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Interest Analysis or the Restatement Second of Conflicts: Which is the Preferable Approach to Resolving Choice-of-Law Problems?

David E. Seidelson*

For some time I operated under the benign assumption that interest analysis¹ and the “most significant relationship” test of the Restatement Second of Conflict of Laws² were, if not simply different manifestations of the same concept, at least similar or complementary in approach. That assumption became increasingly more difficult to sustain. At first, I thought that the divergence in result occurred because some courts did not fully comprehend either approach. I still think that some courts may not fully comprehend either approach; however, I have concluded that the two approaches are different and were intended to be different. More specifically, the Restatement Second approach was intended to be different from interest analysis.³ That being the case, it becomes

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1. See *infra* note 3.

2. RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 145 & 188 (1969) [hereinafter RESTATEMENT (SECOND)].

3. See generally Reese, *The Second Restatement of Conflict of Laws Revisited*, 34 MERCER L. REV. 501 (1983) [hereinafter Reese] (Professor Willis L. M. Reese was Reporter of The Second Restatement of Conflict of Laws (1969)).

A criticism made of the Restatement Second by a number of writers is that it does not give proper emphasis to what, in their opinion, is the only — or at least the principal — value in choice of law. This is that the court should look to the policies underlying the potentially applicable local law rules of the state [sic] having contacts with the case and then, according to the particular writer’s point of view, apply either the rule of the state with the greatest interest in the decision of the particular issue or the rule of the forum if the policy sought to be effectuated by that rule would be furthered by such application. If these writers are correct, the Restatement Second is plainly wrong. It takes the position that this value, although important, does not stand alone and that there are other values to be considered. This insistence that there are a number of relevant values is a primary reason for what can be justly termed the vagueness of some of the Restatement Second formulations. In defense, it can be said that a balancing of values inevitably will be an uncertain process until it is finally determined which of these values should carry the greatest weight in a given situation. In many instances, such a time has not yet come.

appropriate to determine which approach is preferable and why. For me, the choice is an easy one. I prefer interest analysis.⁴ Why? Perhaps an examination of some cases will help explain my preference.

Id. at 518.

The Restatement Second provisions on choice of law can be described as eclectic in nature since they rely on a variety of different theories and values. Among other things, they place emphasis upon territory, namely, upon the state where an act or event occurred, where a thing is located, where a person is domiciled or a resident, or where an organization has its headquarters or place of business.

Id. at 508 (footnote omitted).

Apart from section 6, which sets forth the basic values, the remaining sections of the Restatement Second on choice of law place emphasis on territory.

Id. at 513 (footnote omitted).

4. I retain that preference for interest analysis despite the fact that Professor Reese has written:

Some writers would have us believe that regard for the policies underlying the relevant local law rules of the concerned states should be the only value that need be considered in choice of law.⁸³ Such a simplistic view must be rejected.

Id. at 510-11. Footnote 83 to the above excerpt reads: "See, e.g., Seidelson, *Interest Analysis: The Quest for Perfection and the Frailties of Man*, 19 DUQ. L. REV. 207 (1981)." *Id.* at 511.

On the other hand, Professors William M. Richman and William L. Reynolds have written:

Other attempts have been made to build a theoretical model that would resolve true conflicts. Professor Seidelson, for example, posits second and third levels of inquiry once a true conflict has been identified. Those inquiries would determine whether a state has a "minimal interest" in the litigation and then determine with an "enhanced degree of specificity" the exact impact of possible holdings.²⁶ Such attempts by scholars may help judges, other scholars, and students understand the difficulty of the task before the court. Because of their complexity, however, it is doubtful whether the practical impact of such models will be significant.

W. RICHMAN & W. REYNOLDS, UNDERSTANDING CONFLICT OF LAWS 188 (1984). Footnote 26 to the above excerpt reads: "Seidelson, *Interest Analysis: The Quest for Perfection and the Frailties of Man*, 19 DUQ. L. REV. 207, 226-29 (1981)." *Id.*

I seem to stand accused of being simultaneously simplistic and unduly complex. Perhaps I am guilty on both counts. That verdict I leave to the reader. I have never suggested that a court confronted with a true conflict, a case in which each state has a significant interest in the application of its own local law, should consider each state's minimal interest in the litigation. To do that would be to generate a potentially spurious internal conflict on the part of one or both states. See Seidelson, *Interest Analysis: The Quest for Perfection and the Frailties of Man*, *supra*, at 225-26. I have suggested that a court confronted with a negative standoff, a case in which neither state has a significant interest in the application of its own local law, should consider each state's minimal interest in the litigation and how that minimal interest would best be served. *Id.* Almost invariably, such an inquiry will reveal that each state has a minimal interest in the litigation best served by the other state's local law. Thus, the negative standoff will be converted into a true conflict and the court will be able to resolve the conflict by determining which state's minimal interest in the litigation is the more significant and by applying the local law that serves that interest. *Id.* at 225-27. See *infra* text accompanying note 85 for a discussion and demonstration of that technique.

In *Gaither v. Myers*,⁵ defendant, domiciled in the District of Columbia, left his station wagon parked there with the keys in the tailgate. A thief stole the vehicle. As a result of the thief's negligent driving, the wagon collided with an automobile in Maryland, some five miles from the District line. The thief, of course, fled the scene. Plaintiff, a Maryland domiciliary, sued defendant in the District of Columbia to recover for the personal injuries and property damage plaintiff had sustained when his car was struck by the station wagon.⁶ The District had a traffic code provision that made it illegal to leave an unattended parked vehicle without removing the keys.⁷ The local law of the District imposed civil liability on the neglectful parker for injuries inflicted by the negligent driving of one who stole the vehicle.⁸ It was that law that plaintiff asserted. Maryland had an identical traffic code provision.⁹ Under Maryland's local law, however, one who violates the provision is not civilly liable for injuries resulting from the negligent driving of a thief.¹⁰ Defendant argued that Maryland local law should be applied.¹¹

The late Judge Leventhal resolved the choice-of-law problem by using interest analysis. The first step was to identify the reasons underlying each state's local law. Judge Leventhal discerned two reasons underlying the District's law: conduct regulation and affording the victim a financially responsible defendant.¹² Next he was required to determine whether either of those underlying reasons converted into a significant interest on the part of the District in having its law applied to this case. The conduct regulating purpose was aimed at deterring the conduct prohibited by the traffic code provision.¹³ When a law has a conduct regulating reason, that reason will convert into a significant interest on the part of the state having such a law in having that law applied if: (1) the con-

5. 404 F.2d 216 (D.C. Cir. 1968).

6. *Id.* at 218.

7. *Id.* at 220. "No person driving or in charge of a motor vehicle shall permit it to stand unattended without first stopping the engine, locking the ignition and removing the key . . ." D.C. Traf. & Motor Veh. Regs. art. XIV, § 98 (1970).

8. *Gaither v. Myers*, 404 F.2d 216, 220 (D.C. Cir. 1968). See *Ross v. Hartman*, 139 F.2d 14 (D.C. Cir. 1943).

9. 404 F.2d at 221 & n.17 (citing MD. ANN. CODE art. 66-½, § 11-1101 (1957), recodified and amended at MD. TRANSP. CODE ANN. § 21-1101 (1977)).

10. 404 F.2d at 221 & n.18 (citing *Liberto v. Holfeldt*, 221 Md. 62, 155 A.2d 698 (1959)).

11. *Id.* at 220-21.

12. *Id.* at 222-23.

13. *Id.*

duct intended to be regulated occurred within that state; or (2) the immediate consequences of that conduct occurred within that state; or (3) the ongoing consequences of that conduct will be felt within that state.¹⁴ Although the immediate consequences of the defendant's conduct occurred in Maryland where the collision occurred and the ongoing consequences of that conduct would be felt in Maryland where the plaintiff was domiciled, the conduct itself (leaving the unattended vehicle without removing the keys) had occurred in the District. Therefore, the District had a significant interest in the application of its liability imposing law to this case; and so Judge Leventhal concluded.¹⁵

How about the second reason for the District's law, to provide the victim with a financially responsible defendant; did that convert into a significant interest on the part of the District in having its law applied? My answer would be no. I would be inclined to read that reason as one aimed at assuring that the victim of the thief's negligent driving did not become an indigent ward of the District. Since plaintiff was domiciled in Maryland, not the District, his potential indigence would not be felt in the District. Judge Leventhal concluded otherwise. Although noting that "this compensatory policy has the greatest relevance to cases . . . when District residents are plaintiffs,"¹⁶ he concluded, on the basis of historical and contemporary considerations, that Maryland domiciliaries too were within the class intended to be protected by the District's law.¹⁷ Consequently, Judge Leventhal concluded that

14. *Id.*

Presumably, a state's interest in regulating conduct rests on a desire to avoid the immediate or continuing adverse consequences made possible by such conduct. Consequently, if the conduct occurs within the state, thereby generating its reasonably foreseeable consequences within the state, or the immediate consequences occur within the state, or the continuing consequences will be felt within the state, the state's interest in conduct regulation converts into a significant interest.

Seidelson, *Interest Analysis: The Quest for Perfection and the Frailties of Man*, *supra* note 4, at 239.

The District has a strong policy of deterrence of auto theft. That policy must be viewed in the light of the probabilities of consequential hazards. This perspective fosters our conclusion that there is a significant District of Columbia interest in the application of the District rule of liability to an actor who leaves his car keys accessible to a thief in the District and sets in motion the sequence of events that enlarges the probability of, and in a significant number of instances contributes to, results of death, disability and destruction.

Gaither v. Myers, 404 F.2d 216, 223 (D.C. Cir. 1968) (footnotes omitted).

15. 404 F.2d at 222-23.

16. *Id.* at 223.

17. *Id.*

each of the reasons underlying the District's law converted into a significant interest on the part of the District in having its law applied.

What was the reason underlying Maryland's local law that would not impose civil liability on the neglectful parker? Maryland views the intervening conduct of the thief superseding as a matter of law.¹⁸ Its local law, then, existed to protect the economic integrity of merely neglectful parkers domiciled in Maryland. Since the defendant was domiciled in the District, not Maryland, the reason underlying Maryland's law did not convert into a significant interest on the part of Maryland in having its law applied to the case; and so the court concluded.¹⁹ Interest analysis demonstrated that the case presented a false conflict: although the local laws of the two states were different, only the District had a significant interest in the application of its local law. In those circumstances, of course, the District's law would be applied. Judge Leventhal, however, did not stop there. Rather, having concluded that Maryland had no significant interest in the application of its local law, he recognized the propriety of inquiring as to whether Maryland had some minimal interest in the litigation and, if so, how that minimal interest would best be served.²⁰ Because the plaintiff was domiciled in Maryland, that state did indeed have a minimal interest in the litigation: assuring that its domiciled plaintiff did not become an indigent ward of that state. Obviously, that minimal interest in the

However, to confine the benefits of the *Ross* rule to the territory ceded by the states of Maryland and Virginia to form the Nation's Capital would be to shun the present reality of the economically and socially integrated greater metropolitan area. It is a commonplace that residents of Maryland are part of the Washington metropolitan trading area, and that District residents and businesses have an interest in the well-being of these citizens of the Free State.

Id.

18. *Id.* at 221 (citing *Liberto v. Holfeldt*, 221 Md. 62, 155 A.2d 698 (1959)).

19. *Gaither v. Myers*, 404 F.2d 216, 224 (D.C. Cir. 1968). "[That] interest of Maryland in curtailing liability of a car owner, would not seem to extend to an owner like our defendant, who is not a citizen of Maryland but rather a resident of the District of Columbia." *Id.*

20. *Id.* at 223-24. Once concluding that Maryland had no significant interest in the application of its local law, the court was free to determine that Maryland had a minimal interest in the litigation and that such minimal interest would best be served by the District's law, without generating a spurious internal conflict on the part of Maryland. Because the defendant was domiciled in the District, Maryland's minimal interest in the economic integrity of its domiciled plaintiff could be served (by application of the District's law) without imposing liability on any Maryland domiciled neglectful parker. "This seems especially true where it is a Maryland citizen who is being compensated for his injuries. It is obvious that the finding of such liability would in no way violate the other interest of Maryland" *Id.* at 224.

litigation on the part of Maryland would best be served by the application of the District's law imposing liability on the defendant. That result, application of the District's law, was wholly appropriate once it was determined that the case presented a false conflict. Application of the District's law was demonstrated to be the most nearly perfect result attainable by the court's sensitivity to Maryland's minimal interest in the litigation and the court's recognition that that Maryland interest would be best served by the District's law.²¹

How would the same choice-of-law problem be resolved under the approach of the Restatement Second? Presumably, the court would begin with section 6, "Choice-of-Law Principles":

(1) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.²²

Hardly anyone could quarrel with that conclusion. Indeed, an interest analysis court, finding that the legislature of the forum state had enacted a conflicts statute applicable to the case before the court and producing a constitutional result, would comply with that statutory conflicts law.²³ Of course, more often than not, no such statutory conflicts law will exist. Then subsection (2) of section 6 comes into play:

(2) When there is no such directive, the factors relevant to the choice of the applicable rule of law include

- (a) the needs of the interstate and international systems,
- (b) the relevant policies of the forum,
- (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
- (d) the protection of justified expectations,
- (e) the basic policies underlying the particular field of law,
- (f) certainty, predictability and uniformity of result, and
- (g) ease in the determination and application of the law to be applied.²⁴

How would Section 6(2)(a), "the needs of the interstate . . . system,"²⁵ apply to *Gaither v. Myers*? I confess I'm not sure. Moreover, I find little assistance in the Comment to Section 6(2)(a). The Comment does indicate that "[c]hoice-of-law rules . . . should seek to further harmonious relations between states In formulat-

21. See *supra* note 20.

22. RESTATEMENT (SECOND), *supra* note 2, § 6(1).

23. One of the most common examples of such a statutory conflicts law exists in U.C.C. § 1-105 (1977), the basic conflicts rule for U.C.C. regulated transactions.

