* in order to promote predictability and certainty, and then wryly pointed out that a jury had to be asked where the wrong occurred. *See id.* at 1379, 1379 nn.49, 51.

76. *See* *Debbis v. Hertz Corp.*, 269 F. Supp. 671, 674 (D. Md. 1967).

77. 849 F.2d 639 (D.C. Cir. 1988).

78. *Id.* at 642 n.4.

79. 48 Md. App. 163, 426 A.2d 7 (1981).

80. *Id.* at 164, 426 A.2d at 8.

81. *Id.*

82. 244 Md. 348, 223 A.2d 763 (1966).

of the domicile of the parties, and thus the sole question was where the tort did occur.<sup>83</sup> It is not clear from the report in *Sacra* whether the court applied Maryland's "last event" test<sup>84</sup> for defining the place of the wrong: At one point the opinion seemed to criticize the defendant for "suggest[ing] that there are two separate and distinct elements of the accident in question . . . where the alleged wrongful act . . . took place and . . . where the injury or death was inflicted"<sup>85</sup> but only a few lines later indicated that "the harm" had occurred in Delaware.<sup>86</sup>

*Sacra* demonstrates weaknesses of the *First Restatement* methodology.<sup>87</sup> In the end, in order to apply the law of the place of the tort, the court felt it had to figure out intuitively where the tort happened. The court at first seemed to look at the facts, decided that somehow the center of gravity of the accident involved Delaware facts, and labeled the case a Delaware tort. No explanation for why this intuitive judgment was correct was offered, except to point out that the accident would not have happened but for the running of the stop sign in Delaware. But this would make it appropriate to treat the first event leading to a claim as the place of the wrong—an approach that is clearly not the law of Maryland.<sup>88</sup> It is possible to speculate that some injury was sustained in Delaware, at the point of initial contact with the other vehicle, and that the plaintiff's decedent thus did not suffer his first injury when the vehicle hit the pole in Maryland. If it were true he was hurt, however little, in

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83. *Id.* at 352, 233 A.2d at 765.

84. *See supra* note 24 and accompanying text.

85. *Sacra*, 48 Md. App. at 166, 426 A.2d at 9.

86. *Id.* at 167, 426 A.2d at 9. It is unclear what the court meant by "harm." It could have meant "initial injury," which would make the decision consistent with the "last event" test, or it could have meant simply the point at which the events the court felt were crucial to the ultimate injury occurred. According to the court,

there was a single, integrated accident, which occurred in Delaware and caused the death of the appellant's decedent. The fact that the state line intervened between the impact and death was merely a fortuitous situation. . . . [T]here was no substantial lapse of time or distance between the original impact and the resultant death of the victim. Moreover, it was only because of the harm in Delaware that the appellant has any claim. While the death could have occurred without the impact with the telephone pole, *e.g.*, by spontaneous fire or crushing, no such damage could have transpired without the original collision. It is this happening that is the fons et origo of the unfortunate death . . . which in turn must be imputed to the locus of Delaware.

*Id.* at 166-67, 426 A.2d at 9.

87. *See supra* notes 14-21 and accompanying text.

88. *See supra* notes 23-24 and accompanying text.

Delaware, then at least technically the case would be consistent with the "last event" test, since in reality the last event which counts under the test is the first that makes the claim actionable. From the opinion, there seems no real basis in the record for assuming any injury was sustained in Delaware; at best, in saying the initial "harm" happened in Delaware, the court was engaging in guess-work, rendered somewhat inevitable by the speed with which events proceeded from the running of the initial stop sign to the explosion seconds later.

Whatever guided the intuition of the court in *Sacra* seems unrelated to either the needs of the choice-of-law process or the interests of Maryland or Delaware in regulating the affairs or protecting the interests of the people involved in the accident. The bizarre combination of events along the Maryland-Delaware border are unlikely ever again to be repeated, and hence order and predictability were not served by rigid adherence to rule in the case. The effect of the court's decision in choosing Delaware as the place of the wrong was to minimize the chances of the plaintiff's recovery by making likely the applicability of the Delaware guest statute.<sup>89</sup> In effect, the result of the decision was likely to disable a Maryland family of a Maryland tort victim from recovering against a Maryland driver operating a Maryland garaged vehicle insured in Maryland because an uncertain part of the events, which led to the tragedy, happened outside Maryland. It is hard to imagine any Maryland policy to be advanced by this result, or to discern any Delaware interest served by it.

#### D. The Public Policy Exception

The traditional mode of working through choice-of-law problems allowed the forum to supersede otherwise applicable foreign law whenever its application violated the strong public policy of the forum. The openedness of the public policy exception bred unpredictability<sup>90</sup> and threatened, if the courts were too liberal in its

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89. The result of the case was to allow the defendants to plead the guest statute, but because the record did not indicate whether a guest-host relationship actually existed between the driver of the camper and the decedent, the court remanded in *Sacra* for further proceedings. See *Sacra*, 48 Md. App. at 167, 426 A.2d at 10.

90. The public policy device for escaping foreign law is usually a "substitute for thinking" and dangerous because it is so "beguilingly easy" to employ. Monrad G. Paulsen & Michael I. Sovern, "Public Policy" in the Conflict of Laws, 56 COLUM. L. REV. 969, 987 (1956). "The principal vice of the public policy concepts is that they provide a substitute for analysis. The concepts stand in the way of careful thought, of discriminating distinctions, and of true policy development in the conflict of laws." *Id.* at 1016.



employment, the entire edifice of the traditional system.<sup>91</sup> To prevent these evils, most statements of the exception forbade its use except in extremis, reserving it for those truly "extraordinary case[s]"<sup>92</sup> in which the foreign rule was in some sense "pernicious and detestable"<sup>93</sup> or "violat[ive of] some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal."<sup>94</sup> In effect, judges were admonished to follow the requirements of foreign law unless it would make them want to regurgitate to have to enforce them.

Numerous Maryland cases express this conservative view regarding the scope of the public policy exception. In *Texaco, Inc. v. Vanden Bosche*,<sup>95</sup> the Court of Appeals of Maryland suggested the likely validity of a Virginia statute imposing personal liability on shareholders and officers of a Maryland corporation who failed to fulfill certain procedural requirements for registering the corporation to do business in the Commonwealth.<sup>96</sup> The court stated that "a public policy which will permit a state to refuse to enforce rights created by the law of a sister state must be very strong indeed."<sup>97</sup> Later, in *Harford Mutual Insurance Co. v. Bruchey*,<sup>98</sup> while rejecting the view that Virginia's prohibition on recovery for loss of consortium offended Maryland's strong public policy,<sup>99</sup> the court pointed to *Texaco* as imposing "a heavy burden on him who urges rejection of foreign law on the ground of public policy."<sup>100</sup>

91. It has long been recognized that a willingness to find a violation of the forum's public policy whenever a foreign rule is dissimilar to the forum's would entirely eviscerate choice-of-law rules. See, e.g., *Herrick v. Minneapolis & St. L. Ry.*, 16 N.W. 413 (Minn.), *aff'd*, 127 U.S. 210 (1883); FRANCIS WHARTON, A TREATISE ON THE CONFLICT OF LAWS; OR PRIVATE INTERNATIONAL LAW § 42 (3d ed. 1905). Otherwise, the exception would swallow the rule and the court would always apply *lex fori*. See *Bethlehem Steel Corp. v. G.C. Zarnas & Co.*, 304 Md. 183, 198, 498 A.2d 605, 613 (1985) (Rodowsky, J., dissenting).
92. HERBERT F. GOODRICH, HANDBOOK ON THE CONFLICT OF LAWS § 11, at 22 (3d ed. 1949).
93. Herbert F. Goodrich, *Foreign Facts and Local Fancies*, 25 VA. L. REV. 26, 34 (1938) (quoting *Veytia v. Alvarez*, 247 P. 117, 118 (Ariz. 1926)).
94. The rhetoric is Judge Cardozo's, quoted from the majority opinion in the leading case of *Loucks v. Standard Oil Co.*, 120 N.E. 198, 202 (N.Y. 1918).
95. 242 Md. 334, 219 A.2d 80 (1966).
96. *Id.* at 337, 219 A.2d at 82.
97. *Id.* at 340, 219 A.2d at 83.
98. 248 Md. 669, 238 A.2d 115 (1968).
99. *Id.* at 674, 238 A.2d at 117.
100. *Id.* at 674, 238 A.2d at 117-18. Similar statements can be found in other court of appeals opinions. See *Kramer v. Bally's Park Place, Inc.*, 311 Md. 387, 390, 535 A.2d 466, 467 (1988) ("the public policy must be very strong") (dictum); *Bethlehem Steel Corp. v. G.C. Zarnas & Co., Inc.*, 304 Md. 183, 189, 498 A.2d 605, 608 (1985) (strong public policy required) (dictum).