24. RESTATEMENT (SECOND), *supra* note 2, § 6(2).

25. *Id.* § 6(2)(a).

ing rules of choice of law, a state should have regard for the needs and policies of other states and of the community of states."²⁶ Perhaps Judge Leventhal's sensitivity to Maryland's minimal interest in the litigation and his recognition that that interest would best be served by the District's law, both a product of interest analysis, would be consonant with section 6(2)(a). The language of sections 6(2)(b) and (c), "the relevant policies of the forum"²⁷ and "the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,"²⁸ seem to complement the interest analysis engaged in by the court. "[T]he protection of justified expectations,"²⁹ seems to have little relevance to the facts of *Gaither v. Myers*. As the Comment indicates:

There are occasions, particularly in the area of negligence, when the parties act without giving thought to the legal consequences of their conduct or to the law that may be applied. In such situations, the parties have no justified expectations to protect, and this factor can play no part in the decision of a choice-of-law question.³⁰

Section 6(2)(e), "the basic policies underlying the particular field of law,"³¹ also seems irrelevant to *Gaither*. The Comment provides:

This factor is of particular importance in situations where the policies of the interested states are largely the same but where there are nevertheless minor differences between their relevant local law rules. In such instances, there is good reason for the court to apply the local law of that state which will best achieve the basic policy, or policies, underlying the particular field of law involved.³²

In *Gaither*, the local laws of the two states, one plaintiff-favoring, the other defendant-favoring, were hardly reflective of similar policies.

Section 6(2)(f), "certainty, predictability and uniformity of result,"³³ is a fascinating factor. How would it apply to *Gaither v. Myers*? If the "certainty, predictability and uniformity of result"³⁴ to be achieved means that the court confronted with the choice-of-law problem should attempt to arrive at the same result that

26. *Id.* § 6(2) comment *d.*

27. *Id.* § 6(2)(b).

28. *Id.* § 6(2)(c).

29. *Id.* § 6(2)(d).

30. *Id.* § 6(2) comment *g.*

31. *Id.* § 6(2)(e).

32. *Id.* § 6(2) comment *h.*

33. *Id.* § 6(2)(f).

34. *Id.*

would be achieved by a court sitting in the other state whose local law may be applicable, the court in *Gaither* should have attempted to determine how a Maryland court, confronted with the same choice-of-law problem, would have resolved it. The Maryland courts have declined invitations to adopt any policy-based approach to resolving choice-of-law problems in tort actions. They prefer the ease of application and predictability of result afforded by *lex loci delicti*.³⁵ Thus, a Maryland court confronted with the facts of *Gaither v. Myers* probably would have applied the local law of Maryland, the state where the plaintiff was injured. Had the court in the District opted for "uniformity of result" between Maryland and the District, it too would have applied Maryland local law. Wouldn't that be just a bit peculiar? To achieve that kind of uniformity, a forum having rejected a mechanical application of *lex loci delicti* in favor of a policy-based approach would find that very determination undermined in every case in which the other potentially interested state had elected to retain *lex loci delicti*. Is that what section 6(2)(f) contemplates? Perhaps, perhaps not. The Comment provides that:

[Predictability and uniformity of result] are important values in all areas of the law. To the extent that they are attained in choice of law, forum shopping will be discouraged. These values can, however, be purchased at too great a price. In a rapidly developing area, such as choice of law, it is often more important that good rules be developed than that predictability and uniformity of result should be assured through continued adherence to existing rules.³⁶

Does that mean that the forum's "good rule," interest analysis, for example, should not be subverted by the other state's "adherence

35. See, e.g., *White v. King*, 244 Md. 348, 223 A.2d 763 (1966) (applying Michigan guest statute through *lex loci delicti* to action by Maryland passenger against Maryland driver); *Sacra v. Sacra*, 48 Md. App. 163, 426 A.2d 7 (Md. Ct. Spec. App. 1981) (applying Delaware guest statute through *lex loci delicti* where collision occurred on Delaware side of Delaware-Maryland border). In *Hauch v. Connor*, 295 Md. 120, 453 A.2d 1207 (1983), the court declined to apply the law of Delaware, the state where the collision occurred, and applied the law of Maryland, domicile of the litigants and the place of their common employment, in determining if plaintiff could maintain a tort action against a co-employee. *Hauch* implied the possibility that Maryland might be on the verge of repudiating *lex loci delicti*. The implication, however, was negated in *Jacobs v. Adams*, 66 Md. App. 779, 505 A.2d 930 (Md. Ct. Spec. App. 1986), *cert. denied*, 306 Md. 513, 510 A.2d 259 (1986), *cert. denied*, 306 Md. 514, 510 A.2d 260 (1986). In *Jacobs*, the court applied the District of Columbia's no-fault insurance law through *lex loci delicti* to collisions occurring in the District, notwithstanding the fact that plaintiffs and defendants were domiciled in Maryland. The court read *Hauch* as confirming the general vitality of *lex loci delicti*.

36. RESTATEMENT (SECOND), *supra* note 2, § 6(2) comment *i*.

to" *lex loci delicti*? I'd like to think so. Indeed, the quoted language from the Comment so indicates. But there is one small hooker. As we shall see, the Restatement itself seems to manifest a territorial bias that often points toward *lex loci delicti*.³⁷ That being the case, it isn't entirely clear that, in the Restatement Second view, there would be anything wrong with Maryland's "continued adherence to" *lex loci delicti*.

The factors set forth in section 6(2)(g), "ease in the determination and application of the law to be applied,"³⁸ seem to explain Maryland's retention of *lex loci delicti*. But how do they apply to a court that has rejected that mechanical approach? Presumably, a court having rejected *lex loci delicti* for a policy-based approach has concluded that the ease of the former is outweighed by the rationality of the latter. Section 6(2)(g), directed to such a court, seems to imply that the court erred in repudiating *lex loci delicti*. The Comment to section 6(2)(g) seems to send a mixed message to such a court: "Ideally, choice-of-law rules should be simple and easy to apply. This policy should not be overemphasized, since it is obviously of greater importance that choice-of-law rules lead to desirable results. The policy does, however, provide a goal for which to strive."³⁹

It should be remembered, however, that section 6 presents only the general "Choice-of-Law Principles." "The General Principle" applicable to tort actions in particular is set forth in section 145:

(1) The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties under the principles stated in § 6.

(2) Contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:

(a) the place where the injury occurred,

(b) the place where the conduct causing the injury occurred,

(c) the domicile, residence, nationality, place of incorporation and place of business of the parties, and

(d) the place where the relationship, if any, between the parties is centered.

These contacts are to be evaluated according to their relative importance with respect to the particular issue.⁴⁰

How would the "contacts" enumerated in section 145(2)(a) through (d) influence a court deciding *Gaither v. Myers*, bearing in

37. See text accompanying *infra* note 46.

38. RESTATEMENT (SECOND), *supra* note 2, § 6(2)(g).

39. *Id.* § 6(2) comment j.

40. *Id.* § 145.

mind that those contacts "are to be evaluated according to their relative importance with respect to the particular issue"?⁴¹ Maryland was the place where the injury occurred. Maryland's law, however, not imposing civil liability on the neglectful parker, would seem to have nothing to do with preventing such injuries. The District was the place where the conduct of the defendant occurred and, as we have seen, given the conduct regulating purpose of the District's law, that "contact" converted into a significant interest on the part of the District in having its liability imposing law applied. Plaintiff's Maryland domicile would be germane in determining whether the other purpose of the District's law, providing the victim with a financially responsible defendant, converted into a significant interest on the part of the District in having its law applied. Because I believe that the District's compensatory policy is aimed at preventing District domiciliaries from becoming indigent wards of the District, I would conclude that plaintiff's Maryland domicile led to the conclusion that that second reason for the District's law did not convert into a significant interest on the part of the District in having its law applied. As we have seen, Judge Leventhal read the class of victims to be thus protected broadly enough to include Maryland domiciliaries; thus he concluded that the compensatory policy did convert.⁴² The defendant's domicile in the District removed him from the class of neglectful parkers whose economic integrity Maryland wished to protect.⁴³ Therefore, that reason for Maryland's law did not convert into a significant interest on the part of Maryland in having its law applied. Since the case involved no relationship between the parties, that final "contact" is inapplicable. It would seem that the "contacts" set forth in section 145 tend to complement and even corroborate the interest analysis approach utilized and the result achieved by the court in *Gaither v. Myers*.⁴⁴ Indeed, we could go even further and note that it was the plaintiff's Maryland domicile that led the court to conclude that Maryland had a minimal interest in the litigation, protecting the economic integrity of its domiciled plaintiff, which was best served by application of the

41. *Id.* § 145(2).

42. *Gaither v. Myers*, 404 F.2d 216, 223 (D.C. Cir. 1968).

43. *Id.* at 223-24.

44. It should be noted, however, that section 145 incorporates the principles set forth in section 6, and, as we have noted, those principles are not necessarily consistent with interest analysis. See *supra* text accompanying notes 22-39.

District's law.⁴⁵ If that is the manner in which section 145's contacts are to be utilized, the "most significant relationship" test and interest analysis would seem to be complementary.

There is, however, still section 146 to consider. It provides:

In an action for personal injury, the local law of the state where the injury occurred determines the rights and liabilities of the parties, unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 to the occurrence and the parties, in which event the local law of the other state will be applied.⁴⁶

Why that general reversion to *lex loci delicti*? Here is the *Rationale* stated in Comment *c.* to section 146:

The rule of this Section calls for application of the local law of the state where the injury occurred unless, with respect to the particular issue, some other state has a more significant relationship to the occurrence and the parties. Whether there is such another state should be determined in the light of the choice-of-law principles stated in § 6. In large part, the answer to this question will depend upon whether some other state has a greater interest in the determination of the particular issue than the state where the injury occurred. The extent of the interest of each of the potentially interested states should be determined on the basis, among other things, of the purpose sought to be achieved by their relevant local law rules and of the particular issue (see § 145, Comments *c - d*). . . . The likelihood that some state other than that where the injury occurred is the state of most significant relationship is greater in those relatively rare situations where, with respect to a particular issue, the state of injury bears little relation to the occurrence and the parties.

The rule furthers the choice-of-law values of certainly, predictability and uniformity of result and, since the state where the injury occurred will usually be readily ascertainable, of ease in the determination and application of the applicable law (see § 6).⁴⁷

I apologize for imposing that lengthy excerpt on the reader, but the truth is that I don't know how to paraphrase that "*Rationale.*" The first three sentences seem to be nothing more than a restatement (pun intended) of the section itself. The fourth sentence implicates section 145, at least parenthetically, and the fifth sentence indicates that the general reversion to *lex loci delicti* is indeed the rule, with the "unless" language having applicability only in "relatively rare situations." The actual rationale for the rule doesn't appear until the second and last paragraph. There in one sentence the apparent rationale is stated to be a combination of "certainty,

45. 404 F.2d at 224.

46. RESTATEMENT (SECOND), *supra* note 2, § 146.

47. RESTATEMENT (SECOND), *supra* note 2, comment *c.*

predictability and uniformity of result"⁴⁸ and "ease in the determination and application of the applicable law."⁴⁹

How is section 146 intended to influence a court confronted with *Gaither v. Myers*? I guess the court would begin by assuming that the local law of Maryland, the situs of the injury, was to be applied "unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in §6 to the occurrence and the parties."⁵⁰ Since the principles stated in section 6 include "certainty, predictability and uniformity of result, and . . . ease in the determination and application of the law to be applied,"⁵¹ and since those same principles seem to comprise the ultimate rationale for section 146, the court might very well conclude that those were the dominant principles to be applied in determining if some other state had a more significant interest. We have already noted that, if uniformity of result is intended to move the court toward the same choice-of-law result that would be achieved by a Maryland court, the forum in the District would be impelled toward the application of Maryland law, the result a Maryland court would achieve through *lex loci delicti*. But what of the admonition in the Comment to section 6 that "In a rapidly developing area, such as choice of law, it is often more important that good rules be developed than that predictability and uniformity of result should be assured through continued adherence to existing rules"?⁵² Should not that language dissuade the court from being influenced by Maryland's retention of *lex loci delicti*? Perhaps not, given section 146's general reversion to *lex loci delicti*. Moreover, to the extent that "ease in the determination . . . of the applicable law"⁵³ is to influence the court, once again the court would be impelled toward the application of Maryland law. After all, what could be easier than *lex loci delicti*, especially after that result has received the general imprimatur of section 146? Consequently, section 146 and its rationale could lead the court to the application of Maryland law. That result is troubling, bearing in mind that interest analysis indicated that Maryland had no significant interest in the application of its own local law.