In subsequent cases, Maryland courts have enforced household exclusion clauses valid in the state of contracting but invalid in Maryland;<sup>101</sup> gambling contracts valid where made but illegal under Maryland law;<sup>102</sup> full recovery remedies for foreign torts that would be "capped" had the tort occurred in Maryland;<sup>103</sup> prohibitions on recovery in tort where the state of the wrong limits the plaintiff to no-fault remedies;<sup>104</sup> rules allowing tort recoveries contrary to Maryland's interspousal immunity doctrine;<sup>105</sup> and foreign guest statutes.<sup>106</sup> These cases create the impression that the public policy exception in Maryland is very narrow. Closer inspection indicates, however, that this impression may be quite mistaken. In some of these cases, the putative Maryland policy that was being offered as justification for avoiding application of the otherwise applicable foreign rule was simply nonexistent.<sup>107</sup> In others, the public policy argument was rejected either as a mere afterthought<sup>108</sup> or on stare

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101. See *Allstate Ins. Co. v. Hart*, 327 Md. 526, 611 A.2d 100 (1992).
  102. See *Kramer v. Bally's Park Place, Inc.*, 311 Md. 387, 535 A.2d 466 (1988).
  103. See *Black v. Leatherwood Motor Coach Corp.*, 92 Md. App. 27, 606 A.2d 295, *cert. denied*, 327 Md. 626, 612 A.2d 257 (1992).
  104. See *Jacobs v. Adams*, 66 Md. App. 779, 505 A.2d 930, *cert. denied*, 306 Md. 513, 510 A.2d 259 (1986).
  105. See *Rhee v. Combined Enters.*, 74 Md. App. 214, 536 A.2d 1197, *cert. dismissed*, 314 Md. 123, 549 A.2d 385 (1988); *Linton v. Linton*, 46 Md. App. 660, 420 A.2d 1249 (1980).
  106. See *Sacra v. Sacra*, 48 Md. App. 163, 426 A.2d 7 (1981).
  107. In *Rhee*, 74 Md. App. 214, 536 A.2d 1197, for instance, the Maryland interspousal immunity doctrine being offered up as justification for avoiding application of the full recovery rule of the locus delicti had been abolished in Maryland five years before *Rhee* came up for decision. See *Boblitz v. Boblitz*, 296 Md. 242, 275, 462 A.2d 506, 522 (1983). The claim in *Rhee* accrued only a month and a half before *Boblitz* abrogated the rule prospectively. *Rhee*, 74 Md. App. at 225-27, 536 A.2d at 1202-03. Under such circumstances, Maryland could hardly be called deeply wedded to interspousal immunity, and interspousal recoveries could hardly be viewed as "detestable" or "pernicious." *Id.* Similarly, by the time of *Kramer v. Bally's Park Place, Inc.*, 311 Md. 387, 535 A.2d 466 (1988), the court could hardly find enforcement of a gambling contract that was legal where made offensive to Maryland public policy when Maryland itself had legalized many types of gambling and had held, since *Bender v. Arundel Arena, Inc.*, 248 Md. 181, 236 A.2d 7 (1967), that gambling debts legally incurred inside Maryland were enforceable in Maryland's courts. See *Kramer*, 311 Md. at 394-96, 535 A.2d at 469-70. Finally, in *Bruchey*, see discussion *supra* notes 98-100 and accompanying text, the court called the Maryland rule it was being asked to enforce (husband's right to recovery for loss of consortium) "a vestigial right" and "an 'anachronism' and 'a fossil from an earlier era'" that could hardly qualify as a strong public policy fit to override the normally applicable rule. *Harford Mut. Ins. Co. v. Bruchey*, 248 Md. 669, 675, 238 A.2d 115, 118 (1968) (citations omitted).
  108. See *Black v. Leatherwood Motor Coach Corp.*, 92 Md. App. 27, 39-41, 43, 606 A.2d 295, 300-03 (Maryland cap on damages held not procedural but substantive, and hence inapplicable to action on New Jersey tort), *cert. denied*, 327 Md. 626, 617 A.2d 257 (1992).

decisis grounds.<sup>109</sup> In still others, the public policy argument failed because the Maryland policy was deemed totally inapplicable to the foreign tort.<sup>110</sup>

Indeed, there is substantial evidence to suggest that Maryland judges are prepared to invoke the public policy exception whenever they believe a statutory policy of Maryland would be advanced by enforcement of the Maryland rule. Most of the cases declining to supplant the normally applicable foreign rule with a Maryland one did so because the Maryland rule's scope was simply found too narrow to encompass the foreign case.<sup>111</sup> In the few cases that have supplanted foreign law because of public policy, the court's rationalization of the result was not so much that the foreign law was "pernicious and detestable"<sup>112</sup> as that its enforcement would interfere with a policy set out by the Maryland legislature.

In a series of worker's compensation cases involving suits against co-employees, the Court of Appeals of Maryland has consistently enforced the Maryland view that such suits will lie, not so much because the contrary foreign rule makes the court vomitous, as because the court thinks this is consistent with the policies of the

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109. See, e.g., *Rhee*, 74 Md. App. at 223-24, 536 A.2d at 1201-02 (citing *Harford Mut. Ins. Co. v. Bruchey*, 248 Md. 669, 238 A.2d 115 (1968)); *Sacra*, 48 Md. App. at 168, 426 A.2d at 10 (citing *White v. King*, 244 Md. 348, 223 A.2d 763 (1966); *Linton v. Linton*, 46 Md. App. 660, 420 A.2d 1249 (1980)).

110. See *Allstate Ins. Co. v. Hart*, 327 Md. 526, 532-34, 611 A.2d 100, 103-04 (1992) (Maryland policy against household exclusion clauses insurance policies is limited only to cases where the clauses interfere with statutory minimum liability coverage requirements and hence are inapplicable to policies written on Florida risks to which compulsory insurance statutes do not apply; result would be same here even if Maryland law were applied); *Black*, 92 Md. App. at 47-48, 606 A.2d at 304-05 (purpose of cap to assure availability of liability insurance to Maryland enterprises inapplicable in this case involving Virginia plaintiffs, New Jersey accident, and corporate defendant incorporated in Virginia at time of accident who moved to Maryland shortly before action commenced and no longer in business in any jurisdiction); *Jacobs v. Adams*, 66 Md. App. 779, 795, 505 A.2d 930, 938, cert. denied, 306 Md. 513, 510 A.2d 259 (1986) (Maryland statute giving Maryland small claims claimants option of pursuing tort or uninsured motorist remedies irrelevant to small claims arising in District of Columbia; if there is any public policy involved here, it is to prevent flood of trivial suits into Maryland courts from District accidents that the District has seen fit to foreclose); *Linton*, 46 Md. App. at 667 n.9, 420 A.2d at 1253 n.9 (allowing suits between foreign spouses will not endanger public welfare, health or morals of our people and, because this is a wrongful death case, can hardly be said to threaten marital harmony).

111. See *supra* note 110; see also *Kramer v. Bally's Park Place, Inc.*, 311 Md. 387, 394-98, 535 A.2d 466, 469-71 (1988) (Maryland rule preventing the enforcement of gambling debts applied only to illegal *in-state* gambling and hence could not be used to justify nonenforcement of a gaming contract legally entered into in New Jersey).

112. Cf. *supra* notes 92-94 and accompanying text.

Maryland compensation statute and the interests of Maryland.<sup>113</sup> In *Hauch v. Connor*,<sup>114</sup> the Court of Appeals of Maryland suggested that statute of limitations rules warranted a *lex fori* reference not so much because they were “procedural” as because they represented local “public policy” regarding stale claims.<sup>115</sup> At the very least, such language creates real confusion as to what the “public policy” justification for displacement of foreign law with local law really means.<sup>116</sup>

Adding to this confusion is a line of cases beginning with *Bethlehem Steel Corp. v. G.C. Zarnas & Co.*<sup>117</sup> In *Bethlehem Steel*, the steel company had contracted with Zarnas to paint part of the company’s Sparrows Point, Maryland plant.<sup>118</sup> Under the contract Zarnas pledged to hold harmless Bethlehem Steel from any claims sustained by Zarnas or its employees caused by acts or omissions of Bethlehem Steel or those for whom Bethlehem Steel might otherwise be legally responsible.<sup>119</sup> A Zarnas employee came in contact with high voltage electricity at the plant and sued the steel company.<sup>120</sup> The latter then brought a declaratory judgment action against Zarnas to have the contract declared valid.<sup>121</sup> Zarnas claimed the contract was invalid under Maryland law “because it provided for indemnification for Bethlehem’s sole negligence,” in contravention of a Maryland statute declaring such contracts against public policy, void and unenforceable.<sup>122</sup> Bethlehem Steel argued that the contract’s validity was to be evaluated under the law of Pennsylvania, the state

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113. In this area, the court has refused to analyze the cases under traditional tort or contract law classifications, and instead has treated them as falling under a new worker’s compensation category. *See supra* notes 65-69 and accompanying text. The principal choice-of-law rule in this area involves a balancing of state interests in which the policy of Maryland is extremely important, if not entirely dispositive. *See Bishop v. Twiford*, 317 Md. 170, 174-77, 562 A.2d 1238, 1241-42 (1989); *Hauch v. Connor*, 295 Md. 120, 132-33, 453 A.2d 1207, 1213-14 (1983); *Hutzell v. Boyer*, 252 Md. 227, 233, 236, 249 A.2d 449, 452, 454 (1969).

114. 295 Md. 120, 453 A.2d 1207 (1983).

115. *Id.* at 133 n.10, 453 A.2d at 1214 n.10.

116. Compare the court’s willingness to enforce the Maryland three-year statute of limitations, rather than Illinois’s two year statute of limitations in *Johnson v. G.D. Searle & Co.*, 314 Md. 521, 552 A.2d 29 (1989), discussed *supra* note 40, with the rhetoric limiting enforcement of local law on public policy grounds to those cases where failure to do so would be offensive to good morals. *See supra* notes 92-94 and accompanying text.

117. 304 Md. 183, 498 A.2d 605 (1985).

118. *Id.* at 185, 498 A.2d at 606.

119. *Id.* at 185-86, 498 A.2d at 606.

120. *Id.* at 186, 498 A.2d at 606.

121. *Id.*

122. *Id.* at 187, 498 A.2d at 607; *see MD. CODE ANN., CTS. & JUD. PROC. § 5-305* (1989 & Supp. 1993).

of execution and the principal place of business between the parties, and that under Pennsylvania law the contract was enforceable.<sup>123</sup>

The Court of Appeals of Maryland ruled for Zarnas and applied Maryland law.<sup>124</sup> The court acknowledged that foreign law could not be held unenforceable in Maryland simply on grounds of dissimilarity, and referred specifically<sup>125</sup> to the two leading cases emphasizing the need for a "strong" public policy to displace the law of the state of the making of the contract—*Texaco, Inc. v. Vanden Bosche*<sup>126</sup> and *Harford Mutual Insurance Co. v. Bruchey*.<sup>127</sup> The court noted that in those cases no Maryland statute was involved, whereas in *Bethlehem Steel* a statute specifically grounded on public policy appeared to deal with the problem.<sup>128</sup> But the principal distinction with these

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123. *Bethlehem Steel*, 304 Md. at 188, 498 A.2d at 607-08.

124. *Id.* at 193-95, 498 A.2d at 610-11.

125. *Id.* at 189, 498 A.2d at 608.

126. 242 Md. 334, 219 A.2d 80 (1966); *see supra* notes 95-97 and accompanying text.

127. *Harford Mut. Ins. Co. v. Bruchey*, 248 Md. 669, 238 A.2d 115 (1968); *see supra* notes 98-100 and accompanying text.