Does section 146 lend itself to a different interpretation? It

48. *Id.*

49. *Id.*

50. *Id.* § 146.

51. *Id.* § 6 (2)(f)-(g).

52. *Id.* § 6(2) comment *i.*

53. *Id.* § 6(2)(g).

could be asserted that the section contemplates that the court will use interest analysis in determining whether some state other than the situs of the injury has a more significant interest in the application of its local law. There is, however, a small problem with that interpretation. Why would a court utilizing the Restatement Second approach and confronted with section 146 bother to utilize interest analysis for the limited purpose of determining if some state other than the situs state has a more significant interest in the application of its local law? If the court must utilize interest analysis, why wouldn't the court simply utilize interest analysis in the first instance, as the *Gaither* court did, to determine which state has the most significant interest in the application of its local law, and then apply that local law indicated by interest analysis? That would spare the court the feckless task of traveling from section 6 through section 145 to section 146 and then to interest analysis. If interest analysis is intended to be dispositive, sections 6, 145 and 146 would seem to be superfluous. Consequently, I am left with these conclusions. While section 145 may be similar and even complementary to interest analysis, sections 6 and 146 seem to contemplate a different approach, one utilizing considerations quite different from those that would guide an interest analysis court. And that awkward amalgam of interest analysis, territoriality, uniformity, and ease of determination, reflected in the Restatement Second approach, was not inadvertent, it was intentional.⁵⁴ The result of that amalgamation is an approach that either subverts a court's use of interest analysis or directs the court to a circuitous and tortuous path that may lead back to *lex loci delicti*.

Let's try another case. In *Cipolla v. Shaposka*,⁵⁵ plaintiff, domiciled in Pennsylvania, sued defendant, domiciled in Delaware, to recover damages for injuries sustained in a collision that occurred in Delaware. At the time of the collision, plaintiff had been a passenger in the car operated by defendant. Plaintiff and defendant

54. See Reese, *supra* note 3.

55. 439 Pa. 563, 267 A.2d 854 (1970). I confess that my initial reaction to *Cipolla* included this: "Given a Pennsylvania guest-passenger, a Delaware host-driver, allegedly negligent driving in Delaware resulting in injury to the passenger in Delaware, and a Delaware guest statute, interest analysis would lead almost inexorably to the conclusion that the statute was applicable." Seidelson, *Comment on Cipolla v. Shaposka*, 9 Duq. L. Rev. 423 (1971) (Symposium on *Cipolla v. Shaposka*).

In so concluding, I permitted myself to be influenced by considerations of territoriality that really had little or nothing to do with each state's interest in the application of its own law. Reflection and meditation have persuaded me as to the error of my earlier way. See *infra* text following note 42.

had been attending school in Delaware and defendant was driving plaintiff to his Pennsylvania home. Plaintiff alleged that defendant's negligent driving had occasioned the collision.⁵⁶ Relying on Delaware's guest statute which insulated host driver from liability absent willful or wanton misconduct,⁵⁷ defendant moved for summary judgment. Plaintiff, opposing the motion, asserted that Pennsylvania's law containing no guest statute should be applied.⁵⁸ The Supreme Court of Pennsylvania purported to resolve the choice-of-law problem through interest analysis. At the outset, the court noted, "When doing this it must be remembered that a mere counting of contacts is not what is involved. The weight of a particular state's contacts must be measured on a qualitative rather than a quantitative scale."⁵⁹

The court found that the reason underlying Pennsylvania's local law, no guest statute, was to permit Pennsylvania passengers to recover from negligent hosts, thus assuring that the injured passengers did not become indigent wards of that state.⁶⁰ Because plaintiff passenger was domiciled in Pennsylvania, that reason converted into a significant interest on the part of Pennsylvania in having its law applied. The court perceived two reasons underlying Delaware's guest statute. The first reason was to protect good Samaritan hosts domiciled in Delaware from ungrateful guests.⁶¹ Because defendant host was domiciled in Delaware, that reason converted into a significant interest on the part of Delaware in having its law applied. The second reason discerned by the court was to protect against potentially collusive suits, thus assuring Delaware drivers relatively lower liability insurance premium rates.⁶² Since

56. 439 Pa. at 564, 267 A.2d at 855.

57. *Id.* (citing DEL. CODE ANN. tit. 21, § 6101(a) (1974) (*repealed* 1983)).

58. *Id.* at 565, 267 A.2d at 855.

59. *Id.* at 566, 267 A.2d at 856.

60. *Id.*

61. *Id.*

62. *Id.* Justice Roberts, dissenting, concluded that assuring Delaware drivers lower insurance rates was not a reason for that state's guest statute. *Id.* at 569, 267 A.2d at 858. He determined that

the sole purpose of the Delaware guest statute, as set forth by its courts, "is to protect one who generously, without accruing benefit, has transported another in his motor vehicle. *Engle v. Poland*, 8 Terry 365, 91 A.2d 326 (1952); *Colombo v. Sech*, 2 Storey 575, 163 A.2d 270 (1960)." *Fields v. Synthetic Ropes, Inc.*, 219 A.2d 374, 376 (Del. Superior Ct. 1966).

Cipolla v. Shaposka, 439 Pa. 563, 570-71, 267 A.2d 854, 858 (1970).

The majority opinion cited no Delaware cases in support of its conclusion that the guest statute was intended to provide lower insurance rates by protecting against potentially collusive actions. In fact, however, such authority existed. In *McHugh v. Brown*, 50 Del. 154,

defendant's car was registered and presumably insured in Delaware,⁶³ that reason too converted into a significant interest on the part of Delaware in having its law applied; any pay-out experience on the part of defendant's liability carrier would be charged to its Delaware coverage, thereby creating the potential of higher premium rates for Delaware drivers. *Cipolla* presented a true conflict. Each state had a significant interest in the application of its own local law. After so concluding, the court wrote: "Thus, it appears that Delaware's contacts are qualitatively greater than Pennsylvania's and that it has the greater interest in having its law applied to the issue before us."⁶⁴ It would seem that, contrary to its own admonition that the competing interests be evaluated qualitatively rather than quantitatively, the court concluded that Delaware won 2-1.

The court then added this further consideration: "Also, it seems only fair to permit a defendant to rely on his home state law when he is acting within that state."⁶⁵ That conclusion was drawn from this language of Professor David Cavers:

Consider the response that would be accorded a proposal that was the opposite of this principle if it were advanced against a person living in the state of injury on behalf of a person coming there from a state having a higher standard of care or of financial protection. The proposal thus advanced would require the community to step up its standard of behavior for his greater safety or lift its financial protection to the level to which he was accustomed. Such a proposal would be rejected as unfair. By entering the state or nation, the visitor has exposed himself to the risk of the territory and should not subject persons living there to a financial hazard that their law had not created.⁶⁶

Is that territorial approach justified by the facts of *Cipolla*? I think not. After all, the Delaware driver knew that his passenger lived in Pennsylvania and the driver contemplated an interstate trip from Delaware to Pennsylvania. In those circumstances, it's difficult to justify a conclusion that imposing Pennsylvania law on the Delaware defendant would be unfair. Moreover, the collision could have occurred after the defendant's car entered Pennsylvania. The court's language implies that in those circumstances

162, 125 A.2d 583, 588 (1956), the court wrote that "[t]he guest statute embodies a specific and important legislative policy—the elimination of collusive litigation." *Id.* at 160, 125 A.2d at 588.

63. 439 Pa. at 564, 267 A.2d at 855.

64. *Id.* at 566, 267 A.2d at 856 (footnote omitted).

65. *Id.* at 567, 267 A.2d at 856 (footnote omitted).

66. *Id.* (quoting D. CAVERS, *THE CHOICE-OF-LAW PROCESS* 146-47 (1965)).

Pennsylvania law might have been applied, or, at the very least, such a result would not have imposed unduly on the defendant. Surely the site of the collision occurring during a contemplated interstate trip should not be given determinative or even significant effect by an interest analysis court trying to determine the applicability of a potentially applicable guest statute.

How about the court's implication, contrary to its own admonition, that, with regard to the reasons underlying each state's local law, Delaware wins 2-1? Can we apply a more qualitative analysis? We know that Pennsylvania has a significant interest in the application of its law, no guest statute, in order to assure that the Pennsylvania domiciled plaintiff does not become an indigent ward of that state. Delaware has significant interests in the application of its guest statute in order to protect the economic integrity of the Delaware good Samaritan host and to assure Delaware drivers relatively lower premium rates. Which state has the more significant interest in the application of its own local law? Because the passenger was the injured victim, his capacity to remain self-supporting may be diminished. Given an adverse choice-of-law result, his potential indigence may be more likely to eventuate than the potential indigence of the Delaware defendant. That would suggest that Pennsylvania's interest in protecting the economic integrity of the injured passenger may be of greater significance than Delaware's interest in protecting the economic integrity of the driver. How about Delaware's interest in assuring its drivers relatively lower premium rates? Given an adverse choice-of-law result, that adverse effect would be spread over a significant number of drivers, thus having a severe impact on none. On the other hand, the injured plaintiff's indigence would by definition have a severe impact on him. That would suggest that the Pennsylvania interest may be more significant. But suppose that defendant argues that, even if the injured passenger becomes indigent, the cost of his support will be spread over a significant number of Pennsylvania taxpayers, thus having a severe impact on no one, including the plaintiff. It seems to me that that argument overlooks the adverse effect that indigence has on human dignity. Even assuming that the injured victim, having become indigent, would be able to subsist on welfare payments provided by the state's taxpayers, he would continue to suffer the violation of human dignity that accompanies indigence. I believe that inherent aspect of indigence is sought to be avoided by Pennsylvania's local law. Consequently, I would conclude that Pennsylvania has the more significant interest in the

application of its local law and I would deny defendant's motion for summary judgment predicated on the application of the Delaware guest statute.

How would the Restatement's approach influence the court? Section 6(2)(a), "the needs of the interstate . . . system,"⁶⁷ would appear to be rather enigmatic, at least to me, given the facts of *Cipolla*. Sections 6(2)(b) and (c), "the relevant policies of the forum"⁶⁸ and "the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,"⁶⁹ would seem to complement our interest analysis approach. The "protection of justified expectations,"⁷⁰ section 6(2)(d), might raise the concern noted by the court, the defendant's right to rely on his home state law when acting within that state. The Comment to section 6(2)(d) provides: "Generally speaking, it would be unfair and improper to hold a person liable under the local law of one state when he had justifiably molded his conduct to conform to the requirements of another state."⁷¹ Could it be said that host driver had relied on Delaware's guest statute in offering to share his car with the passenger? I would be inclined to say no, given host's knowledge of the passenger's Pennsylvania domicile and host's intent to drive from Delaware to Pennsylvania. The Comment does not clearly indicate whether this would be a case of justifiable reliance. It does state, however:

There are occasions, particularly in the area of negligence, when the parties act without giving thought to the legal consequences of their conduct or to the law that may be applied. In such situations, the parties have no justified expectations to protect, and this factor can play no part in the decision of a choice-of-law question.⁷²

The "basic policies underlying the particular field of law,"⁷³ section 6(2)(e), would seem to be irrelevant since the local laws of the two states are directly opposite; they are not essentially similar with only "minor differences" between them. That leaves section 6(2)(f) and (g), "certainty, predictability and uniformity of result"⁷⁴ and "ease in the determination and application of the law to be

67. RESTATEMENT (SECOND), *supra* note 2, § 6(2)(a).

68. *Id.* § 6(2)(b).

69. *Id.* § 6(2)(c).

70. *Id.* § 6(2)(d).

71. *Id.* § 6(2) comment *g*.

72. *Id.*

73. *Id.* § 6(2)(e).