128. *Bethlehem Steel*, 304 Md. at 190-91, 498 A.2d at 609. At one point, the majority in *Bethlehem Steel* suggested that "[u]nless there is a contrary indication elsewhere . . . the General Assembly's explicit determination of public policy is sufficient in a case like this to override the *lex loci contractus* principle." *Id.* at 190, 498 A.2d at 608.

In dissent, Judge Rodowsky acidly pointed out that the "statute alerts us to the need for analysis; the statute does not dispense with analysis." *Id.* at 196, 498 A.2d at 611. He then proceeded to demonstrate that the statute in question was clearly not a legislatively drawn choice-of-law directive, and that there were no case law precedents justifying the broad statement. *Id.* at 199-202, 498 A.2d at 613-15.

A number of cases following *Bethlehem Steel* have suggested that the fact that a rule is in a statute makes it a matter of public policy that would likely require its enforcement and that the failure of the legislature to deal with a matter suggests the absence of a Maryland public policy regarding the issue. *See, e.g.*, *Allstate Ins. Co. v. Hart*, 327 Md. 526, 611 A.2d 100 (1992). But, while the legislature is the primary source of public policy declarations in Maryland, *Gaver v. Harrant*, 316 Md. 17, 29, 557 A.2d 210, 216 (1989), it has never been the sole source of public policy declarations, *cf.* *Washington Metro. Area Transit Auth. v. Queen*, 324 Md. 326, 332-33, 597 A.2d 423, 426 (1991) (declaring the prohibition on direct actions against liability insurers to be Maryland public policy). More importantly, the legislative source of the rule does not make it a public policy for choice-of-law purposes; the latter issue involves the extent to which its scope should be construed to include cases with multistate elements. *See, e.g.*, *Kramer v. Bally's Park Place, Inc.*, 311 Md. 387, 535 A.2d 466 (1988); *Black v. Leatherwood Motor Coach Corp.*, 92 Md. App. 27, 606 A.2d 295, *cert. denied*, 327 Md. 626, 612 A.2d 257 (1992); *Jacobs v. Adams*, 66 Md. App. 779, 505 A.2d 930, *cert. denied*, 306 Md. 513, 510 A.2d 259 (1986).

cases was not so much that Maryland's policy was stronger in *Bethlehem Steel* than it had been in *Texaco* or *Bruchey*, but that the state of execution's policy in *Bethlehem Steel* was so much weaker. The *Bethlehem* court pointed out that in *Texaco* and *Bruchey* the foreign state had statutes specifically covering the matter,<sup>129</sup> while in the instant case, "[n]o Pennsylvania statute expressly creates a right of the parties to so contract" and the parties had merely "contracted in Pennsylvania to do something which Pennsylvania common law merely tolerates."<sup>130</sup> The court then pointed to Pennsylvania's choice-of-law cases to show that the state had such a weak interest that had the suit been brought before its courts they would have applied Maryland law to nullify the indemnification clause.<sup>131</sup>

Judge Rodowsky, speaking for himself and Chief Judge Murphy, filed a vigorous dissent in *Bethlehem Steel*.<sup>132</sup> He chided the majority for inventing a distinction between "contracts which are valid but 'merely tolerate[d]'" and . . . contracts which are valid and enthusiastically embraced,"<sup>133</sup> and for threatening to substitute for the strong public policy exception a "balancing of interests approach."<sup>134</sup> Other judges have read *Bethlehem Steel* as doing precisely what Judge Rodowsky feared. Prior indications had been that, consistent with the *First Restatement*, the Maryland courts would not apply a doctrine known as *renvoi*.<sup>135</sup> The *First Restatement* generally forbade use of *renvoi*<sup>136</sup> except in narrow and particularized circumstances where there was a particularly strong need for outcome uniformity between the forum and the other jurisdiction.<sup>137</sup> Research has revealed no Maryland cases prior to *Bethlehem Steel* employing the doctrine, and Judge Kaufman had twice opined that it was not part of Maryland law.<sup>138</sup> Subsequent to *Bethlehem Steel*, however, the federal court

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129. *Bethlehem Steel*, 304 Md. at 190, 498 A.2d at 608-09.

130. *Id.* at 191, 498 A.2d at 609.

131. *Id.* at 191 n.5, 498 A.2d at 609 n.5.

132. *See id.* at 195, 498 A.2d at 611 (Rodowsky, J., dissenting).

133. *Id.* at 197, 498 A.2d at 612 (citation omitted) (Rodowsky, J., dissenting).

134. *Id.*; *see also supra* note 128.

135. Under this doctrine, a court, in making its own choice of law, considers not only the local law of foreign jurisdictions, but also the choice-of-law principles those jurisdictions apply, and if it is discovered that the foreign jurisdiction would apply the forum's own law, the forum court "takes the *renvoi*" (or reference back) and applies its own law. *See Travelers Indem. Co. v. Allied-Signal, Inc.*, 718 F. Supp. 1252 (D. Md. 1989).

136. *See* FIRST RESTATEMENT, *supra* note 2, § 7.

137. *See id.* § 8.

138. *See Polglase v. Greyhound Lines, Inc.*, 401 F. Supp. 335, 337 (D. Md. 1975); *Debbis v. Hertz Corp.*, 269 F. Supp. 671, 682 (D. Md. 1967); *see also Bostingl v. Maryland Nat'l Bank, N.A.*, 841 F.2d 1122 (4th Cir. 1988) (unreported), *aff'g*, 662 F. Supp. 882 (D. Md. 1987).

sitting in Maryland has read the case as authorizing the use of *renvoi* in cases involving issues of important public policy "to pierce through 'false conflicts'" where Maryland's interests are more powerfully implicated than those of the other jurisdiction.<sup>139</sup> More recently, the court of special appeals has opined that Maryland law does not include the doctrine of *renvoi*.<sup>140</sup> Because the court of appeals is currently considering the issue, the availability of *renvoi* in Maryland must be treated as an open question.

A number of recent cases evidence confusion among Maryland judges as to the breadth of the public policy exception. The *Bethlehem Steel* case deeply split the Court of Appeals of Maryland. In a subsequent case, *Allstate Insurance Co. v. Hart*,<sup>141</sup> the trial judge took one position, the Court of Special Appeals of Maryland another, and the Court of Appeals of Maryland yet a different one.<sup>142</sup> *Hart* involved the enforceability of claims for accidental injury inflicted in Maryland in the face of a household exclusion clause of an insurance policy written in Florida on a Florida garaged car of a Florida couple.<sup>143</sup> The court of special appeals rejected the trial

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139. See *Travelers Indem. Co. v. Allied-Signal, Inc.*, 718 F. Supp. 1252, 1254 (D. Md. 1989). Note that in *Travelers*, Judge Motz spoke of "important," not "strong," public policies. See *id.* at 1253. In a supplemental opinion in *Travelers*, Judge Motz noted that the Fourth Circuit's unreported opinion indicated that Maryland's courts were generally opposed to use of *renvoi*, *id.* at 1257 (citing *Bostingl*, 841 F.2d 1122), but felt that case was distinguishable, and that at the very least the Fourth Circuit should certify to the Court of Appeals of Maryland the question of whether Maryland would apply a governmental interest analysis in cases involving important areas of public policy like insurance and environmental law. *Travelers*, 718 F. Supp. at 1257.

In a subsequent case, Judge Hargrove indicated that Maryland would take the *renvoi* "if the law of the other jurisdiction is contrary to a *strongly voiced* public policy in Maryland . . ." *Connecticut Mut. Life Ins. Co. v. Gastman*, No. HAR-89-1629, 1990 WL 199317, at \*4 (D. Md. Dec. 4, 1990) (emphasis added), *aff'd*, 1991 WL 197363 (4th Cir. Oct. 7, 1991) (unpublished) (disposition noted at 946 F.2d 884 (4th Cir. 1991)). Judge Hargrove was quick to note that this policy "differs from the recognized exception to *lex loci contractus* where a strong public policy prohibits application of a foreign law contrary to that policy." *Id.* at \*7 n.5.

Most recently, in *Eastern Stainless Corp. v. American Protection Ins. Co.*, 829 F. Supp. 797 (D. Md. 1993), Judge Nickerson concluded that *renvoi* should be reserved for truly "exceptional situations," and that Maryland's courts were strongly "inclin[ed] to adhere to the general rule of *lex loci* and . . . burden . . . those who would urge the [c]ourt to do otherwise." *Id.* at 800, 801 n.4.

140. See *Artra Group, Inc. v. American Motorists Ins. Co.*, 100 Md. App. 728, 642 A.2d 896, *cert. granted*, 336 Md. 354, 648 A.2d 464 (1994).

141. 327 Md. 526, 611 A.2d 100 (1992).

142. *Id.*

143. *Id.* at 528, 611 A.2d at 101.

judge's refusal to enforce Maryland's exclusion of such clauses on public policy grounds,<sup>144</sup> only to be reversed by the court of appeals two years later. In rejecting the position of the trial court, which applied *lex loci contractus*, the court of special appeals relied on *Bethlehem Steel*. It held that Maryland public policy was sufficient to override the *lex loci* rule wherever the legislature has specifically addressed a kind of contractual clause and unequivocally declared it null and void.<sup>145</sup>

In *Hart*, the court of appeals overruled the intermediate court's decision on the ground that Maryland's statutory rejection of family exclusion clauses "was not based on any general or historic principle of public policy," but instead was limited to cases involving Maryland's requirements for minimum liability coverage<sup>146</sup> in Maryland-written insurance contracts.<sup>147</sup> This led the court to conclude that the clause was enforceable because there was no conflict, and that it was valid under the law of both Florida and Maryland,<sup>148</sup> and alternatively that the Maryland public policy was simply not "sufficiently strong . . . [to] justify disregarding the *lex loci contractus* principle under the facts of this case."<sup>149</sup> The court then added a footnote:

[W]e are not holding that the *lex loci contractus* principle will always be applied to household exclusion clauses in insurance policies. For example, if a family had lived in Florida when the insurance policy on the family automobile was issued in Florida, but moved to Maryland during the life of the policy, and if Maryland law required that the family car be registered in Maryland, the Maryland compulsory insurance statutes . . . would seem to mandate that the household exclusion clause not be enforced to the extent of the minimum required liability coverage.<sup>150</sup>

More recently, in *Ward v. Nationwide Mutual Automobile Insurance Co.*,<sup>151</sup> the Court of Appeals of Maryland divided over whether Maryland should enforce a District of Columbia law that purported to force victims of auto accidents in the District to elect

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144. *Hart v. Allstate Ins. Co.*, 83 Md. App. 642, 648, 577 A.2d 373, 376 (1990).

145. *Id.* at 646-47, 577 A.2d at 375.

146. *Hart*, 327 Md. at 532, 611 A.2d at 103.

147. *Id.* at 533, 611 A.2d at 103.

148. *Id.* at 534, 611 A.2d at 103-04.

149. *Id.* at 534, 611 A.2d at 104.

150. *Id.* at 534 n.1, 611 A.2d at 104 n.1 (citation omitted). The obvious purpose of this footnote in *Hart* was to clarify. Its obvious effect is to muddy.

151. 328 Md. 240, 614 A.2d 85 (1992).



between collecting personal injury protection (PIP) benefits from their driver's insurer or to sue a third-party tortfeasor in tort.<sup>152</sup> Judge Chasanow, dissenting, took the view that District law applied, forced the election, and, because the plaintiff had already recovered PIP benefits, barred the instant action in tort.<sup>153</sup> The majority disagreed, not on the choice-of-law issue,<sup>154</sup> but on the proper construction of District of Columbia law.<sup>155</sup> Under the majority's position, no election was required under either District or Maryland law, and hence the tort action could proceed.<sup>156</sup> The court acknowledged, however, that if Judge Chasanow was correct in his construction of District law, grave choice-of-law issues would be presented to it<sup>157</sup> under the doctrines of *Hauch v. Connor*<sup>158</sup> and *Bishop v. Twiford*.<sup>159</sup>

Most recently, the Court of Special Appeals of Maryland has suggested that there is a need for the court of appeals to examine whether to continue adherence to the *First Restatement*, at least with respect to its contract rule, *lex loci contractus*. In *Commercial Union Insurance Co. v. Porter Hayden Co.*,<sup>160</sup> the plaintiff, a Maryland corporation, sued an out-of-state insurer for indemnification for liabilities the plaintiff was under because of its installation of asbestos insulation in industrial plants in Maryland. If the policy was evaluated under New York law, it would be found to be unenforceable because notice of occurrence had been untimely filed; if the policy were evaluated under Maryland law, it would be enforceable because the notice, while not timely, had not prejudiced the insurer in any way. The court of special appeals discussed at length the *Second Restatement* rules, under which it seemed clear that Maryland would be the state with the most significant relationship because it was the situs of the principal insurable risk.<sup>161</sup> The court felt constrained by precedent to apply the law of the place of making, which it found to be in New York, even as it invited the court of appeals to consider "the instant case as presenting an appropriate opportunity to reconsider Maryland's adherence to the place of contracting rule."<sup>162</sup> The

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152. *Id.* at 242, 614 A.2d at 85.

153. *See id.* at 254, 614 A.2d at 92 (Chasanow, J., dissenting).

154. *Id.* at 247, 614 A.2d at 88.

155. *Id.*

156. *Id.* at 253, 614 A.2d at 91. Interestingly, *Ward* cited *Hart* both for the general applicability of the *lex loci contractus* position and as grounds for refusing to supplant it under Maryland's "narrow public policy exception." *See Ward*, 328 Md. at 246-47, 614 A.2d at 88.

157. *Id.* at 253 n.8, 614 A.2d at 92 n.8.

158. 295 Md. 120, 453 A.2d 1207 (1983).

159. 317 Md. 170, 562 A.2d 1238 (1989).

160. 97 Md. App. 442, 630 A.2d 261, *cert. granted*, 333 Md. 201, 634 A.2d 62 (1993).

161. *Id.* at 455-57, 630 A.2d at 268-69.

162. *Id.* at 457, 630 A.2d at 269.

court acknowledged the public policy/*renvoi* cases in the *Bethlehem Steel* line, but seemed perplexed by them;<sup>163</sup> quite parenthetically, it dismissed them as simply “not applicable to the present case.”<sup>164</sup>

At the very least, the recent “public policy” exception cases in Maryland indicate a radical shift away from the narrow confines of the era of *Texaco* and *Bruchey*, when Maryland’s courts would refuse to apply the otherwise applicable substantive law only when it was viewed as “pernicious and detestable.”<sup>165</sup> Precisely what has been added is unclear. There is suggestion that a matter violates Maryland public policy if there is a Maryland statute speaking to the matter; but the question in such cases cannot be answered simply by citing the statute, but must be answered by ascertaining whether it governs the case. Cases like *Ward* and *Hart* fudge on whether they are refusing to displace a Maryland rule with a contrary foreign rule because of public policy or are simply enforcing a foreign law because a second look has revealed it is really consistent with the Maryland rule and hence there is no conflict.<sup>166</sup> Where the foreign rule does differ from Maryland’s, cases like *Bethlehem Steel* impliedly authorize, on clearly watered down public policy grounds, use of *renvoi* to soften the bite of the otherwise content-neutral choice-of-law rules,<sup>167</sup> and those like *Hauch v. Connor* even authorize on public policy grounds creation of whole new categories of cases to advance Maryland’s interests.<sup>168</sup> Yet Maryland judges—at least those on the Court of Special Appeals of Maryland who heard the *Commercial Union*

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163. *Id.* at 454, 630 A.2d at 267. The court did not cite *Bethlehem Steel* but did discuss *Travelers Indemnity Co. v. Allied-Signal, Inc.*, 718 F. Supp. 1252 (D. Md. 1989), discussed *supra* notes 135, 139.

164. *Id.* The explanation is difficult to fathom. While it cited no New York choice-of-law cases, it did rely upon a text, *SCALES & HAY*, *supra* note 7, § 18.21 (2d ed. 1992), for a categorization of how each state would approach conflict-of-laws problems in contract. The source cited indicates that New York either follows the *Second Restatement*, the center of gravity, or interest analysis in contract cases. *See id.* § 18.21 nn.3, 5. Under either of these approaches, a New York court entertaining *Commercial Union* would have applied Maryland law. Hence, had the Court of Special Appeals of Maryland taken the *renvoi*, as the *Bethlehem Steel* line of cases suggests it should have, the result would have been to render the contract enforceable under Maryland law.

More recently, in *Artra Group, Inc. v. American Motorists Ins. Co.*, 100 Md. App. 728, 642 A.2d 896, *cert. granted*, 336 Md. 354, 648 A.2d 464 (1994), the court of special appeals cited *Porter Hayden Co.* for the proposition that *renvoi* has no place in Maryland law. The court of appeals’ grant of certiorari in *Artra Group, Inc.* indicates that the intermediate appellate court’s *renvoi* declaration is open for reevaluation.

165. *See supra* notes 90-106 and accompanying text.

166. *See supra* notes 140-55 and accompanying text.

167. *See supra* notes 117-39 and accompanying text.

168. *See supra* notes 60-69, 113-16 and accompanying text.

case<sup>169</sup>—appeared uncomfortable employing either rationale, even under circumstances where either seemed readily available,<sup>170</sup> and instead felt the only principled way out was to invite the court of appeals to jettison the *First Restatement*.

## II. MODERN MARYLAND CONFLICTS LAW

### A. *Early Indicators of Policy Analysis*

Although cases like *White v. King*<sup>171</sup> and *Hauch v. Connor*<sup>172</sup> pledge, at least formally, an unyielding allegiance to the territorialist principles of the *First Restatement* on grounds of promoting certainty and predictability, there have been indications of a more policy-oriented approach to choice-of-law even before cases like *Bethlehem Steel*, *Bishop v. Twiford*, and *Hauch* itself suggested a fraying at the edges of the pledge. Perhaps the earliest indications of this tendency are the Maryland cases softening the bite of traditional rules on account of policies favoring party autonomy.

One group of these cases involves the distribution of estates. A basic policy of all states, as evidenced by the uniform adoption of statutes of wills, is to afford people broad freedom to control the passage of title to their property upon death. The traditional choice-of-law rules required a domiciliary reference for the devolution of personal property<sup>173</sup> and a situs reference for succession to estates in land.<sup>174</sup> The Maryland cases strongly indicate frequent subordination of these rules to the policy of effectuating testamentary intent.

In part this tendency was encouraged by legislation, first enacted in 1884,<sup>175</sup> that directed Maryland's courts to validate a will even

169. See *supra* text accompanying notes 159-63.

170. The *Allied-Signal* case is so close to *Commercial Union* that it is hard to understand why the court felt so sure the public policy/*renvoi* doctrine was inapplicable. As indicated *supra* at note 163, had *Commercial Union* applied the whole law of the state of contracting, New York (*i.e.*, taken the *renvoi*), it likely would have gotten a reference back to Maryland. Alternatively, there seems to be no good reason why the court could not have created a new rule, in the manner of *Hauch v. Connor*, for a wholly new category of cases—liability insurance policies—to promote the regulatory interests of the state of principal insurable risk. Either alternative would have been more true to the Maryland precedents than what the court suggested, which was the complete abandonment of *lex loci contractus*.

171. *White v. King*, 244 Md. 348, 223 A.2d 763 (1966); see *supra* notes 3-4 and accompanying text.

172. *Hauch v. Connor*, 295 Md. 120, 453 A.2d 1207 (1983); see *supra* note 4 and accompanying text.