74. *Id.* § 6(2)(f).

applied.”⁷⁵

If “uniformity” is intended to imply that the Pennsylvania court should seek to achieve the same result that would be achieved by a Delaware court, we must look to Delaware opinions. Those opinions indicate that Delaware has rejected any policy-based conflicts law in tort actions, preferring to retain *lex loci delicti*.⁷⁶ Consequently, a Delaware court confronted with *Cipolla* would apply the guest statute of Delaware, the state in which plaintiff was injured. If Delaware’s *lex loci delicti* result is intended to influence the Pennsylvania court’s result, that latter court’s repudiation of *lex loci delicti* in favor of the greater rationality of a policy-based approach would be undermined, notwithstanding the fact that the Pennsylvania court, apparently counting contacts, did apply Delaware’s guest statute. As for “ease in the determination . . . of the law to be applied,”⁷⁷ nothing could be easier than *lex loci delicti*. That too would seem to undermine the forum’s decision to reject that mechanical means of resolving choice-of-law problems.

How about the contacts listed in section 145? The first, “the place where the injury occurred,”⁷⁸ would point to Delaware’s local law. The second, “the place where the conduct causing the injury occurred,”⁷⁹ would also point to Delaware’s law. The third contact, domicile,⁸⁰ apparently would indicate that each state, Pennsylvania as the domicile of the plaintiff and Delaware as the domicile of the defendant, had a “significant relationship to . . . the parties.”⁸¹ The fourth contact, “the place where the relationship . . . between the parties is centered,”⁸² would seem to point to Delaware’s law.

75. *Id.* § 6(2)(g).

76. Smith, *Choice of Law in the United States*, 38 HASTINGS L. J. 1041, 1060-61 (1987).

There is little doubt but that the Delaware courts continue to follow the *lex loci delicti* rule in tort conflicts. The leading case is *Friday v. Smoot*, 58 Del. 488, 211 A.2d 594 (1965) where the Delaware Guest Statute was held inapplicable to a suit by a Delaware automobile passenger against a Delaware driver arising from an accident in New Jersey. The Delaware Supreme Court specifically rejected an invitation to adopt section 379 (now section 145) of the proposed Second Restatement, due to the perceived uncertainty of the new rule and because the court thought adoption of such a choice of law theory was best left to the legislature. All later state and federal cases in Delaware follow the *lex loci delicti* rule.

Id. (footnotes omitted).

77. RESTATEMENT (SECOND), *supra* note 2, § 6(2)(g).

78. *Id.* § 145(2)(a).

79. *Id.* § 145(2)(b).

80. *Id.* § 145(2)(c).

81. *Id.* § 145(1).

82. *Id.* § 145(2)(d).

After all, it was in Delaware that the host-guest relationship was entered into. Of the four contacts set forth in section 145, three appear to point to Delaware law and one to the law of either Pennsylvania or Delaware. Does that mean that Delaware wins 4-1? The concluding language of section 145 would suggest not. That language emphasizes that the contacts "are to be evaluated according to their relative importance with respect to the particular issue."⁸³ The only way I know to accomplish such an evaluation would be to engage in interest analysis. And if the court must utilize interest analysis to effect the evaluation required by section 145, why would the court not simply resolve the issue through interest analysis and forsake the feckless task of slogging through sections 6 and 145? I don't know the answer to that one. Still, let's stay with section 145 and its required evaluation. Our application of interest analysis to *Cipolla* seemed to indicate that the only one of the four contacts set forth in section 145 that was germane to the particular issue, whether Delaware's guest statute or Pennsylvania's common law should be applied, was the domicile of the litigants. That contact pointed in both directions. Does that mean that section 145 would leave the court with a dead heat? If so, how would the court break the tie?

Well, there's always section 146. That section says *lex loci delicti* "unless" and the "unless" clause would require that, as a condition precedent to the avoidance of the *lex loci delicti* result, application of the Delaware guest statute, Pennsylvania would have to have the "more significant relationship under the principles stated in § 6 to the occurrence and the parties."⁸⁴ Two of those principles were uniformity of result and ease in determination. It is those same two principles that are repeated in the *Rationale* for section 146. That would suggest that the Restatement's approach would lead to the application of Delaware's guest statute. That conclusion is troubling, separate and apart from the fact that our application of interest analysis suggests that Pennsylvania has the more significant interest in the application of its local law, because it is contributed to so significantly by Delaware's retention of *lex loci delicti* (uniformity of result) and the obvious ease of determination inherent in that mechanical conflicts rule. Once again, the Restatement approach would seem to subvert the interest analysis apparently required by section 145 and, after a circuitous trip through

83. *Id.* § 145(2).

84. *Id.* § 146.

sections 6, 145, and 146, lead the court back to *lex loci delicti*.

Several years after *Cipolla*, the Pennsylvania Superior Court was confronted with *Miller v. Gay*.⁸⁵ Plaintiff, domiciled in Delaware, sued defendant, domiciled in Pennsylvania, to recover damages for personal injuries sustained in a Delaware collision. Plaintiff had been a passenger in a car operated by defendant. Plaintiff alleged that defendant's negligent driving had occasioned the collision. Asserting the applicability of Delaware's guest statute, defendant moved to dismiss the complaint. Plaintiff opposed the motion, arguing that Pennsylvania's common law should be applied.⁸⁶ What choice-of-law result would interest analysis produce?

We know from *Cipolla* that one reason for Delaware's guest statute is to protect good Samaritan hosts domiciled in Delaware from ungrateful guests. Because defendant host driver was domiciled in Pennsylvania, that reason would not convert into a significant interest on the part of Delaware in having its guest statute applied. The second reason for the guest statute is to protect against potentially collusive suits, thus assuring Delaware drivers relatively lower insurance premium rates. Because defendant's car was registered and presumably insured in Pennsylvania, so that any pay-out experience by the liability carrier would be charged to Pennsylvania, not Delaware, that second reason for the Delaware guest statute would not convert into a significant interest on the part of Delaware in having the statute applied. We also know from *Cipolla* that the reason for Pennsylvania's law, no guest statute, is to afford injured passengers domiciled in that state an opportunity to recover from negligent hosts, thus preventing those passengers from becoming indigent wards of the state. Because the injured passenger was domiciled in Delaware, that reason would not convert into a significant interest on the part of Pennsylvania in having its common law applied. Interest analysis indicates that neither state has a significant interest in the application of its own local law.⁸⁷

What's a poor judge to do now? Well, what he should not do is throw up his hands in despair and either pretend the problem doesn't exist or evade its consequences by fabricating some jerry-built reason for one of the two local laws that may convert into a significant interest.⁸⁸ Interest analysis has demonstrated a negative

85. 323 Pa. Super. 466, 470 A.2d 1353 (1983).

86. *Id.* at 468, 470 A.2d at 1354.

87. *See id.* at 470, 470 A.2d at 1355.

88. Courts confronted with a negative standoff have reacted in various ways. In

standoff at the level of each state's significant interest in the application of its own law. Neither state has such an interest. In *Gaither v. Myers*,⁸⁹ once Judge Leventhal concluded that Maryland had no significant interest in the application of its own local law, he recognized the propriety of inquiring as to whether Maryland had a minimal interest in the litigation and, if so, how that interest would best be served.⁹⁰ Let's try the same thing with both Delaware and Pennsylvania in *Miller v. Gay*. Because the injured plaintiff is domiciled in Delaware, that state certainly has a minimal interest in the litigation: assuring that its injured domiciliary does not become an indigent ward of the state.⁹¹ Clearly, that minimal interest is best served by the application of Pennsylvania's common law. Because the defendant driver is domiciled in Pennsylvania, that state has a minimal interest in the litigation: protecting the economic integrity of its domiciled litigant.⁹² That minimal interest is best served by the application of Delaware's guest statute. What had been a negative standoff at the higher level of interest, neither state having a significant interest in the application of its own law, becomes a true conflict at the lower level of

Neumeier v. Kuehner, 31 N.Y.2d 121, 286 N.E.2d 454, 335 N.Y.S.2d 64 (1972), the court fashioned three rules to resolve choice-of-law problems as to the applicability of an automobile guest statute, thus mooted the negative standoff. For critical comment on those three rules, see Seidelson, *Interest Analysis: The Quest for Perfection and the Frailties of Man*, *supra* note 4, at 215-24. For a Symposium on *Neumeier*, see 1 *HOFSTRA L. REV.* 93-182 (1973). In *Hurtado v. Superior Court*, 11 Cal. 3d 574, 522 P.2d 666, 114 Cal. Rptr. 106 (1974), the court concluded that California's no-ceiling wrongful death statute had a conduct regulating purpose, thus evading the negative standoff. The majority in *Miller v. Gay*, 323 Pa. Super. 466, 470 A.2d 1353 (1983), finessed the negative standoff by applying the RESTATEMENT (SECOND) § 146. See *infra* text accompanying note 85. The dissent evaded the negative standoff by finding a conduct regulating reason for Pennsylvania's absence of a guest statute. See *infra* text accompanying note 99. The cases suggest that the courts may not always recognize a negative standoff or, recognizing it, may not know how to resolve it. For a suggested method of resolution, see *infra* text accompanying note 89.

89. 404 F.2d 216 (D.C. Cir. 1968).

90. *Id.* at 224.

91. Because defendant driver was domiciled in Pennsylvania, he was not within the class of good Samaritan hosts intended to be protected by Delaware's guest statute. Consequently, recognizing Delaware's minimal interest in the litigation, assuring that the Delaware plaintiff does not become an indigent ward of that state, generates no internal conflict on the part of Delaware. Plaintiff's economic integrity may be protected without imposing liability on any Delaware host.

92. Because plaintiff passenger was domiciled in Delaware, she was not within the class of injured passengers intended to be protected by Pennsylvania's law. Consequently, recognizing Pennsylvania's minimal interest in the litigation, protecting the economic integrity of the Pennsylvania defendant, generates no internal conflict on the part of Pennsylvania. Defendant's economic integrity may be protected without subjecting any Pennsylvania passenger to potential indigence.

interest: each state has a minimal interest in the litigation best served by the other state's law. Now the court must determine which state's minimal interest in the litigation is more significant and apply the law that serves that more significant interest. Given an adverse choice-of-law result, the indigence of the injured victim, stripped of some portion of her pre-existing capacity to be self-supporting, seems more likely than the indigence of host driver. Consequently, Delaware's interest in protecting its domiciled victim from indigence would seem to be more significant than Pennsylvania's interest in protecting the economic integrity of its domiciled host driver. Because it is Pennsylvania's common law that best serves Delaware's more significant interest, that is the law that should be applied and defendant's motion to dismiss should be denied.

How did the Superior Court of Pennsylvania resolve the choice-of-law issue? Despite a line of opinions by the Supreme Court of Pennsylvania (including *Cipolla v. Shaposka*⁹³) apparently adopting and applying interest analysis,⁹⁴ the superior court majority concluded that, in fact, the supreme court had embraced the Restatement approach.⁹⁵ I confess that I'm just skeptical enough to wonder if the majority, tacitly recognizing the negative standoff and not being sure what to do about it, may not have been impelled toward the Restatement as a way out. The majority began with section 146 and its reversion to *lex loci delicti* "unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 to the occurrence and the parties, in which event the local law of the other

93. 439 Pa. 563, 267 A.2d 854 (1970).

94. See, e.g., *McSwain v. McSwain*, 420 Pa. 86, 215 A.2d 677 (1966) (intra-familial tort bar); *Griffith v. United Air Lines, Inc.*, 416 Pa. 1, 203 A.2d 796 (1964) (survival action damages); *Cipolla v. Shaposka*, 439 Pa. 563, 267 A.2d 854 (1970) (guest statute; see *supra* text accompanying note 55). It must be conceded, nevertheless, that the court's methodology in resolving choice-of-law problems lends itself to different interpretations.

No state has a more convoluted, eclectic approach to choice-of-law than Pennsylvania. On various occasions, its courts have applied the First and Second Restatements, the center of gravity approach, interest analysis and Professor Cavers' "principles of preference." Because of a paucity of recent Pennsylvania Supreme Court cases, it is anyone's guess what principles will be cited next.

Smith, Choice of Law in the United States, 38 HASTINGS L. J. 1041, 1131 (1987).

In *Coons v. Lawlor*, 804 F.2d 28, 30 (3d Cir. 1986), see *infra* text accompanying note 106, the court noted that "in the tort law context, Pennsylvania adheres to the interest analysis approach to conflicts of law." 804 F.2d at 30. But in *Shields v. Consolidated Rail Corp.*, 810 F.2d 397, 399 (3d Cir. 1987), the court concluded that Pennsylvania had "essentially adopted the Restatement (Second) view . . ." *Id.*

95. *Miller v. Gay*, 323 Pa. Super. 466, 470-71, 470 A.2d 1353, 1354-55 (1984).

state will be applied."⁹⁶ After setting forth section 6, the majority concluded:

We have earlier discussed the relative policies of the forum and Delaware, the only other interested state and do not find them dispositive.

However, we do believe that certainty, predictability and uniformity of result will be aided by the application of Delaware law. We also find no difficulty in the application of that law.⁹⁷

Therefore, the majority affirmed the trial court's order granting defendant's motion to dismiss the complaint.⁹⁸

The dissent did not accept the majority's reading of the opinions of the Supreme Court of Pennsylvania as having embraced the Restatement approach.⁹⁹ On the contrary, the dissent wrote that the supreme court had "noted the concern that the Second Restatement would encourage the mere counting of contacts."¹⁰⁰ The dissent's reading of the supreme court's opinions led it to conclude that those "cases suggest[] that they are consistent with governmental interest analysis"¹⁰¹ We have already determined that interest analysis would lead to the conclusion that neither Pennsylvania nor Delaware had a significant interest in the application of its own law. How did the dissent deal with that negative standoff? First, the dissent seemed to recognize the problem: "Some commentators have described a case such as this one—a case in which the plaintiff resides in a host-protecting state, and the defendant, in a guest-protecting state—as the 'unprovided for case'"¹⁰² Ultimately, however, the dissent evaded the problem by concluding that "Pennsylvania has an interest in seeing that its licensed drivers are held to the standard of ordinary care in the operation of their motor vehicles."¹⁰³ That language suggests that one reason for Pennsylvania's law, no guest statute, is conduct regulation. That seems to me to be an awkward suggestion. It im-

96. *Id.* at 471, 470 A.2d at 1355.

97. *Id.* at 472, 470 A.2d at 1356.

98. *Id.* at 473, 470 A.2d at 1356.

99. *Id.* at 474, 470 A.2d at 1356-57.

100. *Id.* at 478, 470 A.2d at 1358 (quoting *Griffith v. United Air Lines, Inc.*, 416 Pa. 1, 16, 203 A.2d 796, 803 (1964)).

101. *Id.* at 478, n.1, 470 A.2d at 1359, n.1. Still, the dissent stopped short of a firm determination that the Supreme Court of Pennsylvania would utilize interest analysis. Rather, the dissent concluded that that court would use a "flexible approach." *Id.* at 479, 470 A.2d at 1359.

102. *Id.* at 484, 470 A.2d at 1362 (citing R. CRAMTON, D. CURRIE & H. KAY, *CONFLICT OF LAWS* (3d ed. 1981)).

103. *Id.* at 487, 470 A.2d at 1363.

plies that Pennsylvania believes that the absence of a guest statute will encourage a driver to operate his vehicle more carefully when there is a passenger within than when the driver is alone. Frankly, when I drive alone I am motivated to drive carefully to preserve and protect my life and the lives of other users of the roadway, motorists and pedestrians. The presence of a passenger in my car is not likely to enhance that motivation to drive carefully. But even accepting the dissent's suggestion that conduct regulation is one reason for Pennsylvania's common law, there remains the task of determining if that reason converts into a significant interest on the part of Pennsylvania in having its law applied in *Miller*. The conduct intended to be regulated occurred in Delaware. The immediate consequences of that conduct, the collision and plaintiff's injuries, occurred in Delaware. And, given the plaintiff's Delaware domicile, the ongoing consequences of that conduct would be felt in Delaware. Therefore, the conduct regulating reason suggested by the dissent would seem not to convert into a significant interest on the part of Pennsylvania in having its law applied. The dissent, once having suggested the conduct regulating reason, simply assumed its conversion and concluded that Pennsylvania law should be applied.

In *Miller*, the majority, perhaps tacitly recognizing the negative standoff and being uncertain how to resolve it, utilized the Restatement approach and found a quick and easy way out. That way out may have produced a result contrary to legitimate interest analysis. The dissent, recognizing the negative standoff, utilized interest analysis and mooted the problem by finding and assuming the applicability of a questionable reason for Pennsylvania's law. Which of those two approaches is the less desirable? I think it is the majority's approach. The majority used the Restatement to avoid a difficult problem. The Restatement's conclusion was quick and easy only because it was the result of *lex loci delicti*. Because the Supreme Court of Pennsylvania had repudiated *lex loci delicti*, the reversion to that mechanical application in section 146 and its utilizations by the majority in *Miller* undermined and subverted the supreme court's earlier determinations, all in the name of ease of determination and uniformity of result. The result achieved by the majority was uniform *vis-a-vis* that which would be achieved by a Delaware court only because the latter has opted to retain *lex loci delicti*. Those problems are inherent in the Restatement approach. While the dissent may have suggested an awkward reason for Pennsylvania's law and neglected to determine if that reason

converted into a significant interest on the part of Pennsylvania in having its law applied, those shortcomings are not inherent in interest analysis. Reflection, contemplation, and guidance by counsel can enhance the quality of interest analysis. Whatever else judges and lawyers (and I include myself in the second category) may be, they are extraordinarily educable.¹⁰⁴

Three years after *Miller*, the Third Circuit, in a diversity case, concluded that Pennsylvania resolved choice-of-law issues through interest analysis.¹⁰⁵ In *Coons v. Lawlor*,¹⁰⁶ plaintiff, an Indiana domiciliary, sued defendant, a Pennsylvania domiciliary, to recover for injuries sustained by plaintiff while riding as a passenger in a car driven by defendant. Plaintiff passenger was also the vehicle owner.¹⁰⁷ He and defendant planned to drive from defendant's Pennsylvania home to the New Jersey shore. Plaintiff was the original driver¹⁰⁸ but, when he "began to feel tired,"¹⁰⁹ defendant "relieved [the plaintiff] at the wheel."¹¹⁰ While driving in New Jersey, defendant "fell asleep . . . and the car struck a utility pole."¹¹¹ Plaintiff alleged that the impact had resulted from defendant's negligence.¹¹² Asserting the Indiana guest statute, which required willful or wanton misconduct,¹¹³ defendant moved for summary judgment.¹¹⁴ After noting that the Supreme Court of Pennsylvania utilized interest analysis, the Third Circuit carefully avoided a spurious choice-of-law problem by inquiring whether an owner-passenger would be considered a guest under the Indiana guest statute.¹¹⁵ Relying on the wording of the statute and Indiana opinions giving the statute a restrictive reading, the Third Circuit determined that an owner-passenger would not be a guest within the meaning of the statute.¹¹⁶ Because the Indiana guest statute was thus inapplicable and because neither Pennsylvania nor New

104. See *supra* note 55.

105. *Coons v. Lawlor*, 804 F.2d 28 (3d Cir. 1986).

106. *Id.*

107. *Id.*

108. *Id.* at 29.

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.* at 28.

113. IND. CODE § 9-3-3-1 (1979), amended at § 9-3-3-1 (1984). The amendment limited the applicability of the guest statute to those cases in which the passenger is related to the driver or is a hitchhiker.

114. *Coons v. Lawlor*, 84 F.2d 28, 30 (3d Cir. 1986).

115. *Id.*

116. *Id.* at 30-33.

Jersey has a guest statute, the court concluded that there was no choice-of-law problem to resolve.¹¹⁷

Let's tinker with the facts of *Coons*. Let's assume that plaintiff passenger, an Indiana domiciliary, was not the vehicle owner. Rather, defendant driver, domiciled in Pennsylvania, was the owner. In response to plaintiff's allegation of negligent operation, defendant, asserting the Indiana guest statute, moves for summary judgment. With defendant driver the owner, plaintiff passenger would now be a guest pursuant to the potentially applicable Indiana guest statute. Plaintiff, however, asserts that the common law of either Pennsylvania or New Jersey should be applied and defendant's motion for summary judgment denied. With Indiana's guest statute potentially applicable and with neither Pennsylvania nor New Jersey having a guest statute, the diversity court presumably would be required to resolve the choice-of-law problem. How should it go about doing so?

The diversity court, complying with *Klaxon*,¹¹⁸ would be required to resolve the choice-of-law problem precisely as it would be resolved by the Supreme Court of Pennsylvania. Suppose plaintiff asserted that *Miller v. Gay*, although decided by the superior court, was determinative. Plaintiff's assertion presumably would be that this case, like *Miller*, presented a factual pattern in which plaintiff was domiciled in a guest statute state and defendant was domiciled in a common law state. Since in *Miller* the court applied the local law of the place of injury (Delaware), plaintiff argues that the Third Circuit should similarly apply the local law of the place of injury (New Jersey). Should the Third Circuit accept the argument?

It seems to me that there are several problems with plaintiff's argument. First, in *Miller*, *lex loci delicti* applied pursuant to section 146 of the Restatement, led to the application of Delaware's guest statute. In this case, *lex loci delicti* would lead to the application of New Jersey's common law. That kind of random application of *lex loci delicti* might give the Third Circuit pause. Second, in *Miller* the Delaware court would have applied Delaware's guest statute because of Delaware's retention of *lex loci delicti*. That's why the same result achieved by the Superior Court of Pennsylvania produced "uniformity." New Jersey, however, has rejected *lex*

117. *Id.* at 30.

118. *Klaxon Co. v. Stentor Elect. Mfg. Co.*, 313 U.S. 487 (1941).

loci delicti and has adopted interest analysis.¹¹⁹ It isn't immediately clear that a New Jersey court confronted with our spinoff of *Coons* would apply New Jersey's local law. Third, the result achieved in *Miller* was a product of the majority's (dubious) conclusion that the Supreme Court of Pennsylvania had embraced the Restatement approach. As we have noted, the Third Circuit concluded that the Supreme Court of Pennsylvania had adopted and would apply interest analysis.¹²⁰

Let's attempt to resolve the choice-of-law problem through interest analysis, as the Third Circuit presumably would. What are the reasons underlying the Indiana guest statute? One reason is to protect good Samaritan hosts domiciled in Indiana from ungrateful guests.¹²¹ Since, in our spinoff of *Coons*, defendant host is domiciled in Pennsylvania, that reason would not convert into a significant interest on the part of Indiana in having its guest statute applied. A second reason would be to protect against potentially collusive actions, thus assuring Indiana drivers relatively lower liability insurance premium rates.¹²² Because the car in our case is registered and presumably insured in Pennsylvania, any pay-out by the liability carrier would be charged to Pennsylvania, not Indiana. Consequently, the second reason for Indiana's guest statute does not convert. Apparently, Indiana has no significant interest in the application of its guest statute. At that point in the analysis, it might be tempting to say that since Indiana has no significant interest in the application of its guest statute and since neither Pennsylvania nor New Jersey has a guest statute, no guest statute is to be applied. Such a conclusion, however, might be premature. It's possible that further analysis could demonstrate that neither Pennsylvania nor New Jersey has a significant interest in the application of its common law. That would leave the court with a negative standoff and the chore of determining the existence of minimal interests in the litigation on the part of the states. To

119. *Pfau v. Trent Aluminum Co.*, 55 N.J. 511, 263 A.2d 129 (1970) (see *infra* text accompanying note 124); *Veazey v. Doremus*, 103 N.J. 244, 510 A.2d 1187 (1986); *State Farm Mutual Auto. Ins. Co. v. Estate of Simmons*, 84 N.J. 28, 417 A.2d 488 (1980).

120. See *supra* text accompanying note 105.

121. *Sharp v. Egler*, 658 F.2d 480, 484 (7th Cir. 1981). "The [Indiana] guest statute was designed in part to protect a resident host driver from guest passengers to whom he has shown his hospitality." *Id.*

122. *Id.* "The guest statute also seeks to protect insurance companies operating in Indiana from collusive lawsuits." *Id.*

I assume that the intended ultimate beneficiaries would be Indiana drivers who would enjoy lower premium rates as a result of the protection afforded the liability carriers.

avoid such a premature conclusion, let's continue with our analysis.

We already know the reason for Pennsylvania's common law: to assure that Pennsylvania passengers have an opportunity to recover from negligent hosts, thus assuring that such passengers do not become indigent wards of that state. Since plaintiff passenger is domiciled in Indiana, not Pennsylvania, that reason would not convert into a significant interest on the part of Pennsylvania in having its common law applied. How about New Jersey's common law? That law exists to assure that New Jersey domiciled passengers have an opportunity to recover from negligent hosts, thus assuring that such passengers do not become indigent wards of that state.¹²³ Because plaintiff passenger is domiciled in Indiana, not New Jersey, that reason for New Jersey's common law does not convert into a significant interest on the part of New Jersey in having its common law applied. Were that the only reason for New Jersey's common law, the court would indeed be confronted with a negative standoff. Might there be a second reason for New Jersey's common law?

In *Pfau v. Trent Aluminum Co.*,¹²⁴ the Supreme Court of New Jersey indicated that that state's absence of a guest statute was intended to have a conduct regulating purpose: "We are not certain that a defendant's domicile lacks an interest in seeing that its domiciliaries are held to . . . the standard of care which that state's law provide[s] for. A state should not only be concerned with the protection and self-interest of its citizens."¹²⁵ As noted earlier in our discussion of the dissenting opinion in *Miller v. Gay*, I find it awkward to suggest that the absence of a guest statute is intended to have a conduct regulating function. Moreover, in *Pfau* as in *Miller*, even assuming such an intended purpose, it probably would not have converted into a significant interest on the part of New Jersey in having its law applied since in *Pfau*: (1) the conduct occurred in Iowa; (2) the immediate consequences of that conduct (the collision) occurred in Iowa; and (3) the ongoing consequences of that conduct would be felt in Connecticut (the plaintiff-passenger's domicile). Still, when the highest appellate court of New Jersey concludes that the state's common law has a conduct regulating purpose, I guess it has a conduct regulating purpose. More-

123. *Pfau v. Trent Aluminum Co.*, 55 N.J. 511, 523, 263 A.2d 129, 135 (1970). "[T]he strong public policy of [New Jersey] is to allow a guest-passenger to be compensated by his host-driver in cases of ordinary negligence." *Id.*

124. 55 N.J. 511, 263 A.2d 129 (1970).