173. See *supra* notes 20, 27 and accompanying text.

174. See *supra* notes 18, 26 and accompanying text.

175. See Act of April 8, 1884, ch. 293, § 307, 1884 Md. Laws 403 (codified as amended at MD. CODE ANN., EST. & TRUSTS § 4-104(3) (1993)).

though it failed Maryland's own requirements for execution if it was valid under the law of the state where it was executed or the law of the domicile of the decedent.<sup>176</sup> The purpose of this legislation was to assure that the intent of the testator would be vindicated if she was acting under circumstances which would have led her reasonably to believe that what she was doing would have legal effect.<sup>177</sup>

But the tendency of the courts to enforce the intent of the testator went further than was required by the statute. In dealing with trusts set up by testators, the Court of Appeals of Maryland was willing to validate trusts regarding property situated in one state, even though this violated the law of the state of domicile, in order to effectuate testamentary intent;<sup>178</sup> to construe liberally the methods by which powers of appointment could be executed so as to enforce testamentary intent;<sup>179</sup> and even to declare a willingness to allow a testator to choose whatever law he wished to govern his bequests.<sup>180</sup> What *Fletcher v. Safe Deposit & Trust Co.*<sup>181</sup> noted of charitable trusts—that “[c]ourts tend, unhampered by any fixed conflict-of-laws rule, to sustain [them if they] do not violate the policy of any state concerned”<sup>182</sup>—could easily be said about all testamentary trusts,

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176. The legislative history of the present statute is discussed extensively in Judge Orth's opinion for the court in *Wright v. Nugent*, 23 Md. App. 337, 346-49, 328 A.2d 362, 368-70 (1974), *aff'd*, 275 Md. 290, 338 A.2d 898 (1975) (per curiam). The opinion explains a variety of statutory amendments over the years. It briefly mentions that, in its original form, the statute sustained a will's formal validity if it was valid in the place of execution or “place where [the testator] was residing when the [will or other testamentary instrument] was made,” but was amended in 1894 in such a way that the quoted language gave way to the “testator's domicile.” *Wright*, 23 Md. App. at 347, 328 A.2d at 368-69. Judge Orth does not explain why this amendment was made, and it is unclear whether the new language adverts to domicile at the time of execution, domicile at the time of death, or both.
177. *Lindsay v. Wilson*, 103 Md. 252, 271, 63 A. 566, 569 (1906); *see also* *Roach v. Jurchak*, 182 Md. 646, 649, 35 A.2d 817, 819 (1944); *Olivet v. Whitworth*, 82 Md. 258, 276, 33 A. 723, 724 (1896).
178. *See, e.g.*, *Fletcher v. Safe Deposit & Trust Co.*, 193 Md. 400, 67 A.2d 386 (1949) (although charitable bequest invalid under law of testator's domicile because of indefiniteness, it will be upheld because it is valid under the law of the state where it is to be administered); *Johns Hopkins Univ. v. Uhrig*, 145 Md. 114, 125 A. 606 (1924) (bequest to Maryland charity invalid under law of testator's domicile but valid in Maryland, where trust was to be administered, and therefore upheld); *cf.* *Smith v. Mercantile Trust Co.*, 199 Md. 264, 86 A.2d 504 (1952) (refusing to displace New York law with law of situs of property where circumstances did not support inference that situs law was intended by testator).
179. *See Olivet*, 82 Md. at 276, 33 A. at 724.
180. *Smith*, 199 Md. at 273-74, 86 A.2d at 508 (dictum).
181. 193 Md. 400, 67 A.2d 386 (1949).
182. *Id.* at 415, 67 A.2d at 392 (citation omitted) (quoting *Beach v. Gilbert*, 133 F.2d 50, 51 (D.C. Cir. 1943) (citing 2 BEALE, *supra* note 2, § 295.1)).

and strongly supports the view that policy was given enormous play in this area.

The tendency to support party autonomy is not limited to the estates area, but extends into the contracts area as well. Maryland courts routinely uphold choice-of-law provisions in contracts that may well vary the applicable law from that of the law of the place of making of a contract,<sup>183</sup> at least unless enforcement of such clauses would violate Maryland's public policy.<sup>184</sup> Most recently, the Maryland courts have indicated that they will follow the *Second Restatement* in upholding such clauses, unless they conflict with a fundamental policy of a state that has a materially greater interest in the matter than the chosen state and is the state the law of which would otherwise have been applicable.<sup>185</sup> While Maryland does not go so far as to apply *lex validitatis*,<sup>186</sup> even with respect to debt actions and the dubious defense of usury,<sup>187</sup> there is indication that they will

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183. See, e.g., *Kronovet v. Lipchin*, 288 Md. 30, 415 A.2d 1096 (1980); *Williams v. New York Life Ins. Co.*, 122 Md. 141, 89 A. 97 (1913) (dictum).

184. *Mutual Life Ins. Co. v. Mullan*, 107 Md. 457, 69 A. 385 (1908).

185. See *Finch v. Hughes Aircraft Co.*, 57 Md. App. 190, 231, 469 A.2d 867, 887, cert. denied, 298 Md. 310, 469 A.2d 864 (1984), cert. denied, 469 U.S. 1215 (1985) (relying upon SECOND RESTATEMENT, *supra* note 2, § 187).

The federal courts routinely indicate that Maryland will enforce choice-of-law clauses in contract actions. See, e.g., *Satellite Fin. Planning v. First Nat'l Bank*, 633 F. Supp. 386 (D. Del. 1986). Construing Maryland law, a federal court of appeals has indicated that it believes Maryland would go so far as to follow *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972), and enforce a contractual forum selection clause which in effect divested the local courts of jurisdiction to adjudicate a claim. See *General Eng'g Corp. v. Martin Marietta Alumina*, 783 F.2d 352, 358 n.5 (3d Cir. 1986). Should the Court of Appeals of Maryland take the position predicted by the Third Circuit, that would go a long way toward reinforcing Maryland's commitment to party autonomy.

186. Cf. *Commercial Union Ins. Co. v. Porter Hayden Co.*, 97 Md. App. 442, 630 A.2d 261, cert. granted, 333 Md. 201, 643 A.2d 62 (1993), discussed *supra* at notes 159-63. Professor Albert Ehrenzweig claimed that courts in virtually all nations tend to apply that law which will validate (hence, *lex validitatis*) because of the overriding desirability of upholding the sanctity of contracts and security of transactions. See EHRENZWEIG, *supra* note 2, §§ 175-76. There is some disagreement in the literature about the extent to which courts should enforce his presumption of validity. Compare RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS §§ 7.4B-7.4F, 7.5 (3d ed. 1986) (courts should enforce the presumption of validity) and Willis L.M. Reese, *Power of Parties to Choose Law Governing Their Contracts*, 1960 PROC. AM. SOC'Y INT'L L. 49, 51 (courts tend to enforce the presumption), with Brainerd Currie, *Ehrenzweig and the Statute of Frauds: An Inquiry into the "Rule of Validation,"* 18 OKLA. L. REV. 243 (1965) (arguing that Ehrenzweig had misread the cases) and Tracy A. Westen, Comment, *Usury in the Conflict of Laws: The Doctrine of Lex Debitoris*, 55 CAL. L. REV. 123 (1967) (*lex debitoris*, or law of debtor's domicile, governs usury cases).

187. Maryland enforces the law of the state of making in actions in debt where

infer an intention to make a state the state of making in order to enforce the underlying intention of the parties to create a binding agreement.<sup>188</sup>

In addition to the party autonomy cases, Maryland case law contains occasional hints that some form of policy analysis might inform the court's judgment as to how to apply the traditional system. For example, *Milton v. Escue*,<sup>189</sup> in answering whether a young Virginia woman could inherit Maryland lands from her putative father, the court declined to characterize the issue as relating to intestate succession to realty, thus requiring application of situs law, and instead characterized the issue as relating to legitimacy and applied the law of the woman and her parents' domicile.<sup>190</sup> As the court indicated, Professor Beale and the *First Restatement* both supported the characterization it made.<sup>191</sup> What the court did not do is explain why this characterization was correct, although it is likely that its chief purpose was sub silentio to protect the paramount interests of the state of the family, and thus sidestep "the nuisance that [rigid adherence to] the situs rule" would lead to.<sup>192</sup> A short time later, the court of appeals acknowledged the possibility of a limited class of cases involving foreign claims among nonresidents in which Maryland might not allow the claim to go forward under its own statute of limitations but time bar the claim because "the action is barred outright in the state where it accrued."<sup>193</sup> And in the immediate aftermath of its own reaffirmation in *White v. King* that under *lex loci delicti* the rights of Maryland residents could be

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that state's law would invalidate the contract as usurious. See *New York Sec. & Trust Co. v. Davis*, 96 Md. 81, 53 A. 669 (1902); *Eastwood v. Kennedy*, 44 Md. 563 (1876). This position is rejected by the *Second Restatement*, see *SECOND RESTATEMENT*, *supra* note 2, § 203, and has been rejected by many courts in favor of alternative reference, or application of the validating law of whatever state that has a substantial relationship to the transaction. The leading alternative reference case is *Seeman v. Philadelphia Warehouse Co.*, 274 U.S. 403 (1927).

188. See *John Hancock Mut. Life Ins. Co. v. Fidelity Baltimore Nat'l Bank & Trust Co.*, 212 Md. 506, 511, 129 A.2d 815, 819 (1957) ("[T]he proper law governing a . . . note is the law which the parties to the instrument intended to govern."); cf. *Pritchard v. Norton*, 106 U.S. 124, 137 (1882) ("The parties cannot be presumed to have contemplated a law which would defeat their engagements.").

189. 201 Md. 190, 93 A.2d 258 (1952).

190. *Id.* at 205, 93 A.2d at 265.

191. *Id.* at 205-06, 93 A.2d at 265 (citing 2 BEALE, *supra* note 2, § 140.2, at 712; *FIRST RESTATEMENT*, *supra* note 2, §§ 139, 141); see *supra* notes 45-47 and accompanying text.

192. See RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS § 7.6, at 399 (2d ed. 1980). But see *supra* note 26, *infra* note 200 (discussing *Harrison v. Prentice*, 183 Md. 474, 38 A.2d 101 (1944)).