125. *Id.* at 524, 263 A.2d at 136.

over, in our spinoff of *Coons*, that conduct regulating purpose could well convert into a significant interest on the part of New Jersey in having its common law applied since both the conduct (defendant's allegedly negligent driving) and the immediate consequences of that conduct (impact and plaintiff's injuries) occurred in New Jersey. Does that mean that *Pfau* points to a significant interest on the part of New Jersey in having its common law applied to our spinoff of *Coons*? Perhaps.

The language of the court in *Pfau* refers to regulating the conduct of a New Jersey domiciled host, wherever he may be driving.¹²⁶ In our version of *Coons*, host driver is domiciled in Pennsylvania. Does that mean that the conduct regulating reason identified in *Pfau* would be inapplicable to our spinoff of *Coons*? I think not. Although *Pfau* refers to a New Jersey domiciled host driver (the fact before the court there),¹²⁷ it refers as well to the standard of care which New Jersey's common law provides for.¹²⁸ If the Supreme Court of New Jersey concludes that that state's common law has a conduct regulating reason, as it did in *Pfau*, it would be anomalous to conclude that such a reason had no applicability to conduct and the immediate consequences of such conduct occurring in New Jersey, wherever host driver might be domiciled. Indeed, our version of *Coons* would seem to present an *a fortiori* case of the applicability of New Jersey's conduct regulating reason. Consequently, it would seem that New Jersey has a significant interest in the application of its common law to our version of *Coons*. Since neither Indiana nor Pennsylvania has a significant interest in the application of its local law to the case, the court should apply New Jersey's common law and deny defendant's motion for summary judgment.

But wait. Isn't that the very result that would have been achieved had the court accepted plaintiff's assertion that *Miller v. Gay* controlled the choice-of-law issue in our spinoff of *Coons*? And wouldn't that result have been accomplished more quickly and easily had the court accepted *Miller's* Restatement approach and simply applied *lex loci delicti*? Yes to both questions. Does that mean that the Restatement approach would have been preferable? I think not.

Miller found the Restatement approach easy to apply and pro-

126. *Id.* at 524-25, 263 A.2d at 136.

127. *Id.* at 514, 263 A.2d at 130.

128. *Id.* at 515, 263 A.2d at 131.

ductive of uniform results. Of course, *lex loci delicti* is easy to apply, and, in our version of *Coons*, would have produced the same result ultimately achieved through our use of interest analysis, application of New Jersey's common law. Under interest analysis, however, that result was achieved because of the recognition that the New Jersey Supreme Court had identified a conduct regulating reason for that state's law and our conclusion that that reason converted into a significant interest on the part of New Jersey in having its law applied. Absent that somewhat unusual reason for New Jersey's law, our version of *Coons* would have produced a negative standoff. It is possible and perhaps even likely that a court accepting section 146's bias toward *lex loci delicti* would have been unaware of New Jersey's conduct regulating reason and the fact that, absent that reason, the case would have produced a negative standoff. It seems to me that a court's awareness of the reasons for achieving a particular result may be as important as the result achieved. Awareness and explication of those reasons make the court's opinion considerably more persuasive and more readily utilizable in subsequent cases. It isn't simply coincidental that the *Pfau* court's use of interest analysis was helpful in our application of interest analysis; it was *Pfau* that identified the conduct regulating reason for New Jersey's law. As for uniformity, *Miller* produced a result similar to the result a Delaware court would have achieved only because of Delaware's retention of *lex loci delicti*. To suggest that Delaware's retention of *lex loci delicti* and the result Delaware would achieve thereby should become the paradigm for a Pennsylvania court overlooks the fact that the Pennsylvania court has rejected *lex loci delicti*. In our spinoff of *Coons*, the court, examining the opinions of the New Jersey court, found that that court had rejected *lex loci delicti* and embraced interest analysis. Consequently, it was not readily apparent that the New Jersey court would have applied New Jersey law. That easy mode of achieving uniformity was lacking. Yet the result we achieved through interest analysis in our version of *Coons*, application of New Jersey law, may well be the same result that would be achieved by a New Jersey court using interest analysis. And, after our resolution of the spinoff of *Coons*, a New Jersey court, confronted with a similar case, would have the benefit of our use of interest analysis, including our identification of the reasons underlying the local laws of Indiana and Pennsylvania. That kind of uniformity, achieved by reasoned examination of the interests of the potentially interested states, seems to be more laudable and desira-

ble than the uniformity achieved in *Miller* through section 146's reversion to and Delaware's retention of *lex loci delicti*.

Let's try another case, this one a contract action. In *Bushkin Associates, Inc. v. Raytheon Co.*,¹²⁹ plaintiff, a New York finder, sued defendant, a Massachusetts corporation, to recover an \$8,000,000 finder's fee. Plaintiff alleged that an oral agreement had been achieved in a telephone conversation between plaintiff, speaking in New York, and defendant's officer, speaking in Massachusetts, under the terms of which plaintiff would receive a one percent finder's fee for services rendered in connection with defendant's acquisition of Beech Aircraft Corporation. Subsequently, defendant informed plaintiff that defendant was not interested in such an acquisition. Defendant then retained another finder which facilitated defendant's acquisition of Beech for \$800,000,000. The diversity action was brought in federal district court in Massachusetts.¹³⁰ Defendant moved for summary judgment, asserting the applicability of New York's statute of frauds which required that finders' agreements be in writing.¹³¹ Plaintiff resisted the motion, arguing that the Massachusetts statute of frauds, not applicable to such agreements,¹³² should govern. The district court granted defendant's motion and plaintiff appealed. The First Circuit certified the issue to the Supreme Judicial Court of Massachusetts.¹³³ That court decided, in this contract action, "[a]s with our tort cases, . . . not to tie Massachusetts conflicts law to any specific choice-of-law doctrine, but [to] seek instead a functional choice-of-law approach that responds to the interests of the parties, the States involved, and the interstate system as a whole."¹³⁴ That eclectic approach borrowed from the Restatement Second,¹³⁵ Professor Robert A. Leflar's choice-influencing considerations,¹³⁶ and the rule of valida-

129. 393 Mass. 622, 473 N.E.2d 662 (1985).

130. *Id.* at ___, 473 N.E.2d at 664-66.

131. N.Y. GEN. OBLIG. LAW § 5-701 (10) (McKinney 1978).

132. MASS. ANN. LAWS ch. 259, § 1 (Law. Co-op. 1980). After the alleged oral agreement in *Bushkin* had been entered into, the Massachusetts statute of frauds was amended and made applicable to such finders' contracts. MASS. ANN. LAWS ch. 259, § 7 (Law. Co-op Cum. Supp. 1987). "That [amended] statute ha[d] no direct application to [*Bushkin*]." 393 Mass. at 634, n.8, 473 N.E.2d at 670, n.8.

133. 393 Mass. at ___, 473 N.E.2d at 664.

134. *Id.* at 631, 473 N.E.2d at 668.

135. *Id.* at 632, 473 N.E.2d at 669. Subsequently, the court indicated that *Bushkin* had adopted the general principles of the Restatement Second. *Travenol Laboratories, Inc. v. Zotal, Ltd.*, 394 Mass. 95, 474 N.E.2d 1070 (1985).

136. *Buskin Assocs., Inc. v. Raytheon Co.*, 393 Mass. 622, 634, 473 N.E.2d 662, 670 (1985).

tion, generated by "the justified expectations of the parties."¹³⁷ Those considerations led the court to conclude that "the law of Massachusetts should determine the issue of the validity of the alleged oral agreement between the parties."¹³⁸

The Massachusetts court was fully aware of and considered the opinion of the New York Court of Appeals in *Intercontinental Planning, Ltd. v. Daystrom, Inc.*¹³⁹ In *Daystrom*, a New York finder sued a New Jersey principal on an alleged oral agreement.¹⁴⁰ There, as in *Bushkin*, the foreign principal asserted the New York statute of frauds.¹⁴¹ And, as in *Bushkin*, the finder asserted the local law of the principal's state (New Jersey) which did not require such a contract to be in writing.¹⁴² The New York court, using interest analysis, identified several reasons for that state's law requiring such agreements to be in writing. One underlying reason for New York's law was to protect the integrity of the judicial process in New York by avoiding "conflicting testimony [as to the existence of any agreement], with the consequent danger of erroneous verdicts."¹⁴³ Since New York was the forum, that reason converted into a significant interest on the part of New York in having its law applied. The second reason identified by the court was to protect the economic integrity of principals.¹⁴⁴ To the extent that the principals thus intended to be protected were those domiciled in New York, that reason would not have converted since defendant principal was domiciled in New Jersey. However, the court offered a related third reason for New York's law requiring a writing: to protect principals wherever domiciled, thereby encouraging principals to use New York finders.¹⁴⁵ That reason recog-

137. *Id.* at 635, 473 N.E.2d at 670.

138. *Id.* at 636, 473 N.E.2d at 671.

139. 24 N.Y.2d 372, 248 N.E.2d 576, 300 N.Y.S.2d 817 (1969).

140. *Id.* at 375-78, 248 N.E.2d at 578-79, 300 N.Y.S.2d at 819-821.

141. *Id.* at 376, 248 N.E.2d at 577, 300 N.Y.S.2d at 819.

142. *Id.* at 380, 248 N.E.2d at 580, 300 N.Y.S.2d at 823. In support of this assertion, the *Daystrom* court stated: "Our research indicates that New Jersey's Statute of Frauds does not apply to finder's fee agreements pertaining to the sale of businesses. (Cf. N.J. Stat. Ann. 25:1-5, 25:1-9; *Tanner Assoc. Inc. v. Ciraldo*, 33 N.J. 51, 161 A.2d 725; *Fontana v. Polish Nat. Alliance of Brooklyn*, 130 N.J.L. 503, 33 A.2d 844, 148 A.L.R. 672)." *Id.*

143. *Id.* at 383, 248 N.E.2d at 582, 300 N.Y.S.2d at 826 (quoting from Report of N.Y. Law Rev. Comm. 615 (N.Y. Legis. Doc. 65 1949)).

144. *Id.* "It follows from the purpose of the statute that one of the policies embraced by this provision is to protect the principals in the sale of a business interest from the type of claim being asserted here—a claim for a \$2,780,000 finder's fee not supported by the written evidence." *Id.*

145. *Id.* "This policy would include foreign principals who utilize New York brokers or finders because of the nature of the brokerage business as it is conducted here. It is common

nized that New York enjoyed the "position [of] an international clearing house and market place,"¹⁴⁶ and was intended to encourage full utilization of that advantageous position. Since the finder was domiciled in New York, that third reason for New York law converted. Clearly, New York had significant interests in the application of its law requiring such an agreement to be in writing. New Jersey's law which did not require a writing apparently existed to facilitate recovery by finders domiciled in that state.¹⁴⁷ Since plaintiff finder was domiciled in New York, not New Jersey, that reason did not convert. Therefore, New Jersey had no significant interest in the application of its law. The case presented a false conflict. To the extent that New Jersey had a minimal interest in the litigation, based on the principal's domicile there, that minimal interest would best be served by the application of New York law requiring a writing and thus protecting the economic integrity of the New Jersey principal.¹⁴⁸ Of course, the court applied New York law.¹⁴⁹ Not only was that result appropriate, given the conclusion that the case presented a false conflict, it was the most nearly perfect result achievable, securing New York's significant interests in the application of its own law and New Jersey's minimal interest in the litigation.

Bushkin presented a similar factual pattern. The primary distinction between *Daystrom* and *Bushkin* was that, in the former, the forum was the finder's domicile and, in the latter, the forum was the principal's domicile. Since the Massachusetts law, like the New Jersey law in *Daystrom*, did not require such agreements to

knowledge that New York is a national and international center for the purchase and sale of businesses and interests therein." *Id.*

146. *Id.* at 384, 248 N.E.2d at 583, 300 N.Y.S.2d at 827.

147. *Id.* at 385, 248 N.E.2d at 584, 300 N.Y.S.2d at 828. "New Jersey has no interest in having its lack of protection for its residents used to establish their liability in a suit brought by residents of other jurisdictions . . ." *Id.*

I infer that New Jersey's "lack of protection for its residents" translates into the affirmative reason of facilitating recoveries by New Jersey finders. *Cf.*, *Fontana v. Polish Nat'l Alliance*, 130 N.J.L. 503, 33 A.2d 844 (1943) (amendment to statute of frauds permitting real estate broker to recover commission based on oral agreement reflected in unrepudiated memo to principal was intended to better position of broker).