193. *Osborn v. Swetnam*, 221 Md. 216, 220, 156 A.2d 654, 656 (1959).

determined under a foreign guest-host statute despite the interest Maryland had in applying Maryland law to its own citizens, the court of appeals indicated that the Maryland residency of the parties and center of their relationship justified allowing them to belatedly litigate the question of whether there was a gratuitous guest-host relationship despite their failure to raise it prior to the *White* decision.<sup>194</sup>

Notwithstanding the party autonomy cases and occasional early hints at policy analysis, it must be acknowledged that, as a general matter, the Maryland courts adhered steadfastly to the requirements of the traditional system until very recent times. Typical of this adherence was *Union Trust Co. v. Knabe*.<sup>195</sup> In *Knabe*, a Maryland married woman guaranteed a loan made by a New Jersey corporation to her husband. Technically, the guaranty became binding only when the loan issued, which occurred in New Jersey, and so under the place of making rule that state's law should have applied. The Maryland woman was not disabled from binding herself under Maryland law; her defense, if any, required the application of the New Jersey rule. Counsel argued that New Jersey's married women's property act was not meant to protect non-New Jersey women, and hence the statute did not apply. Acceptance of this argument would have been tantamount to acknowledgement of the force of interest analysis.<sup>196</sup> The *Knabe* court flatly rejected this kind of analysis.<sup>197</sup> Furthermore, the Maryland cases were generally faithful to the rules, refusing to utilize escape devices to avoid the unattractive results the rules led to. This was true in their early rejection of *renvoi*,<sup>198</sup> their limited use of public policy,<sup>199</sup> and their refusal to engage in disingenuous characterization to avoid untoward results.<sup>200</sup> In short, as a practical matter, the rules of the *First Restatement* held a tight wrap on Maryland conflicts doctrine, a wrap relaxed only infrequently.

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194. See *Earl v. Anchor Pontiac-Buick, Inc.*, 246 Md. 653, 659, 229 A.2d 412, 416 (1967).

195. 122 Md. 584, 89 A. 1106 (1914).

196. Cf. Brainerd Currie, *Married Women's Property Contracts: A Study in Conflict of Laws Method*, 25 U. CHI. L. REV. 227 (1958).

197. See *Knabe*, 122 Md. at 609, 89 A. at 1115.

198. See *supra* note 135 and accompanying text.

199. See *supra* notes 95-106 and accompanying text.

200. See, for example, *Harrison v. Prentice*, 183 Md. 474, 38 A.2d 101 (1944), wherein the Maryland court applied Maryland law and awarded an intestate share of Maryland land to an estranged British husband of his deceased British wife, when under the law of their common domicile the husband would have received nothing. It is hard to see why it was less officious to visit Maryland's family law policies on Britain in *Harrison* than it would have been to visit them on Virginia in *Milton v. Escue*, discussed *supra* notes 188-90, and the court of appeals certainly could have used characterization to avoid intermeddling in the domestic relations affairs of another state, but it refused to do so.

*B. Recent Developments*

Recent cases suggest that the tight wrap is unraveling. The long coexistence between the incipient policy analysis in the party autonomy cases and cases like *Milton v. Escue*, on the one hand, and the rigid jurisdiction selection rules of traditional analysis evidenced by cases like *Knabe*, on the other, seems to be breaking apart. When the gauntlet was thrown down challenging the traditional system in *White v. King*,<sup>201</sup> the Court of Appeals of Maryland acknowledged the trend away from *lex loci delicti*<sup>202</sup> and "recognize[d] the force of the countervailing arguments,"<sup>203</sup> but refused to budge because of *stare decisis* and the uncertainty of just how the new developments would work out.<sup>204</sup> The court's affirmation of the virtues of the ancient regime was masterfully indirect:

In what we have said, we do not intend any implication that *lex loci delicti* is, in general, in our opinion, an unjust rule. Hardship may result in a particular case, but that, unfortunately, is true under any general legal principle. Certainty in the law is not so common that, where it exists, it is to be lightly discarded. We recognize the force of the countervailing arguments, but in the present state of the law, we leave any change in the established doctrine to the Legislature.<sup>205</sup>

However apologetically, *White* at least rigidly enforced *lex loci*. *Hauch v. Connor*,<sup>206</sup> while paying lip service to the doctrine,<sup>207</sup> avoided its results by creating a new category of cases<sup>208</sup> involving the side effects of worker's compensation laws in which Maryland's statutory and common-law policies of encouraging recoveries for injuries sustained on the job could be advanced through the application of Maryland law.<sup>209</sup> But *Hauch* did more. In the worker's compensation area, at least, it inaugurated not just a new category, but a new methodology for working through conflicts issues, one that requires the court to balance the interests of all the involved states. In *Hauch*, the court said Maryland's law should be applied because, "although the injury did not occur in Maryland, there are greater Maryland interests."<sup>210</sup>

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201. 244 Md. 348, 223 A.2d 763 (1966).

202. *Id.* at 352-53, 223 A.2d at 765-66.

203. *Id.* at 355, 223 A.2d at 767.

204. *Id.*

205. *Id.* (emphasis added).

206. 295 Md. 120, 453 A.2d 1207 (1983).

207. *Id.* at 125, 453 A.2d at 1210.

208. See *supra* notes 60-69 and accompanying text.

209. See *supra* notes 67-68 and accompanying text.

210. 295 Md. at 133, 453 A.2d at 1214.



This became fully evident six years later in *Bishop v. Twiford*.<sup>211</sup> Bishop, a Pennsylvanian, sued Twiford, a Maryland resident, in Maryland's federal court. Both Bishop and Twiford worked for a common corporate employer, a Delaware-based corporation. Bishop was Twiford's supervisor and a passenger in a company car driven by Twiford that crashed in Maryland, causing Bishop injury. If Maryland law applied, Bishop's case could go forward; if Delaware law were applied, the co-employee suit would fail. The Fourth Circuit certified to the Court of Appeals of Maryland the question of whether *Hauch* and an earlier case, *Hutzell v. Boyer*,<sup>212</sup> required application of the law of Maryland or that of Delaware.

The *Bishop* opinion indicates full-blown acceptance of the balancing approach in cases dealing with what law should be applied to co-employee suits. The court acknowledged Maryland's strong policy of promoting compensation under both its common law of tort and its worker's compensation statute, but said that the

public policy of [Maryland] is not itself dispositive. Other factors in the present case favoring application of Maryland law are that the injury occurred in Maryland, the defendant was a resident of Maryland, and the defendant's primary place of employment is in Maryland. . . . Moreover, the situs of the employment relationship involved in the present case, *i.e.*, Bishop's supervision of Twiford . . . was largely Maryland.<sup>213</sup>

The only significant Delaware contact the court found was that the employer was headquartered there.<sup>214</sup> Given this sole contact, Delaware's interests in applying its rule paled in comparison to Maryland's.<sup>215</sup>

When reading *Bishop*, there are times that one may doubt the clarity of the court's thinking.<sup>216</sup> The court's opinion seems to be

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211. 317 Md. 170, 562 A.2d 1238 (1989).

212. 252 Md. 227, 249 A.2d 449 (1969). *Hutzell's* relationship to *Hauch* is noted *supra* notes 67-68.

213. *Bishop*, 317 Md. at 176-77, 562 A.2d at 1242.

214. The court dismissed Twiford's argument that Bishop's primary place of employment was in Delaware because it appeared that although he spent more working time there than any other single jurisdiction, he spent the majority of his working days in states other than Delaware. *Id.* The court felt it appropriate to disregard the fact that the corporation had paid medical expenses in accord with Delaware's worker's compensation statute because the payments made were also consistent with Maryland's worker's compensation statute and the record was too sketchy to determine which state's statute applied. *Id.* at 177, 562 A.2d at 1242.

215. *Id.* at 176, 562 A.2d at 1241.

216. At one point in the *Bishop* opinion, the court stated that even if under the

engaged in contact counting more than it is in defining and weighing state interests in a disciplined or coherent way.<sup>217</sup> Acknowledging that its first steps toward a new methodology for resolving conflicts issues seem clumsy cannot ignore the fact that the steps are being taken.

Nor do recent cases indicate that such steps are confined to the determination of what remedies the courts should grant or deny to people injured at work. The new public policy cases run the gamut of substantive areas of legislative concern to Maryland, reaching from insurance coverage for household members<sup>218</sup> and the regulation of gambling,<sup>219</sup> to the limiting or capping of recoveries<sup>220</sup> and the enforceability of "hold harmless" clauses in contracts.<sup>221</sup> A number of these cases appear to be seeking to avoid responsibility for judicially resolving the conflict; when they decide to enforce the other

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Maryland choice-of-law statute governing worker's compensation benefits Maryland would have found the Delaware statute applicable in determining an employer's liability for worker's compensation on the facts of the case, this still would not have been determinative of the issue of whether the plaintiff could sue a fellow employee. *Id.* at 173 n.4, 562 A.2d at 1240 n.4. This statement is hard to square with the forthright declaration, at the end of its opinion, that "Maryland's worker's compensation law, rather than Delaware's statute, is determinative," *id.* at 177, 562 A.2d at 1242, or with the whole line of cases from *Hutzell* through *Hauch* that had indicated that the right vel non to sue a co-employee was tied to the statutory scheme for assuring worker's compensation rights to the employee and limiting the employer's rights. *Cf.* *Athas v. Hill*, 300 Md. 133, 476 A.2d 710 (1984) (indicating that the rule of *Hutzell* that co-employee suits would lie in Maryland does not mean an employee can sue her supervisor, because such a suit would essentially be for his breach of the employer's duty to provide a safe work environment, and allowing it would be inconsistent with the employer's statutory immunity to common-law tort liability).

217. Early critics addressed precisely the same criticism to the first drafts of the *Second Restatement*. See, e.g., David F. Cavers, *Re-Restating the Conflict of Laws: The Chapter on Contracts*, XXTH CENTURY COMPARATIVE AND CONFLICTS LAW 349 (1961); Albert A. Ehrenzweig, *The Second Conflicts Restatement: A Last Appeal for Its Withdrawal*, 113 U. PA. L. REV. 1230 (1965). The criticism has persisted into recent years. See, e.g., RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS § 7.3D, at 378 (3d ed. 1986) (warning of "grave danger that [the *Restatement*] will be interpreted to direct the counting of physical contacts . . . and awarding the palm to the state with the 'most' contacts").
218. See *Allstate Ins. Co. v. Hart*, 327 Md. 526, 611 A.2d 100 (1992); discussion *supra* notes 140-49 and accompanying text.
219. See *Kramer v. Bally's Park Place, Inc.*, 311 Md. 387, 535 A.2d 466 (1988).
220. See *Black v. Leatherwood Motor Coach Corp.*, 92 Md. App. 27, 606 A.2d 295 (statutory cap on damages recoveries), *cert. denied*, 327 Md. 626, 612 A.2d 257 (1992); *Jacobs v. Adams*, 66 Md. App. 779, 505 A.2d 930, *cert. denied*, 306 Md. 513, 510 A.2d 259 (1986) (limitation of tort victims to no-fault remedies).
221. See *Bethlehem Steel Corp. v. G.C. Zarnas & Co.*, 304 Md. 183, 498 A.2d 605 (1985) (discussed *supra* notes 117-39 and accompanying text).

state's law, they suggest that the Maryland statute in the substantive area simply does not reach the issue,<sup>222</sup> and when they decide to enforce Maryland's law, they suggest that the Maryland statute preempts any alternative choice<sup>223</sup> or that the foreign law does not reach the issue covered by the Maryland rule.<sup>224</sup> Years ago, Brainerd Currie, the father of the "interest analysis" school for resolving conflict-of-laws issues, suggested that one solution to a number of apparent conflicts between local policies and those of other jurisdictions is to adopt a restrained and moderate construction of the forum state's policy or that of the other jurisdiction.<sup>225</sup> This is precisely what the Maryland public policy cases are doing.

The balancing is done indirectly through the process of renvoi in cases like *Bethlehem Steel Corp. v. G.C. Zarnas & Co.*,<sup>226</sup> and has been clearly acknowledged by both those who detract from the process<sup>227</sup> and those who seem to embrace it.<sup>228</sup> Without openly admitting it, the other public policy cases, like Currie and his followers,<sup>229</sup> engage in balancing forum interests against those of

222. See *supra* notes 110-11.

223. E.g., *Bethlehem Steel*, 304 Md. 183, 498 A.2d 605; see *supra* notes 117-31 and accompanying text.

224. See *Ward v. Nationwide Mut. Auto. Ins. Co.*, 328 Md. 240, 614 A.2d 85 (1992); *supra* notes 150-58 and accompanying text.

225. See CURRIE, *supra* note 1, at 186; Brainerd Currie, *The Disinterested Third State*, 28 LAW & CONTEMP. PROBS. 754, 757 (1963); Brainerd Currie, *The Silver Oar and All That: A Study of the Romero Case*, 27 U. CHI. L. REV. 1, 65-75 (1959). Currie vehemently denied that use of such moderation and restraint was the same thing as "weighing" state interests, of which he strongly disapproved. See, e.g., CURRIE, *supra* note 1, at 181-82. But, Currie himself occasionally slipped and admitted that a forum might forego applying its own law when its policy was "relatively weak," *id.* at 118, and his critics strongly condemned him for denying that weighing was necessary, see, e.g., William F. Baxter, *Choice of Law and the Federal System*, 16 STAN. L. REV. 1, 18-22 (1963); Alfred Hill, *Governmental Interest and the Conflict of Laws—A Reply to Professor Currie*, 27 U. CHI. L. REV. 463, 474-77 (1960).

226. 304 Md. 183, 498 A.2d 605 (1985); see *supra* notes 117-31 and accompanying text.

227. See, e.g., *Bethlehem Steel*, 304 Md. at 195, 498 A.2d at 611 (Rodowsky, J., dissenting); see also *supra* notes 128, 132-34 and accompanying text.

228. See *supra* note 139.

229. In discussing Currie's treatment of *Romero v. Int'l Terminal Operating Co.*, 358 U.S. 354 (1959), in *The Silver Oar and All That: A Study of the Romero Case*, 27 U. CHI. L. REV. 1 (1959), David Cavers said he saw no difference between Currie's approach and balancing state interests. See David F. Cavers, *The Changing Choice-of-Law Process*, 28 LAW & CONTEMP. PROBS. 732, 734 n.9 (1963). Currie came close to admitting as much in a later piece. See Brainerd Currie, *The Disinterested Third State*, 28 LAW & CONTEMP. PROBS. 754 (1963). Professor Ehrenzweig indicated that, "as far as I can see, all courts and writers who have professed acceptance of Currie's interest language have transformed it by indulging in that very weighing and balancing of interests

other states through ad hoc narrowing or broadening of the stated scope of domestic and foreign rules.

As in the early development of the co-employee suit cases, the public policy balancing act that the courts in Maryland are practicing is clumsy. It is difficult to reconcile the reasoning in one case to that of another or to predict when a Maryland public policy will be found relevant and strong enough to displace a foreign rule. The court of special appeals' recent, and almost deliberate, avoidance of public policy arguments<sup>230</sup> indicates that confusion is so great that it is time, as suggested by that court, to consider a new approach—reconsideration of Maryland's continued adherence to the *First Restatement*.

### III. CONCLUSION

Nearly thirty years ago, in *White v. King*,<sup>231</sup> the Court of Appeals of Maryland declined to develop a new theory because, it said, the certainty secured by the *First Restatement* should not "be lightly discarded" given "the [then] present state of the law."<sup>232</sup> *White* was a guest-host immunity case brought in the aftermath of New York's abandonment of *lex loci delicti* in a similar guest-host case three years earlier in *Babcock v. Jackson*.<sup>233</sup> At the time *White* was decided only four states had abandoned *lex loci* in tort cases<sup>234</sup> and the *Second Restatement*, though it had been in development since 1953, was five years short of its 1971 adoption date. The rest of the country at least formally adhered to the *First Restatement* "monolith."<sup>235</sup> Today, the American legal landscape is entirely different. The *Second Restatement* is the "majority rule" and the adherents of the *First Restatement* have become a stubborn, but consistently dwindling, minority.<sup>236</sup> Moreover, commentators today are in substantial agreement that, while there remains considerable flux in the law, "an

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from which Currie refrained." Albert A. Ehrenzweig, *A Counter-Revolution in Conflicts Law? From Beale to Cavers*, 80 HARV. L. REV. 377, 389 (1966).

230. See *Commercial Union Ins. Co. v. Porter Hayden Co.*, 97 Md. App. 442, 630 A.2d 261, cert. granted, 333 Md. 201, 634 A.2d 62 (1993) (discussed *supra* notes 159-63 and accompanying text).

231. 244 Md. 348, 223 A.2d 763 (1966).

232. *Id.* at 355, 223 A.2d at 767; see discussion *supra* notes 3-4 and accompanying text.

233. 191 N.E.2d 279 (N.Y. 1963).

234. In addition to the New York decision in *Babcock*, there had been similar guest-host immunity decisions in *Clark v. Clark*, 222 A.2d 205 (N.H. 1966), and *Wilcox v. Wilcox*, 133 N.W.2d 408 (Wis. 1965), and a rejection of *lex loci delicti* in order to avoid the state of the wrong's limitation on death damages in *Griffith v. United Air Lines, Inc.*, 203 A.2d 796 (Pa. 1964).

235. See Patrick J. Borchers, *The Choice-of-Law Revolution: An Empirical Study*, 49 WASH. & LEE L. REV. 357, 359 (1992).

236. See *supra* notes 6-7 and accompanying text.

accommodation is taking place" under developing case law<sup>237</sup> and that "the courts are combining the scholarly theories in an eclectic (or ecumenical) fashion that is gradually producing a fairly consistent body of law on choice of law."<sup>238</sup>

Changes in the legal landscape much less marked than that in American conflicts law have previously led the Court of Appeals of Maryland to reexamine earlier cases in other areas. For example, in *Julian v. Christopher*,<sup>239</sup> the court of appeals overruled its prior holding concerning "silent consent" clauses in residential leases. In *Jacobs v. Klawans*,<sup>240</sup> the court held that when a lease contained a clause prohibiting a tenant from subletting or assigning without the landlord's consent, the landlord had a right to withhold consent even though such action was arbitrary and unreasonable. In rejecting the stare decisis impact of the earlier case, the court of appeals pointed out that at the time *Klawans* was decided the *Restatement (First) of Property*<sup>241</sup> and the overwhelming weight of authority were consistent with it, but that in the ensuing years the *Restatement (Second) of Property*,<sup>242</sup> as well as a substantial and burgeoning minority of state courts, had created a solid trend in the opposite direction.<sup>243</sup> These changes made it much easier for the court of appeals to recognize that public policies against restraints on alienation and in favor of good faith and fair dealing in contractual relations justified a new rule that prevented arbitrary and capricious landlord limitations on a tenant's ability to sublet or assign her lease.<sup>244</sup>

Even before recent cases began to transform the local law of conflicts in Maryland, there was some question whether Maryland conflicts law was as certain and predictable as adherents to the older view would have us believe. During recent years, while conflicts law has undergone a seachange outside Maryland, the Maryland courts have almost imperceptibly moved away from what would have been permissible under the territorialist strictures of Professor Beale and the *First Restatement*.

The changes in Maryland conflicts law have created tensions that threaten to shred the bonds of territorialist theory that have held it together and made it coherent for so long. Maryland conflicts law has moved into uncertainty at precisely the time that conflicts law

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237. SCOLES & HAY, *supra* note 7, § 2.16, at 41.

238. LEFLAR, *supra* note 2, § 4, at 8 (footnote omitted).

239. 320 Md. 1, 575 A.2d 735 (1990).

240. 225 Md. 147, 169 A.2d 677 (1961), *overruled by* *Julian v. Christopher*, 320 Md. 1, 575 A.2d 735 (1990).

241. *See* RESTATEMENT (FIRST) OF PROPERTY § 410 (1944).

242. *See* RESTATEMENT (SECOND) OF PROPERTY § 15.2 (1977).

243. *Julian*, 320 Md. at 4-6, 575 A.2d at 736-37.

244. *Id.* at 8, 575 A.2d at 738.

in the rest of the country is beginning to gel and to develop precedents that courts in other jurisdictions are using to create a predictable body of conflicts law. It is time for the Court of Appeals of Maryland to take a fresh look at the issues presented in *White v. King*, with a view toward overruling it.

Even if Maryland conflicts doctrine was not unstable, Maryland lawyers would face a daunting task in working through choice-of-law problems for their clients. As more and more clients encounter problems arising from activities in far flung places, increasingly involving foreign countries as well as other states, the need to be familiar with the rules and conventions of other states grows. The ability to quickly access their local law and to assess the likelihood of its being applied has long been important for Maryland attorneys.<sup>245</sup>

The fact that other states' choice-of-law regimes differ so radically from Maryland's complicates this task immensely, because it compels Maryland lawyers not only to be able to evaluate how a case may come out in Maryland's courts, but also to determine how the same case might come out under substantially different sets of choice-of-law principles of other states. The fact that Maryland's courts have so long held onto traditional principles while most other states' conflicts jurisprudence has been thoroughly overhauled has created a wide gulf between Maryland doctrine and foreign doctrine, such that some Maryland practitioners may have difficulty even comprehending the language and structure of foreign conflicts law, much less its details. This vastly increases the time needed to shop fora. Thus, in an almost perverse way, the Maryland courts' refusal to change likely complicates the task of Maryland lawyers and increases the cost of the services they render to Maryland clients, rather than simplifying the lawyers' task and making the rendition of their services cheaper to Maryland clients.