148. Because the finder was domiciled in New York, New Jersey had no significant interest in the application of its law intended to facilitate recoveries by New Jersey finders. Therefore, recognizing New Jersey's minimal interest in the litigation, protecting the economic integrity of the New Jersey principal, generates no internal conflict on the part of New Jersey. Defendant principal's economic integrity may be protected without frustrating recovery by a New Jersey finder.

149. *Intercontinental Planning, Ltd. v. Daystrom, Inc.*, 24 N.Y.2d 372, 386, 248 N.E.2d 576, 584, 300 N.Y.S.2d 817, 828 (1969).

be in writing, that forum law was not aimed at preserving the integrity of the judicial process in Massachusetts. Also, because New York was not the forum in *Bushkin*, the first reason for New York's law requiring a writing, to protect the integrity of the judicial process in New York, would not convert. The second reason for New York's law, protecting New York principals, would not convert in *Bushkin* for the same reason it did not convert in *Daystrom*: the principal was not domiciled in New York. The third reason for New York's law, protecting principals wherever domiciled, thus encouraging such principals to utilize New York finders, would convert in *Bushkin*, just as it did in *Daystrom*, into a significant interest on the part of New York in having its law applied. Assuming that the Massachusetts law, like the New Jersey law in *Daystrom*, existed to facilitate recoveries by domiciled finders, that reason would not convert into a significant interest on the part of Massachusetts in having its law applied for the same reason New Jersey's reason did not convert in *Daystrom*: the finder was domiciled in New York. *Bushkin* would seem to present the same conclusion as *Daystrom* had: New York, the finder's domicile and desirous of exploiting its position as an international clearing house, would have a significant interest in the application of its law requiring a writing; and Massachusetts, the principal's domicile, would have no significant interest in the application of its law not requiring a writing. Another false conflict. Moreover, as the principal's domicile, Massachusetts would have a minimal interest in the litigation, protecting its principal's economic integrity, best served by the application of New York's law.¹⁵⁰ Apparently, in *Bushkin*, as in *Daystrom*, application of New York law would be the most nearly perfect result obtainable.

Then why the different result in *Bushkin*? Why did the Massachusetts court wind up applying Massachusetts law? The basic answer to that question, of course, was the Massachusetts court's decision not to utilize "any specific choice-of-law doctrine"¹⁵¹ (interest analysis, for instance). Had the Massachusetts court uti-

150. Because the finder was domiciled in New York, Massachusetts had no significant interest in the application of its law intended to facilitate recoveries by Massachusetts finders. Consequently, recognizing Massachusetts' minimal interest in the litigation, protecting the economic integrity of the Massachusetts principal, generates no internal conflict on the part of Massachusetts. Defendant principal's economic integrity may be protected without precluding recovery by a Massachusetts finder.

151. *Bushkin Assocs., Inc. v. Raytheon Co.*, 393 Mass. 622, 631, 473 N.E.2d 662, 668 (1985).

lized interest analysis, that approach, coupled with the court's awareness of *Daystrom*, probably would have led to the same result: application of New York law. That uniformity of result would seem to be desirable. It would not have been the random result of the other state's (New York's) retention of *lex loci contractus*. Rather, it would have been a uniformity born of: (1) New York's application of interest analysis; (2) its conclusion that the finder's domicile, having a statute of frauds applicable to such contracts and a desire to encourage principals to utilize its finders, had a significant interest in the application of its law; (3) its conclusion that the principal's domicile, having a statute of frauds inapplicable to such contracts, had no significant interest in the application of its law; (4) its conclusion that, therefore, the case presented a false conflict, indicating that New York's law should be applied; and (5) that the application of New York's law would serve the minimal interest in the litigation of the principal's domicile. Of course, the Massachusetts court would have been free to identify some reason for its local law, not requiring a writing, other than or in addition to the reason the New York court imputed to New Jersey's law in *Daystrom*. If that additional reason for the Massachusetts law converted into a significant interest on the part of Massachusetts in having its law applied, the Massachusetts court would have been confronted with a true conflict, both New York and Massachusetts having significant interests in the application of their conflicting laws. Even then, the Massachusetts court, desirous of achieving or at least not unduly frustrating uniformity of result, could take that consideration into account and, as a result, conclude that New York's interest in the application of its law was more significant than the Massachusetts interest in the application of its law. Ultimately, however, the Massachusetts court, confronted with such a true conflict, could conclude that, notwithstanding its desire for uniformity, its interest was so clearly superior to that of New York that Massachusetts law should be applied even at the cost of achieving a result different from that achieved by New York in *Daystrom*. The fact that New York used interest analysis in *Daystrom*, complemented by the hypothetical use of interest analysis by Massachusetts in *Bushkin*, would have permitted the Massachusetts court to utilize the *Daystrom* opinion (clearly enunciating the reasons underlying New York's law and their convertibility). The Massachusetts court could then have made a precise determination of Massachusetts' interests, if any, and ultimately could have weighed any such Massachusetts interest

against the New York interest and the Massachusetts court's desire for uniformity. Instead, the eclectic approach in fact employed by the Massachusetts court in *Bushkin* led the court to conclude that "uniformity of result . . . point[s] toward neither Massachusetts nor New York."¹⁵² What ultimately led the *Bushkin* court to the application of Massachusetts law was the court's conclusion that "the justified expectations of the parties . . . militates for Massachusetts law."¹⁵³ Those "justified expectations" led the court to the rule of validation and Massachusetts law. How the New York finder, domiciled in a state requiring such contracts to be in writing and whose highest appellate court had applied that law in *Daystrom*, could have had a justified expectation that no writing would be required to enforce the alleged oral contract for an \$8,000,000 finder's fee, is not readily apparent.

What would have happened had the *Bushkin* court employed the Restatement approach in resolving the choice-of-law problem in this contract action? The "Choice-of-Law Principles" of Restatement Second, section 6, already discussed in connection with the tort cases earlier considered, would remain the same. But in this contract action sections 145 and 146 would be supplanted by sections 141, 187, and 188. Section 141 provides:

Whether a contract must be in writing, or evidenced by a writing, in order to be enforceable is determined by the law selected by application of the rules of §§ 187-188.¹⁵⁴

Section 187 deals with the efficacy of a choice of law made by the parties.¹⁵⁵ *Bushkin* presented no such designation of law by the parties. Section 188 reads as follows:

Law Governing in Absence of Effective Choice by the Parties

(1) The rights and duties of the parties with respect to an issue in contract are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the transaction and the parties under the principles stated in § 6.

(2) In the absence of an effective choice of law by the parties (see § 187), the contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:

- (a) the place of contracting,
- (b) the place of negotiation of the contract,
- (c) the place of performance,

152. *Id.* at 635, 473 N.E.2d at 670.

153. *Id.* at 635, 473 N.E.2d at 670-71.

154. RESTATEMENT (SECOND), *supra* note 2, § 141.

155. *Id.* § 187.

(d)the location of the subject matter of the contract, and
 (e)the domicil, residence, nationality, place of incorporation and place of business of the parties.

These contacts are to be evaluated according to their relative importance with respect to the particular issue.

(3) If the place of negotiating the contract and the place of performance are in the same state, the local law of this state will usually be applied, except as otherwise provided in §§ 189-199 and 203.¹⁵⁶

Section 199 reads:

Requirements of a Writing-Formalities

(1) The formalities required to make a valid contract are determined by the law selected by application of the rules of §§ 187-188.

(2) Formalities which meet the requirements of the place where the parties execute the contract will usually be acceptable.¹⁵⁷

Comment *b.* to section 199, headed *Scope of section*, provides in part:

The rule of this Section applies to such questions as whether a contract must be in writing, or evidenced by a writing, in order to be valid and enforceable . . .¹⁵⁸

Comment *c.*, headed *Rationale*, reads in part:

Usually, a contract will be upheld with respect to formalities if it complies with the requirements of the state where it was executed. To the extent that they thought about the matter at all, the parties would undoubtedly try to comply with the requirements of this state and would expect that the contract would be held valid with respect to formalities if the requirements of this state had been complied with. Upholding the contract with respect to formalities under such circumstances is supported by the choice-of-law policy favoring protection of the justified expectations of the parties.¹⁵⁹

And now I must beg the reader's pardon for and indulgence in quoting the following lengthy second paragraph of the *Rationale* to section 199:

156. *Id.* § 188. Section 189 deals with "Contracts for the Transfer of Interests in Land." *Id.* § 189. Section 190 deals with "Contractual Duties Arising from Transfer of Interests in

Land." *Id.* § 190. Section 191 deals with "Contracts to Sell Interests in Chattel." *Id.* § 191. Section 192 deals with "Life Insurance Contracts." *Id.* § 192. Section 193 deals with "Contracts of Fire, Surety or Casualty Insurance." *Id.* § 193. Section 194 deals with "Contracts of Suretyship." *Id.* § 194. Section 195 deals with "Contracts for the Repayment of Money Lent." *Id.* § 195. Section 196 deals with "Contracts for the Rendition of Services." *Id.* § 196. Section 197 deals with "Contracts of Transportation." *Id.* § 197. Section 198 deals with "Capacity to Contract." *Id.* § 198. Section 203 deals with "Usury." *Id.* § 203.

157. RESTATEMENT (SECOND), *supra* note 2, § 199.

158. RESTATEMENT (SECOND), *supra* note 2, § 199 comment *b.*

159. RESTATEMENT (SECOND), *supra* note 2, § 199 comment *c.*

It must be remembered, however, that, to some extent at least, rules relating to formalities are designed for the protection of the parties. Sometimes such rules embody strong policies, such as when they are part of special regulatory legislation, as statutes regulating the form of contracts to make a will or designed for the protection of a particular class, as consumers, laborers or debtors. Situations will arise where a contract valid with respect to formalities under the local law of the state of execution will nevertheless be held invalid by application of the local law of some other state which, with respect to the particular issue, is the state of most significant relationship under the choice-of-law principles set forth in § 6. Such an eventuality is particularly likely to occur in the rare situation where the place of execution is fortuitous and bears no real relation to the transaction and the parties.¹⁶⁰

How would the *Bushkin* court, confronted with all of that, have reacted?

I imagine that, after reading all of sections 6, 141, 187, 188, 189-199, and 203, the court would have glommed onto section 199 which, after all, does seem to relate directly to the choice-of-law problem before the court. Moreover, section 199(2) holds out the promise of providing a quick and easy solution (remember section 6 specifically alludes to "ease in the determination . . . of the law to be applied")¹⁶¹ to the problem: apply the law of the place of execution if that state's law would be satisfied. Where was the place of execution of the alleged oral agreement entered into by phone with plaintiff in New York and defendant's officer in Massachusetts? Plaintiff alleged that "the contract was made in Massachusetts"¹⁶² and, "for summary judgment purposes,"¹⁶³ the court felt compelled to "accept [that] assertion."¹⁶⁴ Since Massachusetts law did not require the agreement to be in writing, the alleged oral agreement would have met the requirements of that law. Under section 199(2), in those circumstances "the contract will usually be acceptable."¹⁶⁵ What could be easier; simply apply Massachusetts law and hold the alleged oral agreement valid and enforceable. Section 199(2) provides, however, that "the contract will *usually* be acceptable."¹⁶⁶ What are the exceptions to that usual result?

That lengthy second paragraph of the *Rationale* to section 199

160. *Id.*

161. *Id.* § 6(2)(g).

162. *Bushkin Assocs., Inc. v. Raytheon Co.*, 393 Mass. 622, 631, 473 N.E.2d 662, 668 (1985).

163. *Id.*

164. *Id.*

165. RESTATEMENT (SECOND), *supra* note 2, § 199(2).

166. *Id.* (emphasis added).

sets forth some of those exceptions. If the rules requiring a writing “embody strong policies, such as when they are part of special regulatory legislation, or statutes regulating the form of contracts to make a will or designed for the protection of a particular class, as consumers, laborers, or debtors,”¹⁶⁷ an exception may exist. Does *Bushkin* involve such an exception? New York’s statute of frauds, applicable to finders’ contracts, would hardly constitute “special regulatory legislation.”¹⁶⁸ If it did, statutes of frauds generally would constitute an exception to the usual rule and the exception would consume the rule. Moreover, the situation in *Bushkin* is distinguishable from “contracts to make a will,”¹⁶⁹ in which case the now deceased party to be charged isn’t available to contradict plaintiff’s testimony, and from “the protection of a particular class, as consumers, laborers, or debtors,”¹⁷⁰ in which case the party to be charged may be particularly vulnerable to overreaching. How about the next two sentences of that paragraph of the *Rationale*? They provide that:

Situations will arise where a contract valid with respect to formalities under the local law of the state of execution will nevertheless be held invalid by application of the local law of some other state which, with respect to the particular issue, is the state of most significant relationship under the choice-of-law principles set forth in § 6. Such an eventuality is particularly likely to occur in the rare situation where the place of execution is fortuitous and bears no real relation to the transaction and the parties.¹⁷¹

Did that “rare situation” exist in *Bushkin*?

I am inclined to think the court would say no, for several reasons. First, the two sentences above quoted follow immediately those sentences describing “special regulatory legislation,” already found to be inapplicable to *Bushkin*. The court could conclude that the following two sentences were intended to be applicable only to such “special regulatory legislation.” Second, even if the two sentences were read independently of the preceding language, they would seem inapplicable to *Bushkin*. The second of the two sentences indicates that the “rare situation” is “particularly likely where the place of execution is fortuitous and bears no relation to the transaction and the parties.”¹⁷² Although the alleged oral

167. *Id.* § 199 comment c.

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

agreement in *Bushkin* was the product of an interstate phone conversation, each party to the conversation was speaking in his own domicile or the domicile of his principal. Plaintiff's allegation that the contract was made in Massachusetts, defendant's domicile, accepted as true by the court, would under section 199 point to the local law of Massachusetts. Clearly, Massachusetts has a "real relation" to the defendant. Third, and finally, if the court were to find that *Bushkin* presented that "rare situation," the court would be referred back to the general principles of section 6. What court really needs that, especially when section 199 purports to offer an easy resolution of the choice-of-law problem and section 6 itself identifies as one of the general principles "ease in the determination . . . of the law to be applied."¹⁷³ I think it a fair assumption that, had the *Bushkin* court utilized the Restatement approach, the court would have applied section 199 and the Massachusetts local law not requiring a writing. That assumption is corroborated to some extent by the fact that the court in reaching that very conclusion relied in part on the Restatement and complemented that reliance with the "justified expectations of the parties,"¹⁷⁴ language appearing in the first paragraph of the *Rationale* to section 199.

As between that Restatement guided conclusion (application of Massachusetts law), and the conclusion suggested by our utilization of interest analysis (application of New York law), which is preferable? I think the interest analysis result better commends itself to reason. That result was the product of an identification of the reasons underlying each state's local law, a determination of which of those reasons, if any, converted into a significant interest on the part of each state in having its local law applied, and a conclusion (in *Daystrom* and by implication in *Bushkin*) that only New York had a significant interest in the application of its local law. Given such a false conflict, the application of New York law would be entirely appropriate. Given the added factor that New York law served Massachusetts' minimal interest in the litigation, that result would seem to be the most nearly perfect result achievable. Indeed, in the actual *Bushkin* opinion, applying Massachusetts law, there is no clear indication of any Massachusetts interest served by that result. Rather, the court's opinion reflects an antagonistic reaction to *Daystrom* and "the Empire State's imperial

173. *Id.* § 6(2)(g).

174. *Id.* § 199 comments c.

reach."¹⁷⁵ With interest analysis, the *Bushkin* court would have been considerably more likely to achieve a result uniform with that achieved in *Daystrom* and less likely to be the product of self-generated judicial antagonism. Ultimately, the *Bushkin* court relied on the Restatement approved "justified expectations of the parties,"¹⁷⁶ particularly dubious in light of the finder's domicile in New York and the New York Court of Appeals decision in *Daystrom*, and applied the law of Massachusetts, the place of execution, consistent with the result suggested by section 199.

Why does the Restatement approach seem to point to the application of Massachusetts law in such circumstances? The answer, I think, is the Restatement's effort to achieve an amalgam of state interests in the particular issue, concepts of territoriality, and a specific conflicts law, in this instance *lex loci contractus*. The result is inherently awkward. Where the contract was executed may or may not have a direct bearing on each state's interest in the application of its local law to resolve the particular issue presented. Our use of interest analysis indicated that the Massachusetts law existed to facilitate recoveries by Massachusetts finders. Since the finder was domiciled in New York, not Massachusetts, that reason for the Massachusetts law did not convert into a significant interest on the part of Massachusetts in having its law applied. Yet, the territorial bias reflected in section 199 necessarily implies such an interest. That emphasis on territorial considerations was not inadvertent; it was intended by the drafters of the Restatement Second. That intent to commingle the identification of state interests in the particular issue presented with territorial considerations related to a variety of facts and circumstances, whether or not germane to those state interests in the particular issue, sends a mixed message to the courts. That mixed message is compounded by the Restatement's apparent urge to impel the courts toward a thinly disguised retention of mechanical conflicts laws, *lex loci delicti* in tort cases and *lex loci contractus* in contract actions. Often, the result is a judicial conclusion difficult to support persuasively.

What, then, is the appeal that the Restatement approach holds for the courts? I think that in essence it is the appeal of numbered rules. A court confronted with a choice-of-law problem, and especially a difficult one, understandably yearns for a set of rules that

175. *Bushkin Assocs., Inc. v. Raytheon Co.*, 393 Mass.622, 630, 473 N.E.2d 662, 667 (1985).

176. RESTATEMENT (SECOND), *supra* note 2, § 199 comment c.

ultimately will yield one rule that appears applicable. When those numbered rules are accompanied by a general principle that aims for easy resolution of the choice-of-law problem, not only is the judicial yearning satisfied, but it is satisfied in the least painful way. Human nature being what it is, most of us find the pre-formulated solution attractive, and that attraction is enhanced enormously if the solution is easily obtainable. Can the same thing be said of interest analysis? I think not. Minds far more brilliant than mine have attempted to reduce interest analysis to a set of numbered rules and the results have been less than remarkably efficacious.¹⁷⁷ Moreover, interest analysis by its very nature is not calculated to produce quick and easy results. Two things are required of a court utilizing interest analysis: the willingness to expend intellectual effort and patience.

The intellectual effort is required to identify the reasons underlying each state's local law, to determine which, if any, of those reasons converts into a significant interest on the part of each state in having its law applied, to recognize a true conflict and, in such instances, to determine which state's interest in the application of its own law is the more significant, to recognize false conflicts, to recognize negative standoffs and, in such instances, to comprehend the method of resolution. Patience is required in order to permit the passage of time during which cases may be resolved by interest analysis and then to utilize those decided cases to facilitate each of the intellectual steps required by interest analysis in future cases. The process of *stare decisis* usually is one of accretion; it does not lend itself to artificial acceleration. Those courts willing to expend the necessary intellectual effort and capable of exercising the required patience are likely to find that interest analysis produces choice-of-law results that are persuasively supported and ultimately available to facilitate the process in future cases.

But how about predictability of result? There is a natural and

177. See, e.g., the three mechanical rules suggested for resolving choice-of-law problems related to guest statutes in *Neumeier v. Kuehner*, 31 N.Y.2d 121, 286 N.E.2d 454, 335 N.Y.S.2d 64 (1972), and critical comment thereon in Seidelson, *Interest Analysis: The Quest for Perfection and the Frailties of Man*, 19 DUQ. L. REV. 207, 216 (1981); and Professor Russell J. Weintraub's suggested three rules for resolving all choice-of-law problems in tort actions, R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 360 (3d ed. 1986), and critical comment thereon in Seidelson, *Interest Analysis: The Quest for Perfection and the Frailties of Man*, 19 DUQ. L. REV. 207, 208 (1981); and Professor Weintraub's suggested rule for resolving all choice-of-law problems in product liability cases, R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 355 (3d ed. 1986), and critical comment thereon in Seidelson, *The Choice-of-Law Process in Product Liability Actions*, 26 DUQ. L. REV. 559 (1988).

understandable judicial urge to achieve such predictability and, at the same time, a concern that interest analysis may be antithetical to such predictability. I think the desideratum of predictability must be kept in proper perspective. In a wholly domestic case, one involving no choice-of-law problems, predictability of result is not likely to be readily achievable. And that relative absence of predictability is not due simply to the likelihood of conflicting evidence and, therefore, the possibility of divergent factual conclusions. Even assuming uncontested facts, the result is not likely to be readily predictable. If it were, far fewer domestic cases would go to litigation. Plaintiff's counsel is likely to urge the application of some domestic law, statutory or decisional, that serves the plaintiff's cause, and defendant's counsel is likely to argue that that law is inapplicable to the case. Plaintiff's counsel may argue that the rationale for that law indicates its applicability; defendant's counsel may challenge that rationale or, accepting it, assert that it is not applicable to the case. That's the stuff of which wholly domestic litigation is made. Neither counsel would be able to warrant to his client that the law would or would not be applied to the case. Until considering and reflecting upon the arguments of counsel, the court is unlikely to know whether the disputed law is applicable to the case. Obviously, predictability of result is not likely to achieve a high level even in such wholly domestic cases.

Still, given a choice-of-law problem, isn't counsel's chore of preparing for trial likely to be exacerbated significantly if he cannot determine even which state's law is likely to be applied?¹⁷⁸ Of course. But that concern is more chimerical than real. Most choice-of-law problems are susceptible of resolution well prior to trial. Typically, the choice-of-law problem will be identified by counsel and imposed on the court by appropriate pleadings, a motion to dismiss the complaint, a motion to strike an asserted defense, a motion for judgment on the pleadings, a motion for summary judgment or partial summary judgment, just by way of example. That

178. Maier, *Coordination of Laws in a National Federal State: An Analysis of the Writings of Elliott Evans Cheatham*, 26 VAND. L. REV. 209, 255-56 (1973).

To the extent that the attorney is unable to predict from the forum's choice-of-law rules what local law will be applied in a particular case, the rules fail to satisfy practical needs that are important to the attorney in *all* cases. Post-event, pre-trial planning is just as vital to the legal process as is any other kind of planning. In order to make the choice-of-law system work effectively, the need for predictability must be considered in all types of cases and given due consideration in structuring choice-of-law rules.

Id.

means that counsel are likely to know well before trial which state's law will be applied and, therefore, to be able to prepare for trial accordingly. It also means that the court will have the opportunity to consider the choice-of-law problem, aided by briefs and, where appropriate, oral argument, without the time pressure of an ongoing or even imminent trial.

Nor should the concern that interest analysis is antithetical to predictability be accepted without consideration. We have already noted that the predictability and even the uniformity of result sometimes achieved by the Restatement approach may be nothing more than the fortuitous product of the non-forum state's retention of *lex loci* and the Restatement's territorial bias. If, in *Miller v. Gay*, the Superior Court of Pennsylvania, using the Restatement approach, can say that the result achieved, application of Delaware's guest statute, is the same result that a Delaware court would achieve, it is only because the Delaware court retains *lex loci delicti*. In *Bushkin*, on the other hand, the result achieved by the Supreme Judicial Court of Massachusetts, influenced by the Restatement approach, was directly opposite from the result achieved by the New York Court of Appeals in *Daystrom*, despite strikingly similar facts and identical local laws. Indeed, had the *Bushkin* court utilized interest analysis, it is likely that the court would have achieved the same result achieved by the New York court in *Daystrom*. And, as we have noted, that uniformity of result, produced by each state's analysis of its own and the other state's interest in having its law applied, commends itself to reason far more than a uniformity produced by a combination of the forum's use of the Restatement approach with its territorial bias and the other state's retention of *lex loci*.

Perhaps the ultimate irony of the Restatement approach is its apparent imposition of an obligation on the court to engage in interest analysis and its subsequent subversion of that analysis. Section 6's general principles require the court to be sensitive to its own policies and the policies of other interested states. Section 145, applicable to tort actions, requires the court to evaluate each state's contacts "according to their relative importance with respect to the particular issue."¹⁷⁹ And section 188, applicable to contract actions, requires the court to evaluate the contacts listed therein "according to their relative importance with respect to the

179. RESTATEMENT (SECOND), *supra* note 2, § 145(2).

particular issue.”¹⁸⁰ I don’t know any way for the court to comply with those instructions other than to engage in interest analysis. But then the Restatement imposes on the court the general principle of achieving “ease in the determination . . . of the law to be applied,”¹⁸¹ the implication that the contacts listed must have some significance (sections 145 and 188 and their territorial bias), and, in tort cases, a general reversion to *lex loci delicti* (section 146) and, in contract actions involving the formalities required, a general reversion to *lex loci contractus* (section 199). To invite the court to devote the intellectual effort required by interest analysis only to subvert that process with a territorial bias and a general reversion to *lex loci* conflicts rules, presumably simplifying the choice-of-law process, is to send the court on a fool’s errand. If a court demands simplicity, it probably will retain *lex loci* rules and avoid the feckless chore of traveling from section to section through the Restatement. If a court is willing to devote the intellectual effort necessary to utilize interest analysis, it is hardly likely to welcome the Restatement’s subversion of that process. Once having utilized interest analysis, the court is likely to prefer the choice-of-law result thereby indicated to a result achieved by blurring that rational process with concepts of territoriality and an urge toward simple conflicts rules. In an effort to be all things to all courts, the Restatement Second, in my opinion, invites the courts to accept the worst of both available alternatives. Make mine interest analysis.

180. *Id.* § 188(2).

181. *Id.* § 6(2)(g).