Formal adherence to the requirements of the *First Restatement* imposes other costs as well. The *First Restatement* leads to unjust results in many "false conflicts" cases, or those where only one state's legislative interest would be advanced by application of its rule, and the issue is beyond the legitimate legislative concern of the other state.<sup>246</sup> The easiest examples to identify involve the guest-host

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245. See *supra* note 5.

246. Brainerd Currie is the leading proponent of the "false conflict" doctrine, asserting that when one occurs, all states should agree that the law which should apply is that of the only state whose policy interests would be advanced through application of its law. See, e.g., CURRIE, *supra* note 1, at 107, 110. A wide variety of writers agree with him. See DAVID F. CAVERS, *THE CHOICE OF LAW PROCESS* 82-89 (1965); Arthur T. von Mehren, Book Review, 17 J. LEGAL ED. 91, 92 (1964) (reviewing BRAINERD CURRIE, *SELECTED ESSAYS ON*

immunity cases. There were a lot of things wrong with *Sacra v. Sacra*,<sup>247</sup> but the chief error was the view that Delaware had a legitimate interest in preventing the recovery simply because some of the facts transpired there; in truth, on the facts of that case, only Maryland was legitimately concerned with who should recover and who should not. Every one of the Maryland guest-host cases, from *White v. King*<sup>248</sup> onward,<sup>249</sup> applied the law of the "place of the wrong," rather than the law of the state that was the common domicile of the parties, the state where their relationship was rooted, and the state where the car involved was garaged and insured. The argument that prevailed in *Babcock v. Jackson*<sup>250</sup>—that the only state whose policy interests were seriously implicated was the state where the parties came from, where their relationship had its seat, and where the principal risk of insurance was centered—is based on a clear-headed analysis of the purposes with which guest immunity statutes are drafted and the reasons why they have been rejected. *Babcock*, hailed by both Brainerd Currie<sup>251</sup> and Willis Reese,<sup>252</sup> the leading proponent of the *Second Restatement*, as an excellent example of the brand of conflicts jurisprudence each was advocating, came out right; the Maryland cases were wrong.

The guest-host immunity cases are not the only Maryland cases that have been wrongly decided in recent years. False conflicts cases abound in Maryland jurisprudence. There was no reason for Maryland to apply its statute of limitations in such a way as to entertain *Johnson v. G.D. Searle & Co.*,<sup>253</sup> an Illinois tort claim by Illinois claimants against an Illinois defendant, when the action would have been time-barred under the law of the state from which the case originated.<sup>254</sup>

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THE CONFLICT OF LAWS (1963)). Even followers of the *Second Restatement* concede its utility as a concept. See, e.g., SCOLES & HAY, *supra* note 7, at 17-18.

247. 48 Md. App. 163, 426 A.2d 7 (1981) (discussed *supra* notes 79-89 and accompanying text).

248. 244 Md. 348, 223 A.2d 763 (1966).

249. In addition to *Sacra*, the cases include *Brady v. State Farm Mutual Auto. Ins. Co.*, 254 Md. 598, 255 A.2d 427 (1969); *Cook v. Pryor*, 251 Md. 41, 246 A.2d 271 (1968); and *Earl v. Anchor Pontiac-Buick, Inc.*, 246 Md. 653, 229 A.2d 412 (1967).

250. 191 N.E.2d 279 (N.Y. 1963).

251. See *Comments on Babcock v. Jackson, A Recent Development in Conflict of Laws*, 63 COLUM. L. REV. 1212, 1235 (1963).

252. *Id.* at 1253.

253. 314 Md. 521, 552 A.2d 29 (1989) (discussed *supra* note 40).

254. A court applying interest analysis would certainly not have entertained *Johnson*. See, e.g., *Heavner v. Uniroyal, Inc.*, 305 A.2d 412 (N.J. 1973). As originally promulgated in 1971, § 142 of the *Second Restatement* characterized statutes of limitations as procedural and required a forum reference, but the section was revised in 1986 to reach the same result as that reached in cases like *Heavner*.

There was no reason in *Harrison v. Prentice*<sup>255</sup> for Maryland to give the estranged British husband of a deceased British wife land situated in Maryland, when the state concerned with the distribution of her estate and the protection of her spouse would have cut him off clean. There was no reason, in *Commercial Union Insurance Co. v. Porter Hayden Co.*,<sup>256</sup> to validate and enforce an insurance contract that insured against Maryland risks simply because the contract was brokered in New York. The fact is that from its inception, the territorialist regime of the *First Restatement* has repeatedly forced courts in Maryland to refuse to apply the law of the state with the most significant contacts with the case,<sup>257</sup> thus inducing the wrong result.<sup>258</sup>

Of course, not all cases are "false conflicts;" not all can be resolved correctly as easily as the cases just discussed. But there are

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255. 183 Md. 474, 38 A.2d 101 (1944) (discussed *supra* notes 26, 200). Professor Weintraub has thoroughly analyzed and severely criticized the blanket application of the situs rule in real estate cases in his *Commentary on the Conflict of Laws*. See WEINTRAUB, *supra* note 185, §§ 8.1-8.22. He believes that under his "functional analysis"—a modernized variant of Currie's interest analysis—the situs rule should frequently give way, and suggests that there is evidence in recent cases of this trend. *Id.* § 8.21A. As he points out, the *Second Restatement* refers almost all issues regarding land to the law of the situs, although it does suggest that "situs courts 'might' apply the law of the marital domicile in determining marital property rights and explains that they 'might do so for the reason that [the marital domicile] is the state which has the dominant interest in the parties.'" *Id.* § 8.21A n.2 (quoting SECOND RESTATEMENT, *supra* note 2, § 233 cmt. b). Thus, there is a bare possibility that a *Second Restatement* court might not follow the situs rule of *Harrison*.
256. 97 Md. App. 442, 630 A.2d 261, cert. granted, 333 Md. 201, 634 A.2d 62 (1993) (discussed *supra* notes 159-63).
257. In addition to the guest-host cases and *Commercial Union Ins. Co. v. Porter Hayden Co.*, see, for example, *Debbis v. Hertz Corp.*, 269 F. Supp. 671 (D. Md. 1967). In *Debbis*, Judge Kaufman considered a wrongful death claim involving the death of a Maryland resident against the Hertz Corporation, a national corporation authorized to do business in Maryland, after plaintiff's decedent was killed in West Virginia by a negligently maintained Hertz vehicle leased to Virginia drivers in Virginia. West Virginia law regarding recovery of damages for wrongful death was considerably less generous than was Maryland's, but Judge Kaufman concluded that under *White v. King* he was bound to apply the West Virginia rule. Judge Kaufman noted that the then-current draft of the *Second Restatement*, which, like the final version, required application of the law of the state with the most significant relationship with the transaction and the parties, would probably mandate application of Maryland law, but specifically found that *White* foreclosed consideration of the *Second Restatement* and instead required application of *lex loci delicti*. See *Debbis*, 269 F. Supp. at 674-75.
258. See *supra* notes 245-55 and accompanying text. At the very least, the results in these Maryland cases are inconsistent with what interest analysis or a liberal reading of the *Second Restatement* would require.



ways of resolving many conflict-of-laws problems in a completely above-board, rational way, and courts have gone a long way since the days of Brainerd Currie and the drafting of the *Second Restatement* in demonstrating how this can be accomplished.<sup>259</sup>

It has been pointed out that most of the states that rejected the *First Restatement's* *lex loci delicti* rule did so when confronted with cases where application of the doctrine entailed reaching an unjust result, such as application of a guest statute, intrafamily immunity, damage limitations in wrongful death cases, or other anachronistic tort rules applied in such a way as to needlessly harm forum residents.<sup>260</sup> Maryland's *White v. King* line of cases<sup>261</sup> are exceptions to this trend; when faced with a hard decision, Maryland's courts held onto bad law.<sup>262</sup> Times have now changed, and there is no need to continue to ignore results. Maryland courts should now move on, abandoning at long last *lex loci delicti* and the *First Restatement*. There is now a reasonably consistent doctrine abroad to which Maryland courts could look in developing a new approach to conflicts problems. This would clarify the inconsistencies in recent Maryland case law and lead, in the long run, to a more stable and predictable set of rules that would facilitate the accessibility of the legal system to people here, the protection of Maryland interests where Maryland policies need enforcement, and a more uniform treatment of cases in courts here and in other states. It would also go a long way toward eliminating the dysfunctional tendencies of territorialist rules that ignore the underlying policies of states whose interests are at stake in conflicts problems, making Maryland cases not only more predictable and certain, but also, most importantly, more just.

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259. See *supra* notes 236-37.

260. See BORCHERS, *supra* note 6, at 380-81.

261. See *supra* notes 246-48 and accompanying text.

262. As indicated in the text, most of the states that changed from the *First Restatement* to another system did so when the alternative choice of adhering to it would lead to unjust results, needlessly robbing local citizens of rights they would have had under local law. Indeed, aside from the *White v. King* line of cases in Maryland, since 1963, Virginia is the only state whose highest court has rigidly adhered to the *First Restatement* at the cost of substantial justice. See *McMillan v. McMillan*, 253 S.E.2d 662 (Va. 1979) (holding that a Virginia wife was foreclosed from recovery for injuries sustained in a Tennessee auto accident in which her husband was the driver because of a Tennessee interspousal immunity doctrine). More commonly, when states are faced with such hard choices they have employed one or more escape devices. See, e.g., *Paul v. National Life*, 352 S.E.2d 550 (W. Va. 1986) (public policy used to avoid intrafamily immunity doctrine of accident state); *Haumschild v. Continental Casualty Co.*, 95 N.W.2d 814 (Wis. 1959) (majority uses characterization; concurrence uses *renvoi* to escape interspousal immunity doctrine of accident state).